

Contents

Abbreviations

xv

A Theory of Constitutional Rights and the British Constitution *Julian Rivers*

1. Human Rights and Constitutional Rights	xvii
2. Convention Rights as Subjective Rights and Objective Law	xix
3. The Theory of Principles and Rules	xxiii
4. Horizontal, or Third Party, Effect [<i>Drittwirkung</i>]	xxviii
5. The General Right to Liberty	xxxvi
6. The General Right to Equality	xli
7. Constitutional Entitlements	xliv
8. Conclusion: The Constitutionalization of the Legal System	xlviii

A Note on this Translation

lii

Introduction

1

1. The Content and Purpose of a Theory of Constitutional Rights	5
I. The Concept of a General Legal Theory of the Constitutional Rights of the Basic Law	5
1. A Theory of the Constitutional Rights of the Basic Law	5
2. A Legal Theory of the Constitutional Rights of the Basic Law	6
3. A General Legal Theory of the Constitutional Rights of the Basic Law	10
II. Constitutional Rights Theory and Constitutional Rights Theories	11
III. Constitutional Rights Theory as Structural Theory	13
2. The Concept of a Constitutional Rights Norm	19
I. On the Concept of a Norm	20
1. On the Controversy about the Concept of a Norm	20
2. The Semantic Concept of a Norm	21
3. The Separation of Semantic Questions from Questions of Validity	25
4. The Connection of Semantic Questions with Questions of Validity	27

5. The Assertion and Creation of Norms	28
II. The Constitutional Rights Norm	30
1. Constitutional Rights Norms and Constitutional Rights Provisions	31
2. Derivative Constitutional Rights Norms	33
3. On Friedrich Müller's Theory of Constitutional Rights Norms	38
3. The Structure of Constitutional Rights Norms	44
I. Rules and Principles	44
1. Traditional Criteria for Distinguishing Rules from Principles	45
2. Principles as Optimization Requirements	47
3. Competing Principles and the Conflict of Rules	48
4. The Different Prima Facie Character of Rules and Principles	57
5. Rules and Principles as Reasons	59
6. Generality and Principles	60
7. Three Objections to Principles	61
8. Principles and Proportionality	66
II. Three Models	69
1. The Model of Pure Principles	69
2. The Model of Pure Rules	71
3. The Model of Rules and Principles	80
III. Theories of Principles and Values	86
1. Principles and Values	86
2. Objections to Theories of Principles and Values	93
4. Constitutional Rights as Subjective Rights	111
I. On the Current Debate about Subjective Rights	111
1. Subjective Rights and Normative Questions	111
2. Subjective Rights and Empirical Questions	113
3. Subjective Rights and Analytical Questions	114
II. A System of Basic Legal Positions	120
1. Rights to Something	120
2. Liberties	138
3. Powers	149
III. The Complete Constitutional Right	159
5. Constitutional Rights and Legal Status	163
I. Jellinek's Theory of Legal Status	163

1. The Passive Status	164
2. The Negative Status	166
3. The Positive Status	169
4. The Active Status	172
II. On the Critique of Jellinek's Status Theory	173
6. The Limits of Constitutional Rights	178
I. The Concept and Types of Constitutional Rights Limit	178
1. The Logical Possibility of Limits	178
2. The Concept of a Constitutional Rights Limit	181
3. Types of Limit	184
4. On the Guarantee of an Inalienable Core as a Limit to Limits	192
II. The Scope and Limits of Constitutional Rights	196
1. The Protected Area and Scope of Rights	196
2. Narrow and Wide Theories of Scope	200
III. Limitation and Outworking	217
7. The General Right to Liberty	223
I. The Concept of a General Right to Liberty	223
II. A Formal-Material Conception of the General Right to Liberty	226
1. The No-Content Objection	226
2. The Combination of Formal and Material Principles	232
III. Spheres of Protection and Implied Liberties	236
1. Sphere Theory	236
2. Implied Liberties	239
IV. Problems with the General Right to Liberty	243
1. The General Right to Liberty and Selected Guarantees	244
2. The General Right to Liberty and the System of Constitutional Rights	245
3. The General Right to Liberty and the 'Isolated Individual'	248
4. The General Right to Liberty and Other Constitutional Norms	251
8. The General Right to Equality	260
I. Equality in the Application and Creation of Law	260
II. The Structure of the Requirement of Equality in the Creation of Law	262
III. The Formulae of the Federal Constitutional Court	265

IV.	Similar and Differential Treatment	270
1.	The Requirement of Similar Treatment	270
2.	The Requirement of Differential Treatment	271
V.	The Principle of Equality and Evaluation	273
VI.	Legal and Factual Equality	276
1.	The Concepts of Legal and Factual Equality	276
2.	The Principles of Legal and Factual Equality	276
3.	On the Role of the Principle of Factual Equality	278
VII.	The Structure of Equality Rights as Subjective Rights	285
9.	Rights to Positive State Action (Entitlements in the Wide Sense)	288
I.	Basic Terms and Concepts	288
1.	Constitutional Text and Legislative History	288
2.	The Case-Law of the Federal Constitutional Court	290
3.	The Nature of the Dispute about Entitlements	293
4.	The Concept and Division of Entitlements	294
5.	The Guiding Idea	297
II.	Protective Rights	300
1.	On the Concept of Protective Rights	300
2.	The Existence of Protective Rights	301
3.	Structure and Justiciability of Protective Rights	308
III.	Rights to Organization and Procedure	314
1.	On the Current State of Debate	314
2.	The Concept of a Right to Organization and Procedure	315
3.	On the Problem of their Existence	317
4.	Procedural Rights and Status Theory	319
5.	Types of Right to Organization and Procedure	323
IV.	Entitlements in the Narrow Sense (Social Constitutional Rights)	334
1.	Concept and Structure	334
2.	On the Arguments For and Against Social Constitutional Rights	337
3.	A Model of Social Constitutional Rights	343
10.	Constitutional Rights and Constitutional Rights Norms in the Legal System	349
I.	The Fundamental Nature of Constitutional Rights Norms	349
II.	Third Party, or Horizontal, Effect	351
1.	On the 'Radiation' Thesis	352
2.	The Construction of Horizontal Effect	354
III.	The Legal System and Constitutional Rights Reasoning	365
1.	Constitutional Rights and the Nature of the Legal System	365

2. On the Problem of the Controlling Competence of the Constitutional Court	366
3. Argumentation and Decision	369

Postscript	388
------------	-----

I. Too Little and Too Much	388
II. Framework and Foundation	390
1. The Concept of a Framework	391
2. The Concept of a Foundation	394
II. Structural Discretion and Balancing	394
1. End-Setting Discretion	395
2. Means-Selecting Discretion	396
3. Discretion in Balancing	396
IV. Formal Principles	414
1. Epistemic Discretion as the Outcome of Balancing	414
2. Epistemic Discretion and the Binding Nature of the Constitution	422

Appendix: The Constitutional Rights Provisions of the German Basic Law	426
---	-----

Bibliography	434
--------------	-----

Index	457
-------	-----

For educational use and reference only