

## Freedom of speech and privacy

Professor Eric Barendt of University College London discusses the delicate balance between free speech and privacy.



Both freedom of speech and privacy are fundamental rights, which are equally recognised in the Universal Declaration of Human Rights, by international conventions such as the European Convention on Human Rights, and in many national constitutions. How do they relate to each other?

It is generally thought that these two rights must be in conflict with each other, and sometimes that is the case, most notably when a tabloid newspaper or a blogger wants to reveal something about a celebrity's private life – particularly intimate details of her sex life – which she would prefer to keep to herself and a few friends. But quite often privacy is necessary for freedom of speech (or expression). Friends and lovers cannot communicate openly with each other, unless they are sure that their conversations will not be overheard and filed by the government or repeated in the mass media. Even political conversations may require privacy, as when civil servants and ministers, or coalition partners, discuss sensitive matters of policy; they may not want to disclose – at least for the time being – their conversations to the general public, and some courts, notably, the German Constitutional Court have held that they can be protected as a matter of privacy.

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But how should conflicts between privacy and freedom of speech be resolved? The law cannot protect both rights when these conflicts arise – neither is absolutely protected. My view is that we have to ask what the value of the speech in the particular case is and compare it with the importance of the privacy, which would be sacrificed if freedom of speech is given priority over it. If the speech – say, an article in a newspaper or a blog – contributes to important political or social debate and does not intrude greatly on intimate details about an individual's private life – say, it mentions in passing only her dietary preferences or what she wore at a dinner party – freedom of expression should win over privacy. But if the article reveals intimate details of a celebrity's sexual life or medical history, privacy should win, because it is hard to see how such disclosure can contribute to an important public debate.

Of course, there are some very difficult issues in this area. How much privacy does a politician sacrifice when she enters public life? Suppose a tabloid paper reveals that she took drugs at university and justifies publication of that story with the argument that voters are entitled to know the moral record of someone who is standing for election as a member of parliament? On the other hand, can it be argued that even politicians are entitled to some privacy, because otherwise few people, except the crassly insensitive, will enter public life and further, few, if any of us, have an unimpeachable moral record? I think that even a degree of hypocrisy may be justified as an essential element of privacy; we are surely all entitled to say to strangers that, "We are in good health and spirits," even though we have been told earlier that day that we have a serious illness or that our partner wants to end the relationship. Privacy gives everyone a right to control what information is divulged to whom.

The courts in England in the last few years have frequently given orders to the press not to publish stories of little public interest which infringe the personal privacy of celebrities, particularly those revealing the behaviour of footballers off the pitch. Then comes the hard question, whether these orders can be made effective against bloggers and tweeters who reveal the name of the footballer or details of his behaviour. Bloggers can claim individual freedom of expression and then the press can argue that the story is now in the public domain because it is all over the internet. Another hard question is whether resolution of these conflicts can be left to the courts or should be handled by some informal tribunal or body such as the UK Press Complaints Commission; it costs several thousand pounds to get a court order, well beyond the means of most people. But the existence of these difficult issues should not lead us to abandon privacy rights altogether, for without their effective protection much individual autonomy and intimacy would be lost.

*Eric Barendt, Emeritus Professor of Law, UCL, is the author of the classic reference work *Freedom of Speech (OUP)* and an advisor to *Free Speech Debate*.*

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