COMPARATIVE CONSTITUTIONALISM
CASES AND MATERIALS
Third Edition

Norman Dorsen
Frederick I. and Grace A. Stokes Professor of Law
and Founding Director, Hauser Global Law School Program
New York University School of Law

Michel Rosenfeld
University Professor of Law and Comparative Democracy
Justice Sidney L. Robins Professor of Human Rights
Benjamin N. Cardozo School of Law, Yeshiva University
Founding Editor-in-Chief, International Journal of Constitutional Law
and President Emeritus, International Association of Constitutional Law

András Sajó
University Professor
Central European University, Budapest (on leave)
and Vice-President, European Court of Human Rights

Susanne Baer
Professor of Public Law and Gender Studies
Faculty of Law, Humboldt University, Berlin
James W. Cook Global Law Professor
University of Michigan Law School
and Justice of the German Federal Constitutional Court
(First Senate, 2011–2023)

Susanna Mancini
Professor of Comparative Constitutional Law Law
School of Law, University of Bologna, Italy
and Adjunct Professor of International Law
Johns Hopkins School of Advanced International Studies

AMERICAN CASEBOOK SERIES®
C. RACIST SPEECH

A great divide among constitutional democracies in the understanding of the limits to speech emerges in the context of racist speech (hate speech).\textsuperscript{\textdagger} Speech is restricted for arousing hatred against others, primarily in relation to their belonging to a specific racial, ethnic, national, or religious community. On the other hand racist speech is often singled out irrespective of its possibly inciting effects; it is prohibited because its content is seen as humiliating to people belonging to the race. The assumptions regarding racially degrading and inciting speech often apply to nationalist and antiminority hate speech, too: it too may vary. Racism is condemned in most countries of the world. International conventions prohibit racial discrimination. It is argued that without the criminalization of racist propaganda, racist prejudice and even violence will increase, and discriminatory social practices will become the norm. It is also argued that without intervention at the level of communication, racist totalitarian political movements will endanger democracy. The prevailing American position, however, is that government interference with racist propaganda is likely to curtail free speech, while nonintervention by the state does not indicate any recognition of the “truth” of totalitarian racism: Some propositions seem true or false beyond rational debate. Some false and harmful, political and religious doctrine gain wide public acceptance. Adolf Hitler’s brutal theory of a ‘master race’ is sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible. The liberty cannot be denied to some ideas and saved for others. The reason is plain enough: no man, no committee, and surely no government, has the infinite wisdom and disinterestedness accurately and unselfishly to separate what is true from what is debatable, and both from what is false. To license one to impose his truth upon dissenters is to give the same license to all others who have, but fear to lose, power. The judgment that the risks of

\textsuperscript{\textdagger} The meaning of racist speech is unclear, as Justice McLachlin noted in her dissent in \textit{R. v. Keegstra}, below:

The \textit{Shorter Oxford English Dictionary} defines “hatred” as: “The condition or state of relations in which one person hates another: the emotion of hate: active dislike, detestation: enmity, ill-will, malevolence.” The wide range of diverse emotions which the word “hatred” is capable of denoting is evident from this definition. Those who defend its use in § 319(2) of the \textit{Criminal Code} emphasize one end of this range—hatred, they say, indicates the most powerful of virulent emotions lying beyond the bounds of human decency and limiting § 319(2) to extreme materials. Those who object to its use point to the other end of the range, insisting that “active dislike” is not an emotion for the promotion of which a person should be convicted as a criminal. To state the arguments is to make the case: “hatred” is a broad term capable of catching a wide variety of emotion.
suppression are greater than the harm done by bad ideas rests upon faith in the ultimate good sense and decency of free people.


Democracies seem to handle racist speech partly in light of their historical experiences, but the differences are also related to the way democracy works in a given country and to the value attributed to free speech in the constitutional system. Moreover, most liberal democracies, with the notable exception of the U.S., have ratified antidiscrimination and antiracism conventions, which require states to take steps against racism and racist discrimination, including racist speech.

