

## PRIVACY POLICY 101: THE BASICS OF PRIVACY POLICY

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### ABSTRACT

*Asking for consent is a morally correct way of living peacefully and lovingly in a civilization. Today, when everyone is on the internet, businesses either do not bother or are unaware of the fact that they are legally bound to explain to their website users that their personal and/or sensitive data is being collected through their website and stored at the business's backend. Keeping this in mind, nations have developed their own set of privacy rules and regulations to protect user data from being exploited. Part I of the article outlines the meaning of privacy policy and how the concept of the Right to Privacy was introduced in India. Part II is about the need of having a Privacy Policy and a list of all the important heads that must be included in a Privacy Policy to protect the user data that a website collects. Part III of the work briefly outlines the Personal Data Protection Bill, of 2018, and the primary rights of the user. Lastly, Part IV describes the challenges faced by businesses because of a vague and unclear Privacy Policy.*

**Keywords:** Right to Privacy, Constitution, Privacy Policy, IT Act, GDPR.

### INTRODUCTION

The Right to Privacy is defined under Article 21 of the Indian Constitution. In the landmark case of *K.S. Puttaswamy v. Union of India*, 2017,<sup>1</sup> the Hon'able Supreme Court, upholding the constitutional validity of the Aadhar project, declared the Right to Privacy as a fundamental right. Most countries worldwide consider data privacy a serious issue; hence they have formulated a set of guidelines for data protection. Internet privacy falls under the ambit of data privacy which includes the collection of data and information of the users. Privacy Policy is a legal webpage on a website that determines why and how you are collecting user data. It is a legally binding agreement. It is a sheet of transparency and choice between the user and the website. Having a Privacy Policy webpage is not a formality but a legal requirement under the guidelines of the Information Technology Act 2000.<sup>2</sup> It is a compulsion for all sorts of

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<sup>1</sup> *Justice K.S. Puttaswamy v. UOI*, Writ Petition (Civil) No. 494 of 2012

<sup>2</sup> Information Technology Act 2000

businesses, traders, e-commerce, and bloggers to have a detailed Privacy Policy on their websites. Section 43 A of IT Act 2000, read along with IT Rules 2011,<sup>3</sup> states that any website that collects personal and sensitive data from users is obligated to provide valid reasons for the collection of data, the amount of data stored and used, cookies and web beacons, data sharing with third parties, and other necessary information that may risk or violate a user's Right to Privacy.

### **WHY IS THERE A NEED FOR A PRIVACY POLICY?**

The primary need for a Privacy Policy is to comply with the legal provisions. Since websites are used worldwide, the privacy policy must comply with the country where the website consumers are. USA has the Children Online Privacy Protection Act (COPPA)<sup>4</sup> and California Consumer Protection Act (CCPA)<sup>5</sup> to set strict guidelines regarding the minimum required age of the user to access the website, cookie policy, option to opt-out, etc. Europe and, to some extent, India follow the General Data Protection Regulation (GDPR),<sup>6</sup> which describes the rights of the users, like the type of user data a website is collecting and how they are using and securing the information.

Article 15 of GDPR allows users to get information about the data being collected, the purposes of data collecting, and every other information related to personal or sensitive data collection. As per Article 16, users can demand rectification of the incorrect data. Article 15, Article 17, and Article 18 give them the right to correct, delete, or restrict data collection.

Having a separate webpage for the Privacy Policy on a website helps to:

1. Avoid misinterpretation while collecting, sharing, or retaining the data
2. Comply with the rules and regulations of a country's privacy policy
3. Differentiate between the handling of personal data and sensitive data
4. Protect the rights and privacy of the users, business, and yourself
5. Save the collected user data from vendors to end users.

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<sup>3</sup> Informational Technology Rules 2011

<sup>4</sup> Children Online Privacy Protection Act (COPPA)

<sup>5</sup> California Consumer Protection Act (CCPA)

<sup>6</sup> General Data Protection Regulation (GDPR) 2018

## 6. Build trust with the customers

### **IMPORTANT HEADS OF INFORMATION TO INCLUDE IN THE PRIVACY POLICY AS PER GDPR**

Drafting a privacy policy is not just about copy-pasting the drafts and samples. It is a blend of research, writing, editing, and proofreading. While drafting the Privacy Policy, the following are the key heads that must be included with clear descriptions such that a layman can understand what the business is trying to convey.

