A tenth-anniversary celebration of South Africa's democracy.

Anita Zieminski / AFP / Getty Images
Out of South Africa

Arising from the injustice of apartheid, the country’s transition to one of the world’s most progressive constitutions offers lessons to established democracies around the globe.

The violence and struggle in post-Saddam Iraq starkly demonstrate the profound challenges entailed in trying to establish a constitutional democracy. However, those discouraged by the seemingly intractable situation in Iraq might find inspiration in the example of South Africa.
Arising from the injustice of apartheid, the progressive South African constitution has guided that nation's transition to a vibrant democracy. After a short decade, South Africa has established itself as a laboratory for constitutional transformation that can offer lessons to emergent and established democracies around the globe.

"South Africa is an ongoing miracle," says Assistant Professor Peter Danchin, a native of the country who now teaches South African law at Maryland, "a success story in how a country in great difficulties is able to make a transition toward a democratic system based on the rule of law."

"Lots of people," he continues, "are studying how the struggle unfolded in South Africa, how the African National Congress built the capacity to govern, the depth of talent they had within the ANC, and how that was a transnational movement with links to many countries, including America." Professor Danchin calls it "a terrifically interesting ongoing experiment."

"If we can learn how that occurred," he says, "it might help correct some of the disasters we see unfolding elsewhere, not the least of which is Iraq, a disaster on so many levels."

Professor of Law Sherrilyn Ifill has been inspired in other ways by the post-apartheid successes in South Africa. One of the questions she takes on in her new book, *On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-first Century*, is "How can communities confront their history of racial violence?" In America, she says, "We are timid and even juvenile in our conversations about race." We need to "speak more forthrightly about the issues that commission encouraged the perpetrators to publicly admit their wrongdoing, to begin a process of healing rather than punishment.

Professor of Law Karen Czapskiy witnessed firsthand those transformational days of 1994 as Nelson Mandela was elected president and a new, non-racial democratic government was seated.

"It was an extraordinary time to be in South Africa," says Czapskiy, who

“The opportunity to study South Africa’s open-eyed look at its past racial injustices inspires us to formulate a similar plan for our own society.”

was in Durban on one of the first post-apartheid Fulbright professorships. She remembers a moment when all of the constitutional words and rights became real.

Some village women "had this garden plot with these very puny cabbages, next to another garden plot with these huge, plump, lush ones. It was the same soil, so I asked what had been going on there," she says. "They said they knew they were now citizens because women and blacks were now part of the constitution, and they'd never been before. And now that they were citizens, they thought it was time to upgrade what they did with their lives.

"So they went to the U.S. embassy and said, 'Would you buy us an irrigation pump so we can water these cabbages better?' And the embassy came through with a couple hundred dollars. And now they were growing these incredible cabbages for market.

"And the only reason they decided it was worth doing was because now they were citizens. Here they were, owning their country and, through that, owning themselves."

All of this springing from a carefully crafted constitution, a simple, beautiful, and still-growing document that turned the country from a pariah into a model for nations.

The South African Parliament building continues as a democratic symbol and site of lawmaking.
Helping South Africa Get Down to Business

Jim Hanks (LLB ’67) is the consummate corporate lawyer, but one with an extraordinary sense of adventure. That spirit has drawn him to teach and practice corporate law around the world, from Maryland to Paris to China—and to his most unusual assignment yet, heading an international team that is helping post-apartheid South Africa completely revise its corporate and securities laws.

Hanks, a partner at Venable LLP in Baltimore, is remarkably well-qualified to advise on creating, from scratch, a nation’s corporate and securities statutes. He serves on the ABA’s influential Committee on Corporate Laws, which has authored the Model Business Corporations Act (adopted by half of the states), and is widely considered the leading expert on Maryland corporate law.

So in 2000, when the U.S. Agency for International Development asked him to form and chair a small team of American lawyers to help South Africa revise its Companies Act, Hanks was eager to apply his expertise. (Even though he logs 2,000 billable hours a year at Venable and teaches as an adjunct at Cornell and Northwestern law schools, not to mention his role on the UM Law Board of Visitors.)

He asked four colleagues on the ABA committee to join him. With support from the U.S. Agency for International Development (AID), he began a seven-year odyssey that is still not over.

South Africa post-apartheid was virtually a country reborn. Hanks explains that under the rigidly stratified system of racial segregation before 1994, “South Africa was a good place to do business, if you were the right color and had the right views.”

“There was enormous wealth there, but they recognized that apartheid had exacted a terrible price—not only by degrading the majority of their people and misallocating wealth, resources, and labor, but externally, as more and more countries and companies refused to do business with or invest in South Africa.”

Under President Nelson Mandela and a new non-racial democratic constitution, South Africans were revising many of their old laws. When it came time to revise their corporation law, they reached out to America for advice. “There is great respect around the world for American law and legal institutions,” Hanks says.

Hanks and his team have traveled several times to South Africa, meeting with practicing lawyers, professors, top executives of the Johannesburg Stock Exchange, company directors, government officials, judges like Richard Goldstone of the Constitutional Court and Dennis Davis of the High Court of Cape Town, and a wide range of other stakeholders.