These international instruments embody quite a different conception of freedom of expression from the case law under the U.S. First Amendment. The international decisions reflect the much more explicit priorities of the relevant documents regarding the relationship between freedom of expression and the objective of eradicating speech, which advocates racial and cultural hatred. The approach seems to be to read down freedom of expression to the extent necessary to accommodate the legislation prohibiting the speech in question.


USA

When the intensity of hate speech reaches the level of intimidation and constitutes a “true threat,” it can be constitutionally criminalized. The Virginia Supreme Court held that the following formulation is facially unconstitutional in light of R.A.V.: “It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.” (Virginia’s cross-burning statute, § 18.2–423)

However, in Virginia v. Black, 583 U.S. 343 (2003), O’Connor, J stated: We did not hold in R. A. V. that the First Amendment prohibits all forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment.

Unlike the statute at issue in R. A. V., the Virginia statute does not single out for opprobrium only that speech directed toward “one of the specified disfavored topics.” It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s “political affiliation, union membership, or homosexuality.” Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities.

The First Amendment permits Virginia to outlaw cross burnings
done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in R. A. V. In this case we consider whether the Commonwealth of Virginia’s statute banning cross burning with “an intent to intimidate a person or group of persons” violates the First Amendment. We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

[The Virginia statute was held unconstitutional as it stated that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate” and this provision made no attempt to distinguish among different types of cross burnings—between, for example, burning a cross at a public rally of likeminded believers or directing the same action at an individual by burning the cross on his lawn.]

**R. v. Keegstra**

Supreme Court (Canada)

[1990] 3 S.C.R. 697

Dickson C.J.C. (Wilson, L’Heureux-Dubé, and Gonthier JJ., concurring):

2. **Keegstra** was a high school teacher **from the early 1970s until his dismissal in 1982. In 1984, Mr. Keegstra was charged under § 319(2) (then 281.2[2]) of the Criminal Code with unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. He was convicted by a jury in a trial before McKenzie J of the Alberta Court of Queen’s Bench.

3. **He taught his classes that Jews “created the Holocaust to gain sympathy” and expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered.**

[After conviction, Keegstra appealed, claiming that § 319(2) of the Criminal Code unjustifiably infringed his freedom of expression as guaranteed by § 2(b) of the Charter.

**Criminal Code:**

8. 319

(2) Every one who, by communicating statements, other than
in private conversation, wilfully promotes hatred against any identifiable group is guilty of
(a) an indictable offence.
(3) No person shall be convicted of an offence under subsection (2)
(a) if he establishes that the statements communicated were true:

The Canadian Charter of Rights and Freedoms, 1982 provides as follows:
Section 1 [Limitation of Rights]
The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in
it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a
free and democratic society.
Section 2 [Freedom of Religion, Speech, Association]
Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and
other means of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Sec. C Racist Speech 1131
(b) if, in good faith, he expressed or attempted to establish
by argument an opinion upon a religious subject;
(c) if the statements were relevant to any subject of public
interest, the discussion of which was for the public benefit,
and if on reasonable grounds he believed them to be true; or
(d) if, in good faith, he intended to point out, for the purpose
of removal, matters producing or tending to produce feelings
of hatred towards an identifiable group in Canada.

318(4) *** “identifiable group” means any section of the public
distinguished by colour, race, religion or ethnic origin.

V. The History of Hate Propaganda Crimes in Canada

23. *** Following the Second World War and revelation of the
Holocaust, in Canada and throughout the world a desire grew to protect human
rights, and especially to guard against discrimination. Internationally, this
desire led to the landmark Universal Declaration of Human Rights in 1948,
and, with reference to hate propaganda, was eventually manifested in two
international human rights instruments.

VI. Section 2(b) of the Charter—Freedom of Expression

35. *** Communications which wilfully promote hatred against an
identifiable group without doubt convey a meaning, and are intended to do so
by those who make them. [Hate speech is expression protected under 2(b). It is
not a form of violence.]