1. Information about the company or the business
2. The nature of the data or information collected from a user accessing the website
3. How is the information collected
4. Purpose of collecting the information
5. Protection of the collected information
6. How long is the personal data kept encrypted
7. Usage of Cookies and Web Beacons linked to Cookie Policy
8. Accessibility of personal and sensitive information by third parties
9. List of all third parties and their use of the collected data
10. Terms of Use & Terms of Service
11. Children's Policy
12. Opt out of receiving promotions or newsletters
13. Email/ SPOC details for grievance redressal.

### **LEGAL ANALYSIS**

Post the judgment in re *Puttuswamy*, Justice AP Shah Committee was organized in 2012 to discuss privacy issues in India and frame regulations.

The following nine privacy principles<sup>7</sup> were set out:

1. Notice
2. Collection Limitation
3. Choice and Consent
4. Access and Correction
5. Purpose Limitation
6. Disclosure of Information
7. Accountability
8. Security
9. Openness

### **PERSONAL DATA PROTECTION BILL, 2018**

Till 2018, personal data was given by the rules of Sensitive Personal Data and Information of IT Rules, 2011. The Indian government introduced the Personal Data Protection Bill in 2018 to have a stringent hold on data privacy. The bill applies to Indians, businesses operated in India, and the government. Chapter VI - Data Principal Rights,<sup>8</sup> mentions the following rights of the data principal:

- Right to confirmation and access
- Right to correction
- Right to Data Portability
- Right to Be Forgotten

Under PDPA, there are 3 types of data: sensitive data (health details, sexual orientation, caste, religion), critical data (such as military or national security data), and general data. Penalties for a data breach or minor violations of PDPA could reach 5 crore rupees or 2% of a company's

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<sup>7</sup> Planning Commission, *Report of the Group of Experts on Privacy* (October 16, 2012), ch 3

<sup>8</sup> Personal Data Protection Bill 2018

global revenues. While the penalties would triple or reach 4% of revenues in case of major violations.<sup>9</sup>

## CHALLENGES OF PRIVACY POLICY

There are some challenges that a company might suffer because of the unclear Privacy Policy.

**i) Using a template of Privacy Policy:** Every website is different, depending upon its structure, services, or products. Not all websites collect the same type of data from the users; thus, using a template for your website does not create a customized legal safeguard.

**ii) Missing out important clauses:** People worldwide may visit the website, so ensure the Privacy Policy webpage complies with privacy laws that have extensive coverage, like GDPR, CCPA, COPPA, etc. Last year, Irish Court penalized Whatsapp \$267 million for having an unclear privacy policy that breaches EU data privacy rules.<sup>10</sup>

**iii) Not Updating Privacy Policy:** In case of any updates or modifications in the website resulting in alterations in the data collection of the users, it is necessary to include that in the updated version of the Privacy Policy.

**iv) Not making the Privacy Policy properly visible and understandable to the users:** The Privacy Policy must be locatable within the website. A user must know clearly about the Privacy Policy's terms before collecting data.

**v) Not taking consent from the users if you are collecting any Sensitive Personal Data of the user:** There must be an option to opt-out of the Privacy Policy page. The collection of personal and sensitive information without consent is a clear violation of the user's right to privacy.

## CONCLUSION

Around 97% of privacy policies fail to comply with the GDPR standards as of 2021.<sup>11</sup> An original, well-written, and detailed Privacy Policy is like direct communication with the users,

<sup>9</sup> Personal Data Protection Bill 2000, s 69

<sup>10</sup> Sam Shead, 'WhatsApp is fined \$267 million for breaching EU privacy rules' (CNBC, 2 September 2021) <<https://www.cnbc.com/2021/09/02/whatsapp-has-been-fined-267-million-for-breaching-eu-privacy-rules.html>> accessed 23 October 2022

<sup>11</sup> Martin Anderson, 'AI Researchers Estimate 97% Of EU Websites Fail GDPR Privacy Requirements- Especially User Profiling' (Unite.AI, 26 November 2021) <<https://www.unite.ai/ai-researchers-estimate-97-of-eu-websites-fail-gdpr-privacy-requirements-especially-user-profiling/>> accessed 23 October 2022

assuring them of protecting their right to privacy. The ideal way is to have a framework of the clauses ready and the country's data privacy laws based on the website consumers' location. Sentences must be kept short and crisp with short headings and add numberings, alphabets, and bullets wherever required, understandable for the general audience. There must neither be redundant information nor any legal jargon used in the Privacy Policy because the consumer is a shopper who need not be from a legal background. Complying with the data protection rules and guidelines, websites and businesses can successfully avoid legal issues and complications alongside prioritizing the user's data privacy.