“This is zero-based statutory drafting,” says Hanks. “Every major issue has been debated from scratch, but the final decisions on what goes into the bill are made by South Africans.”

Eventually, at Hanks’ suggestion, some British, Australian, and Canadian lawyers also joined the advisory process. When the Enron and WorldCom scandals hit, the U.S. Congress quickly passed the Sarbanes-Oxley Act of 2002. “Inevitably,” Hanks says, the new act influenced his work in South Africa. (Coincidentally, former Senator Paul Sarbanes was a partner at Venable.) While the new Companies Bill proposes hundreds of changes, the one that Hanks is proudest of is the ease with which a corporation can now be formed. “Particularly in country like South Africa,” he says, “form a company ought to be as simple as mailing a letter, and now it is.”

Hanks reflects, “Personally, it is a thrill for me to work with people, in and out of government, who are the John Adamses, Thomas Jeffersons, and James Madison’s of the new South Africa. I’ve often thought how much I would like to have the opportunity to talk to those founding fathers. Well, South Africans today have that opportunity.”

On Feb. 7, the Cabinet approved the South Africa Companies Bill of 2007, and final approval by Parliament seems likely by the end of the year.

Now that the enormous task is nearly complete, Hanks says, “It’s definitely the most rewarding professional assignment of my career.”

—B.G.

South Africa’s Great Leap Forward

In the early seventies, following the rise of the U.S. civil rights movement, many Americans became increasingly aware of growing resistance to white rule across southern Africa.

Professor Emeritus Clinton Bamberger recalls, “I first went to South Africa in 1974, when a rather courageous dean at a law school in Durban decided to have a conference on legal aid for poor people. The South African government thought it was a communist conspiracy. This was in the very dark days of apartheid.”

It was just the beginning of a long relationship between the Law School and a brave country that has made momentous changes in the last quarter-century. Bamberger honored the ANC’s call for a boycott on international travel and exchanges, and stayed away for fifteen years. But he had felt the anger firsthand. He remembers talking with a white Afrikaaner law professor, who told him, “I will stand at my doorstep with my gun and die there if necessary to defend apartheid.” Bamberger says, “Everybody predicted a bloody end; nobody expected a peaceful solution.”

It was all the more remarkable then, when a reformist white South African president, F.W. de Klerk, began dismantling the apartheid structure at the end of the 1980s. Negotiating with Nelson Mandela, the leader of the African National Congress, the white power structure eventually agreed in a protracted, difficult process to a new interim constitution, which paved the way to a multi-racial democracy. Bamberger had gone back during these heady days; he returned just as Mandela was freed from his twenty-seven-year prison term.

“It was kind of like living in the sixties in the U.S.” Bamberger continues, “when there was a sense that you could change things. There were lots of wonderful people, old and young, working for change.”

He was in Johannesburg again on that 1994 day Mandela became president. “That was an exciting day, a historic day,” he says.

Now South Africans could act, and became engaged in an extraordinary, broad-based process of drafting their permanent constitution.

The new document had to meet strict criteria on protection of white interests, but also garner the support of the 85 percent of the population that was black. Over the next year, the Constitutional
Assembly received 1.7 million submissions and petitions from the public on what they wanted in their new constitution.

Thanks in large part to the statesmanship of Mandela and the ANC's genuine commitment to democratic rights, the process delivered: The new constitution was approved by popular vote in 1996. By the next year all South Africans had their rights, on paper at least.

The World's Most Progressive Constitution?

Newly formed nations, emerging democracies, post-war regimes—many have struggled with the tenets required to change the course of a country. South Africa emerged from its darkest days with what many describe as the most democratic, progressive constitution in the world.

As our own legislatures argue discrimination on the basis of sexual orientation, for example, the South African constitution stands as the first constitution in the world to ban such discrimination. Just last year, Parliament passed a law permitting same-sex marriage; the first weddings were celebrated in December.

Peter Quint, UMLaw's Jacob A. France Professor of Constitutional Law, speaks highly of the ways South Africa's government and Constitutional Court have steered an intelligent, practical course between its high aspirations and the social realities it faces. Quint, who has done extensive comparative constitutional work (and recently taught the seminar “Constitutions and Crisis—South Africa, India, and Germany”), notes that unlike post-Nazi Germany, which put its disgraced leaders on trial and executed some of them, South Africa opted for a Truth and Reconciliation Commission. The new government also guaranteed property rights, "to keep the country on an even keel economically," he says. "They knew they needed the managers."

One of the court's very first decisions under the new constitution was to rule the death penalty unconstitutional. With South Africa experiencing a high crime level, that decision was quite unpopular, but the court has, shall we say, stuck to its guns.

Professor Danchin adds, "The court really looked in depth at how the death penalty has been dealt with in other countries, and within the European and U.N. systems. It's a remarkable thing to read."

It's an example of another innovative principle in this system. "There is a provision that the courts must consider the law of other countries in interpreting the constitution, and may consider international law," Danchin says. "That's why the Constitutional Court has had foreign researchers."