VII. Section I Analysis of § 319(2)
A. General Approach to Section I

49. Obviously, a practical application of § I requires more than an
incantation of the words “free and democratic society.” These words require some definition, an elucidation as to the values that they invoke. To a large extent, a free and democratic society embraces the very values and principles which Canadians have sought to protect and further by entrenching specific rights and freedoms in the Constitution, although the balancing exercise in § I is not restricted to values expressly set out in the Charter. 

C. Objective of § 319(2)

(i) Harm caused by expression promoting the hatred of identifiable groups

63. Looking to the legislation challenged in this appeal, one must ask whether the amount of hate propaganda in Canada causes sufficient harm to justify legislative intervention of some type.

64. **The presence of hate propaganda in Canada is sufficiently substantial to warrant concern.** Disquiet caused by the existence of such material is not simply the product of its offensiveness, however, but stems from the very real harm which it causes. Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. **

65. In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person’s sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded to the groups to which he or she belongs. **

The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual’s sense of self-worth and acceptance.

(ii) International human rights instruments

69. **I would also refer to international human rights principles** for guidance with respect to assessing the legislative objective.

70. Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself. **

Moreover, international human rights law and Canada’s commitments in that area are of particular significance in assessing the importance of Parliament’s objective under § I. **

71. No aspect of international human rights has been given attention greater than that focused upon discrimination. **

(hereinafter CERD). The Convention, in force since 1969 and including Canada among its signatory members, contains a resolution that States Parties agree to:

* * * adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination.

Article 4 of the CERD is of special interest, providing that: States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

a. Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

73. Further, the International Covenant on Civil and Political Rights, 999 UNTS 171 (1966) (hereinafter ICCPR), adopted by the United Nations in 1966 and in force in Canada since 1976 *** guarantees the freedom of expression [in Art. 19] while simultaneously prohibiting the advocacy of hatred: *** Article 20 [states]: “1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” ***

(iii) Other provisions of the Charter

78. Significant indicia of the strength of the objective behind § 319(2) are gleaned not only from the international arena, but are also expressly evident in various provisions of the Charter itself *** Most importantly for the purposes of this appeal, §§ 15 and 27 represent a strong commitment to the values of equality and multiculturalism, and hence underline the great importance of Parliament’s objective in prohibiting hate propaganda.

(iv) Conclusion respecting objective of § 319(2)

85. In my opinion, it would be impossible to deny that Parliament’s objective in enacting § 319(2) is of the utmost importance. Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada has decided to suppress the wilful promotion of hatred against identifiable groups.
D. Proportionality

87. * * * [The interpretation of § 2(b) under Irwin Toy gives protection to a very wide range of expression. Content is irrelevant to this interpretation, the result of a high value being placed upon freedom of expression in the abstract. This approach to § 2(b) often operates to leave unexamined the extent to which the expression at stake in a particular case promotes freedom of expression principles. In my opinion, however, the s. I analysis of a limit upon § 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of § 2(b).]

91. From the outset, I wish to make clear that in my opinion the expression prohibited by § 319(2) is not closely linked to the rationale underlying § 2(b).

92. At the core of freedom of expression lies the need to ensure that truth and the common good are attained, whether in scientific and artistic endeavors or in the process of determining the best course to take in our political affairs. Since truth and the ideal form of political and social organization can rarely, if at all, be identified with absolute certainty, it is difficult to prohibit expression without impeding the free exchange of potentially valuable information. Taken to its extreme, this argument would require us to permit the communication of all expression, it being impossible to know with absolute certainty which factual statements are true, or which ideas obtain the greatest good. The problem with this extreme position, however, is that the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth: the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.

