Contents

| Abbrev | Tations | XV | |
|---------------|--|-------------|--|
| A Theo | ory of Constitutional Rights and the British Constitution | | |
| Julian Rivers | | | |
| 1. | Human Rights and Constitutional Rights | xix | |
| 2. | Convention Rights as Subjective Rights and Objective Law | xxiii | |
| 3. | The Theory of Principles and Rules | xxviii | |
| 4. | Horizontal, or Third Party, Effect [Drittwirkung] | XXXVI | |
| 5. 6. | The General Right to Liberty The General Right to Equality | xli xliv | |
| 7. | Constitutional Entitlements | xlviii | |
| 8. | Conclusion: The Constitutionalization of the Legal System | 1 | |
| | | 1 | |
| A Note | on this Translation | lii | |
| Introdu | ction | 1 | |
| | | | |
| 1. Th | e Content and Purpose of a Theory of Constitutional Rights | 5 | |
| I. | The Concept of a General Legal Theory of the Constitutions | | |
| | Rights of the Basic Law | 5 | |
| | A Theory of the Constitutional Rights of the Basic Law A Legal Theory of the Constitutional Rights of the | 5 | |
| | Basic Law | 6 | |
| | 3. A General Legal Theory of the Constitutional Rights | 4.0 | |
| II. | of the Basic Law Constitutional Rights Theory and Constitutional Rights | 10 | |
| | Theories | 11 | |
| III. | Constitutional Rights Theory as Structural Theory | 13 | |
| | | | |
| 2. Th | ne 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 | 2.7 | |
| | of Validity | 27 | |

| II. | 5. The Assertion and Creation of Norms The Constitutional Rights Norm | 28 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 |
| 2 11 | Constitutional Rights Norms | 44 |
| 3. In | e Structure of Constitutional Rights Norms | |
| I. | Rules and Principles | 44 |
| | 1. Traditional Criteria for Distinguishing Rules | 45 |
| | from Principles 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. | | 86 |
| | 1. Principles and Values | 86 |
| | 2. Objections to Theories of Principles and Values | 93 |
| 4. C | onstitutional Rights as Subjective Rights | 111 |
| I. | On the Current Debate about Subjective Rights | 111 |
| 1. | 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 |
| 11. | 1. Rights to Something | 120 |
| | 2. Liberties | 138 |
| | 3. Powers | 149 |
| III. | The Complete Constitutional Right | 159 |
| 5 C | onstitutional Rights and Legal Status | 163 |
| т | Jollings's Theory of Legal Status | 163 |
| | TATIONAL E LIBERTY DE L'EUSE MAINS | 1 (1.) |

| | Contents | xi |
|-------------------|--|---|
| II. | The Passive Status The Negative Status The Positive Status The Active Status On the Critique of Jellinek's Status Theory | 164 166 169 172 173 |
| 6. T | he Limits of Constitutional Rights | 178 |
| I. | The Concept and Types of Constitutional Rights Limit The Logical Possibility of Limits The Concept of a Constitutional Rights Limit Types of Limit On the Guarantee of an Inalienable Core as a | 178 178 181 184 |
| II. | Limit to Limits The Scope and Limits of Constitutional Rights 1. The Protected Area and Scope of Rights 2. Narrow and Wide Theories of Scope Limitation and Outworking | 192 196 196 200 217 |
| | | |
| 7. 1 | he General Right to Liberty | 223 |
| I. III. IV. | The Concept of a General Right to Liberty A Formal–Material Conception of the General Right to Liberty The No-Content Objection The Combination of Formal and Material Principles Spheres of Protection and Implied Liberties Sphere Theory Implied Liberties Problems with the General Right to Liberty The General Right to Liberty and Selected Guarantees The General Right to Liberty and the System of Constitutional Rights The General Right to Liberty and the 'Isolated Individual' The General Right to Liberty and Other Constitutional Norms | 223 226 226 232 236 236 239 243 244 245 248 |
| 3. Th | ne General Right to Equality | 260 |
| I. II. | Equality in the Application and Creation of Law The Structure of the Requirement of Equality in the Creation of Law | 260 |
| III. | The Formulae of the Federal Constitutional Court | 262 |

xii Contents

| 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. Ri | ghts to Positive State Action (Entitlements in the Wide Sense) | 288 |
| I. | Basic Terms and Concepts | 288 |
| 1. | 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 |
| 11. | 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 |
| 111. | 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 | 323 |
| 1 4. | Rights) | 334 |
| | 1. Concept and Structure | 334 |
| | 2. On the Arguments For and Against Social | 334 |
| | Constitutional Rights | 337 |
| | 3. A Model of Social Constitutional Rights | 343 |
| | 3. It winder of social constitutional regits | 373 |
| | | |
| 10. Co | onstitutional Rights and Constitutional Rights Norms | |
| in | the Legal System | 349 |
| 1. | 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 | |

| | Contents | xiii |
|------------------|---|---|
| | On the Problem of the Controlling Competence of the Constitutional Court Argumentation and Decision | 366 369 |
| Postsci | ript | 388 |
| I. II. IV. | Too Little and Too Much Framework and Foundation 1. The Concept of a Framework 2. The Concept of a Foundation Structural Discretion and Balancing 1. End-Setting Discretion 2. Means-Selecting Discretion 3. Discretion in Balancing Formal Principles 1. Epistemic Discretion as the Outcome of Balancing 2. Epistemic Discretion and the Binding Nature of the Constitution | 388 390 391 394 395 396 396 414 414 |
| Appen | dix: The Constitutional Rights Provisions of the German Basic Law | 426 |
| Bibliography | | 434 |
| Index | | 457 |