Clint Eastwood buffs favour the scene. The eponymous Kid says to Clint that the recently deceased had it coming to him. "We all got it coming, Kid" is the bleak reply.

Not quite all of us, it would seem. Bitter former foes share office in the Government of National Unity. The spectre for some, or exorcising prospect for others, of the Nuremberg trials has gone. Indemnities already thickly carpet the past: my Magoo’s Bar Bomber for your Strijdom Square gunman.

The serving Supreme Court judges, however, remain unforgiven. They have it coming – for holding judicial office before 27 April 1994.

The irony is profound. The judicial arm flexes unprecedented muscle: even Acts of Parliament may now be struck down if in conflict with the Constitution. From this process, however, the whole judiciary from the Chief Justice down will be excluded, save for two exceptions. The first comprises the Constitutional Court. This Court, and it alone, is trusted to carry out the more important aspects of constitutional adjudication. The second exception is that parties to litigation may (if it suits them) agree to confer plenary powers of constitutional review on a Supreme Court judge.

There are three main objections to this overall approach: it is wrong in principle; it will not work; and it will cause great harm to the administration of justice in South Africa.

It is wrong in principle because it excludes from national reconciliation that area of Government least involved in the social conflicts of the past. Some will say, heatedly, that that is exactly the problem. They say, with Graham Greene’s revolutionary priest, that it is better to have blood on your hands than water, like Pilate. Their perception is that too many suffered severely under what they experienced as harsh statutes enforced by cold judges; the serving judiciary could have done much more to uphold fundamental rights in the face of those statutes.

It is hard to disagree entirely with that view. There were (with important exceptions) many such lost opportunities. But the serving judiciary cannot fairly be written off for that reason. No less than those legislators and administrators who have achieved such remarkable reconciliation, they were the product of their time, and in addition, of the conservative professionalism of their breed. Enoch Dumbutshena (formerly chief justice of Zimbabwe), looking back on the grant of similar constitutional powers to Smith’s judges under the new Mugabe government, has reflected that they were not bad men; they did their best; and that above all, innate pride in professionalism made them adjust to the new era.

It must be wrong in principle to vaunt national reconciliation and yet to exclude from it a generally talented, independent and experienced core of South African public servants. They are no "juristic Jurassic park" as one newspaper recently spluttered in the dyspepsia of a defamation defeat. Its distress is understandable; it is however no rational basis to attack the whole judiciary.

The second objection is that the exclusion of the serving judiciary en bloc from the new judicial function will not work, because the Constitutional Court cannot possibly cope with the welter of new constitutional work, both as court of first instance and as the only court of appeal in this respect. It particularly will not work because of the entire exclusion of the Appellate Division – generally staffed by the best and most experienced lawyers in the land – from every aspect of the constitutional process. The Appellate Division may not interpret a single provision in the Constitution, the law crafted to lie at the very heart of legal life.

The new system must also fail because cases are often seamless; issues run together, merge and overlap. A system positing the surgical excision of constitutional issues from other disputes in a case, with separate appeals on those and other issues to different courts, displays in the end an intolerable disregard for litigants. By 1986 there was a backlog of 10 000 cases in the India Supreme Court. In 1994 there was a delay of between five and nine years for Euro-
pean litigants to get to the Court of Human Rights in Strasbourg (it heard 2 492 cases in 1992). The jurisdictional gerrymandering of the Constitutional Court is calculated to foster that kind of result.

This leads to the third objection. The present exclusion of serving judges from constitutional adjudication can only harm an already weakened administration of justice. The implacable conviction that serving judges are not to be trusted in constitutional adjudication will give rise not only to delays, costs, and confusion but also to a general limiting of the reach of the Bill of Rights. If it is properly to imbue the legal process, and ultimately the values of all South Africans, it should operate fully at all court levels (except perhaps the lowest).

There is a final thought. There can be little doubt of the current demoralisation of South African judges. They have legitimacy enough to determine when a contract is against public policy; to regulate the standards of care required of pedestrians and pediatricians; and to determine society’s protection in the sentencing of prisoners. Yet into the constitutional area they are not trusted to stray. They are duty-bound to apply the law – but not all of it. So viewed, there would seem to be less principle in their exclusion from the process than a mulish determination to exclude reconciliation from the third arm of government.

What is to be done? The answer is to follow countries like Zimbabwe and Namibia in adopting a constitutional approach which integrates all judges in the legal process. Let every South African judge have the power thus far reserved to the Constitutional Court to hear cases with a constitutional element. Let the Appellate Division in particular bring its experience and expertise to bear as a court of appeal in relation to constitutional issues too (and thereby end the litigant’s nightmare of curial hopscotch). And then, put the Constitutional Court where it belongs: as a final normative court of appeal on constitutional issues, once every other issue in a case is resolved. (Provision may perhaps also be made for direct access in exceptional circumstances.) In that way the Constitutional Court can redress any failure by the serving judiciary to serve the values expressed in the new Constitution.

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Editorial notes:
1. Misgivings similar to those mentioned supra have also been expressed in the editorial entitled “The new South Africa” in the April 1994 issue of Consultus. We therefore support Advocate Gauntlett’s proposal that amending legislation should be considered, more particularly to draw the Appellate Division back into the court machinery in respect of constitutional issues. It is totally unfair to withhold the expertise of this highly respected institution from constitutional litigants in particular and the community in general.

2. Advocate Gauntlett’s note, some time ago, appeared in the Sunday Times in shortened form. That paper very kindly consented to the publication in Consultus of the full text of the note.

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