[Chief Justice Dickson recognizes that self-fulfillment is also an important free speech objective. However, this self-fulfillment is realized in a community and it must “therefore be tempered insofar as it advocates with inordinate vitriol an intolerance and prejudice which views as execrable the process of individual self-development and human flourishing among all members of society.”]
[In 1991, a regional association of the far-right National Democratic Party of Germany (NPD) issued invitations to a meeting intended to discuss “Germany’s future in the shadow of political blackmail.” The featured speaker was David Irving, a revisionist historian, who has argued that the mass extermination of Jews during the Third Reich never occurred. The Bavarian state government permitted the meeting on the condition that the “Auschwitz Hoax” thesis not be promoted. It took this action on the authority of the Assembly Act, one provision of which allows the prohibition of meetings where the likelihood exists that things said will themselves constitute criminal violations. In this case the likely violations were denigration of the memory of the dead, criminal agitation, and, most importantly, criminal insult, all prohibited by the Criminal Code. The NPD held its meeting but claimed that the condition constituted an unconstitutional intrusion on its right to free expression. The complaint was rejected by the lower courts, before being heard by the Federal Constitutional Court.]

Judgment of the First Senate:

B. II. The contested decisions do not constitute a violation of Art. 5 (1), first sentence of the Basic Law.
1. Art. 5 (1), first sentence, of the Basic Law guarantees everyone the right freely to express and disseminate his opinion.
   a) These decisions have to be assessed primarily in terms of this basic right. It is true that the condition the complainant opposes relates to a meeting.

   Its subject, however, is certain utterances which the complainant, as organizer of the meeting, was neither allowed to make nor to tolerate. The constitutional assessment of the condition depends, above all, on whether such utterances are allowed or not. An utterance which cannot be prohibited on constitutional grounds, cannot give rise to a restrictive measure applying to a meeting pursuant to section 5 (4) of the Assemblies Act. The criteria for answering this question follow not from the basic right of freedom of assembly but from the right of freedom of expression.
   b) The subject matter of the Basic Law’s protection under Art. 5 (1) is opinions. Freedom of expression and dissemination relates to opinions. Opinions are shaped by the individual’s subjective relationship towards the content of his utterance. The element of comment and appraisal is characteristic of opinions. To this extent, demonstration of their truth or untruth is not possible. They enjoy the protection of a basic right without it mattering whether their expression was well-founded or unfounded, or is deemed to be emotional or rational, valuable or worthless, dangerous or harmless. The protection of the basic right also extends to the form the utterance takes. An expression of opinion does not lose its protection as a basic right by being sharply or hurtfully worded. In this respect, the question can only be whether, and to what extent, limitations on freedom of expression ensue in accordance with Art. 5 (2) of the Basic Law.

Strictly speaking, representations of fact, on the other hand, are not expressions of opinion. By contrast with the latter, in their case it is the
objective relationship between the utterance and reality that comes to the fore. Hence they are also amenable to an examination of their truth content. But this does not mean that representations of fact automatically lie outside the purview of Art. 5 (1) of the Basic Law. Since opinions are usually based on factual assumptions or they comment on factual circumstances, they are protected by the basic right at any rate to the extent that they are a condition for the formation of opinions, which Art. 5 guarantees as a whole [citing the Campaign Slur Case].

Consequently, the protection of a representation of fact only stops when it is unable to contribute anything to the constitutionally presupposed formation of opinion. From this angle incorrect information does not constitute an interest meriting protection. For this reason, the Federal Constitutional Court has constantly ruled that a deliberate or demonstrably untrue representation of fact is not covered by the protection enjoyed by freedom of expression [citing the Böll Case]. However, requirements affecting the duty of truth must not be assessed in such a way that the function of freedom of expression will suffer as a result or that permissible expressions of opinion are self-censored for fear of sanctions [citing the Böll and Campaign Slur cases].

