

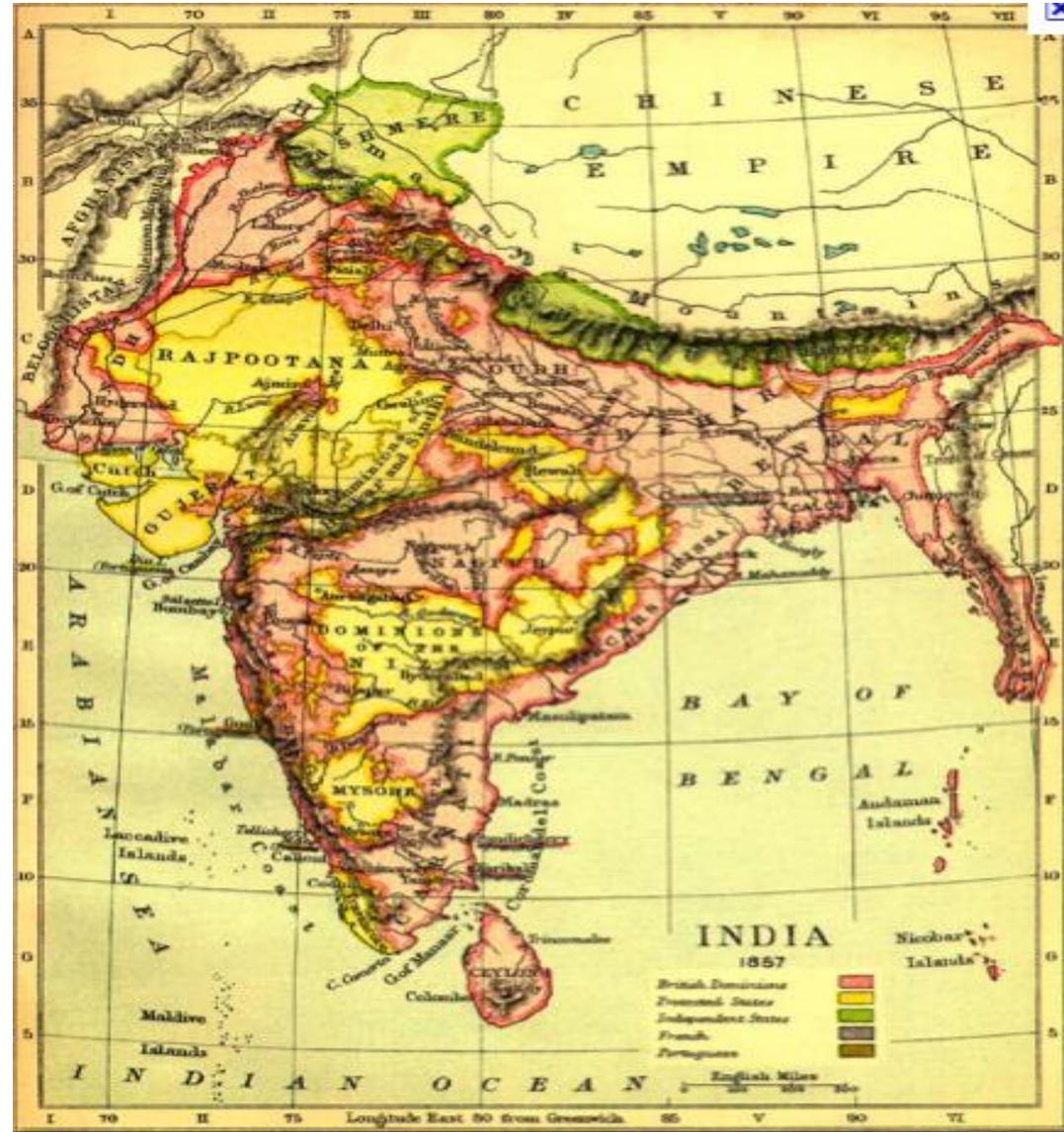
# INDIA



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India in 1857 – ‘The Great Rebellion’

# India – Overview

[ADPL Ch 15 ‘India – Confusion Raj, with outsourcing’];  
2019 Update pp. 15-18; 2018 Update pp.15-20; 2017 Update pp. 33-36

- *Context:* World’s largest democracy, with often-functioning rule of law, despite consistent problems of corruption. Huge outsourcing.
- India’s legislative privacy protections are still piecemeal; its supposedly general ‘Rules’ of 2011 are in fact very limited and useless
- India twice failed to obtain an EU adequacy finding (most recent 2013)
- Crucial question: Does the Indian Constitution imply a privacy right?
  - A 21 protection of ‘personal liberty’ is the basis
  - Was mainly used to limit search and surveillance *Naz Foundation Case* (2009) extended previous case by holding unconstitutional legislation criminalising homosexuality, based on autonomy; but SC appeal (2013) overturned this; Supreme Court had not expanded this to ‘informational self-determination
  - The Aadhaar ID number system was attacked as being unconstitutional, with Mr Puttaswamy (92 year old SC judge) as one of the petitioners...



# India - *Puttaswamy's* consequences

- In *Puttaswamy v Union of India* (2017) the Indian government argued there was no constitutional right of privacy at all; in August 2017 a nine judge 'constitution bench' of the Supreme Court found there was an inalienable fundamental rights of privacy (Chandrachud J, lead opinion)
  - three main aspects of privacy: privacy of the body; privacy of information; and privacy of choice.
  - Any legislation/government actions affecting privacy must be (i) for legitimate state interests; (ii) necessary and proportionate; & (iii) authorised by law.
- All Indian privacy issues are now in flux in light of *Puttaswamy*:
  - *Navtej Johar v Union of India* (6 September 2018) – five judge Constitution Bench held criminalisation of homosexual conduct was unconstitutional (reversing result of 2013 *Naz* appeal).
  - *Puttaswamy #2* – Challenge to constitutionality of Aadhaar biometric ID system was defeated 4/1 by Constitution Bench in Sept. 2018 (Chandrachud J dissenting); held partially unconstitutional but Aadhaar survived; legislation was enacted 2019 to remedy the unconstitutional defects.

# India – Srikrishna Report and draft Personal Data Protection Bill 2018

- *Modi government's imperatives:*
  - The Aadhaar has been saved by *Puttaswamy #2* .
  - But many other government schemes will still need to show that any invasions of privacy involved are 'necessary and proportionate' through legislation that *sufficiently* protects privacy against abuses.
  - To obtain a positive adequacy assessment from the EU, particularly to benefit its outsourcing industry.
  - A comprehensive data privacy law may be needed ...
- Srikrishna Report (July 2018) recommended draft *Personal Data Protection Bill 2018* (see 2019 Update 16-18)
  - Indian government (DeitY) called for submissions in 2018.
  - No government response, or Bill, has yet appeared
  - New IT Minister says Bill is a key priority

# India – draft Personal Data Protection Bill 2018 (2)

- Srikrishna Bill compared with GDPR:
  - See 2019 Update pp16-18; 2018 Update pp. 17-18
  - More prescriptive than the EU’s decentralisation of responsibility/liability to controllers
  - Many key GDPR features are included:
    - Some GDPR obligations only apply to ‘significant’ fiduciaries
    - GDPR elements excluded may not be vital
  - Potentially very strong enforcement by a national DPA, including up to 4% administrative fines
  - Combined with strong data localisation requirements (Chinese influenced?) and data export limitations