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Allan R. Brewer-Carías

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## CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS

### *A Comparative Law Study*

In all democratic states, constitutional courts, which are traditionally empowered to invalidate or to annul unconstitutional statutes, have the role of interpreting and applying the Constitution to preserve its supremacy and to ensure the prevalence of fundamental rights. In this sense, they were traditionally considered “negative legislators,” unable to substitute for the legislators or to enact legislative provisions that could not be deduced from the Constitution. During the past decade, the role of constitutional courts has dramatically changed, as their role is no longer limited to declaring the unconstitutionality of statutes or annulling them. Today, constitutional courts condition their decisions on the presumption of constitutionality of statutes, opting to interpret them according to or in harmony with the Constitution to preserve them, instead of deciding their annulment or declaring them unconstitutional. More frequently, constitutional courts, instead of dealing with existing legislation, assume the role of assistants or auxiliaries to the legislator, creating provisions they deduce from the Constitution when controlling the absence of legislation or legislative omissions. In some cases, they act as “positive legislators,” issuing temporary or provisional rules to be applied pending the enactment of legislation. This book analyzes this new role of the constitutional courts, conditioned by the principles of progressiveness and of prevalence of human rights, particularly regarding the important rediscovery of the right to equality and nondiscrimination.

Since 1963, Allan R. Brewer-Carías has been Professor at the Central University of Venezuela. He was Simón Bolívar Professor at the University of Cambridge, where he was a Fellow of Trinity College (1985–6); he was Adjunct Professor at the University of Paris II (1990) and at Columbia University in New York (2006–7). He is Titular Member of the International Academy of Comparative Law, where he served as Vice President (1982–2010), and he is a member of the Venezuelan National Academy of Political and Social Sciences, where he served as President (1997–9). He has extensively worked and written on matters of public law and comparative law, particularly on matters of judicial review.

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**Allan R. Brewer-Carías**

Professor of Law, Central University of Venezuela

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