Drawing the distinction between expressions of opinion and representations of fact can certainly be difficult because the two are often linked together and only jointly give sense to the utterance. In this case, severance of the factual from the evaluative elements is only permissible if this does not falsify the meaning of the utterance. If that is not possible the utterance must, in the interest of effective protection of the basic right, be viewed as an expression of opinion as a whole and be included within the ambit of the protection afforded freedom of expression because otherwise there would be the threat of substantial curtailment of basic right protection.

c) Freedom of expression is certainly not unconditionally guaranteed. Art. 5 (1) provides that it is limited by provisions of general law, statutory provisions for the protection of youth and of personal honor. Nevertheless, in the interpretation and application of laws that have a limiting effect on freedom of expression account must be taken of the significance of freedom of expression [citing the Lüth Case]. This usually requires balancing, in the light of the elements of the pertinent norms and on an individual basis, the limited basic right against the legal interest served by the law limiting this basic right. In balancing, the Federal Constitutional Court has developed some rules according to which freedom of expression by no means always takes precedence over the protection of personality, as the complainant thinks. On the contrary, where expressions of opinion are regarded as a formal insult or vilification, protection of the personality normally comes before freedom of expression [citing the Wallraff Case]. Where expressions of opinion are linked to representations of fact, the protection merited can depend on the truth content of the factual assumptions on which they are based. If the latter are demonstrably untrue, freedom of expression will likewise usually come after the protection of personality [citing the Campaign Slur Case]. Otherwise it is a matter of which legal interest deserves to be given preference in an individual case. Here, however, it must be borne in mind that there is a presumption in favor of free speech as regards questions of importance to the public [citing the Lüth Case]. Hence, we must constantly take account of this presumption as
well when balancing the legal positions of the persons involved.
2. Seen in these terms, a breach of Art. 5 (1) of the Basic Law has
manifestly not been committed. The condition imposed on the complainant as
the organizer of the meeting, namely to see to it that there would be no denial
or doubt cast on the persecution of the Jews during the Third Reich, is
compatible with this basic right.
   a) The complainant has not contested the prognosis of danger made by the
authority dealing with the meeting and affirmed by the administrative courts,
namely that utterances of this kind would be made during the course of the
meeting. On the contrary, the complainant argues that it should be able to
make such statements.
   b) The prohibited utterance that there was no persecution of the Jews
during the Third Reich is a representation of fact that is demonstrably untrue
in the light of innumerable eye-witness accounts and documents, of the
findings of courts in numerous criminal cases and of historical analysis. Taken
on its own, a statement having this content therefore does not enjoy the
protection of freedom of expression. Therein lies an important difference
between denying the persecution of the Jews during the Third Reich and
denying German guilt in respect of the outbreak of the Second World War—
the subject of the decision handed down by the Federal Constitutional Court
on 11 January 1994. [The Historical Fabrication Case.] Utterances concerning
guilt and responsibility for historical events are always complex evaluations
that cannot be reduced to representations of fact, whilst denial of an event
itself will normally have the character of a representation of fact.
   c) But even if we do not take the utterance to which the condition relates
on its own but view it in connection with the subject of the meeting and thus
as a precondition for forming opinion on the “susceptibility to blackmail” of
German politics, the contested decisions will still withstand constitutional
review. The prohibited utterance does, it is true to say, enjoy the protection of
Art. 5 (1) of the Basic Law but there are no objections under constitutional law
to its limitation.
   aa) Such limitation has a lawful basis confirming to the constitution.
[The Court goes on to vindicate Section 5 (4) of the Assemblies Act, which
authorizes the state government to prohibit meetings that support or provide
the occasion for uttering views which “form the subject of a serious crime
(Verbrechen) or a less-serious crime (Vergehen) prosecutable ex officio.” The
guarantee of freedom of assembly under Art. 8 (1), however, does require the
legislature and government to observe the principle of proportionality.
Similarly, the Act did not violate freedom of expression since the “Auschwitz
Hoax” thesis had been held previously to constitute the offence of “insult”
under the Criminal Code, the constitutionality of which the Court then
affirmed in what follows.]
There are no doubts about the constitutionality of the criminal provisions
on which the condition [i.e., that the “Auschwitz Hoax” thesis not be promoted] 
was based here. The laws against defamation protect personal honor, which is
expressly mentioned in Art. 5 (2) of the Basic Law as a legal interest justifying
a limitation on freedom of expression. Section 130 of the Criminal Code is a
general law within the meaning of Art. 5 (2) serving to protect humanity and
ultimately having its foundation in Art. 1 (1) of the Basic Law [mandating the
inviolability of the dignity of man]. * * * 

(1) The administrative authorities and courts based their decisions on the criminal norm as interpreted by the ordinary courts. According to this interpretation, the Jews living in Germany form an insulable (beleidigungsfähige) group in view of the fate of the Jewish population under national socialist rule; denial of the persecution of the Jews is regarded as an insult to this group. On this point, the Federal Court of Justice had the following to say:
The historical fact itself that human beings were singled out according to the criteria of the so-called “Nuremberg Laws” and were robbed of their individuality for the purpose of extermination puts Jews living in the Federal Republic into a special personal relationship vis-à-vis their fellow citizens; what happened is also present in this relationship today. It is part of their personal self-perception to be comprehended as belonging to a group of people who stand out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others and that this is a part of their dignity. Respect for this self-perception is virtually, for each individual, one of the guarantees against repetition of this kind of discrimination and forms a basic condition of their life in the Federal Republic. Whoever seeks to deny these events denies, vis-à-vis each individual, the personal worth due to each [Jewish person]. For the person concerned this means continuing discrimination against the group to which he belongs and, as part of that group, against himself.

–BGHZ 75, 160, 162 et seq.

* * *

There is no cause for objection to the fact that, in the light of this court’s jurisprudence, these contested decisions bear witness to a grave violation of the right of personality in so far as persecution of the Jews was denied. Constitutionally, no fault can be found with the explanatory connection established by the Federal Court of Justice between the racially motivated extermination of the Jewish population during the Third Reich and the attack on the right to respect and the human dignity of the Jews today. In this sense there is also a distinction between denying the persecution of the Jews and denying German war guilt [citing the Historical Fabrication Case]. At any rate, the last opinion referred to does not, irrespective of its being questionable from a historical point of view, injure the interests of third persons. * * * 

(2) Balancing the defamation on the one hand against the limitation of freedom of expression on the other does not reveal any errors relevant to constitutional law. It is the gravity of the injury in each case that is decisive for this balancing. When insulting opinions are voiced, containing a representation of fact, it is crucial whether the representations of fact do not constitute an interest worth protecting. If they are inseparably connected with opinions, they will benefit from the protection of Art. 5 (1) of the Basic Law, but from the outset interference will be less serious than in the case of representations of fact that have not been shown to be untrue. That is the case here. Even if one regards the utterance that the complainant was prohibited from permitting at its meeting as an expression of
opinion in connection with the subject of the meeting, this does nothing to change the proven falsity of its factual content. Hence, interference relating to this is not particularly serious. In view of the weight attached to the insult, there can be no objection to the contested decisions' having given precedence to the protection of personality before freedom of expression. Also, matters do not change if one considers that Germany’s attitude to its national socialist past and the political consequences thereof, which were the subject of the meeting, is a question concerning the public in an important way. It is true that in this case there is a presumption in favor of free speech, but this does not apply if the utterance constitutes a formal insult or vilification [of the Jewish people], nor does it apply if the offensive utterance rests on demonstrably untrue representations of fact.

Overstretching the requirements of truth as regards the factual core of the utterance in a manner incompatible with Art. 5 (1) of the Basic Law is not then the result of this balancing. Limitation of the duty of care, from which the Federal Constitutional Court proceeds in the interest of free communication and of the critical and controlling function of the media, refers to representations of fact whose accuracy at the time of the utterance is still uncertain and which cannot be checked within a very short space of time. But it does not come into operation when the untruth of a statement is already established, as in this case.