And in a notable departure from the U.S. approach, the South African bill of rights protects rights not only against government action, but also against private parties.

As with all living documents, the South African constitution is a work in progress, as an activist Constitutional Court continues to define broadly the rights specified in the constitution. Danchin notes that the court has strengthened and expanded the constitution's guarantees of social, economic, and cultural rights. Quint agrees, but notes that, while the 1996 constitution has more guarantees of social and economic rights than the U.S. constitution, "The court has been fairly cautious in applying those."

What it did do, as recently as last year,
was to overturn two controversial laws that had been passed with insufficient public participation. The constitution requires that Parliament "facilitate public involvement in the legislative process," but the court had to serve notice that requirement must be taken seriously when it rescinded the laws.

"This is a radical idea for a democracy," says Professor Czapskiy, who has been studying and writing about the path-breaking decision known as the "Doctors for Life" case. The court reviewed five pieces of legislation, and found that two—relating to termination of pregnancy and traditional health practitioners—were not valid because citizen input had not been sufficiently sought out. So, Czapskiy says, "the South African parliament has to start over."

In another instance, Danchin points out, the court ruled that there's "a minimum obligation on the government to provide access to housing," which is justiciable. It also found that the government was obliged to provide "anti-retroviral drugs for women with AIDS to stop mother-to-child transmission."

Czapskiy notes that "even if these rights are aspirational"—that is, even if the government cannot deliver on its promises in all cases—"they may still make a difference in the actual delivery of services."

By recognizing rights like these, South Africa goes far beyond the U.S. focus on civil and political rights, and is closer to the Canadian and German constitutions, says Danchin. And, reminds Czapskiy, these legal changes have made a real difference in people's lives. When she was in South Africa in 1994, she says, "Lots of gay people were very closeted. When I came back in the spring of 2005, it was a different world; people were much more open, more confident."

South Africa is very much a land in transition, and, as recent court decisions show, its constitutional regime is still evolving as well. As Bamberger describes it, "I don't know if it's the most liberal, but it's considered one of the best constitutions in the world."
lawyers. Some of the many individuals who have lent their expertise to Maryland students include Arthur Chaskalson, first Chief Justice of the South African Constitutional Court; Legal Resources Centre director Geoff Bender; former ambassador Thandabantu Nhlapo, now the Deputy Vice-Chancellor of the University of Cape Town; and High Court Judge Dennis Davis (see sidebar).

The externship established by Bamberger continues to this day. For nearly twenty years, Maryland students have been living, working, and learning in South Africa. Each year, as required by the ABA, faculty members visit the externship sites to evaluate and learn about the students' placements. This has led to deep and abiding relationships with the legal and academic communities in South Africa.

Most recently, Dean Karen Rothenberg strengthened those ties further with her trip to the law school of the University of Cape Town (UCT) last March. In addition to making an academic presentation, school in Australia, Danchin came to UMLaw in 2006 after directing the human rights program at Columbia University's School of International and Public Affairs. He returned to post-apartheid South Africa to do a clerkship in 1999 with Arthur Chaskalson, Chief Justice and President of the Constitutional Court. Danchin describes Chaskalson as "one of the pivotal figures in the legal history of South Africa," a judge who encouraged his clerks to argue with him. "I learned more about law with Chaskalson than I'd ever learned in my life."

In the course, Danchin draws on his personal experience, not only discussing South African law from a comparative and historical perspective, but also "teaching what it means to be a public interest lawyer in South Africa."

The Experiment Continues
That's important preparation for students who go into Maryland Law's South Africa externship program, where they are placed to work for a semester with local public interest law organizations.

The externship "is not for everybody. It's very much a program for self-starters," says program director Sherrilyn Ifill. "And our students have been amazing; they've risen to the occasion." It can be "a life-changing experience" for the law students who go there, she says.

Brigid Ryan ('08), who spent a summer at the Legal Aid Board for the Cape Town District Court, where she did everything except represent clients in court, agrees: "Since I'm white, blonde, and tall, many people think I'm an Afrikaaner [who tended to be backers of apartheid]. People come up and speak to me in Afrikaans." She was impressed with how well the courts dealt with two main official languages, English and Afrikaans, and eleven recognized languages in all.

Extern Melissa Hill worked this summer with the Institute for Democracy in South Africa, a policy group that advises Parliament on suggested reforms. She joined the cadre of scholars around the world who are continually fascinated by the experience of this "new" country.

The process is one of the areas scholars continue to explore. While the drafters of South Africa's constitution learned from the U.S. experience, they also looked at many other examples. "It shows Americans that constitutionalism can be done in different ways, that some of the most revered features of the U.S. constitution are not as revered elsewhere," says Danchin.

He also suggests that America can learn from South Africa about dealing with racial discrimination: "Affirmative action is an entrenched part of life in South Africa, whereas here it's still a very suspect question."

"South Africa is also struggling with the idea of legal pluralism. It's a very diverse country—you have the customary law systems of the different tribes, the immigrant communities, the white communities, the black communities. The courts are dealing with all these questions, and this school is providing legal education and training on that front," Danchin adds. "And we need that kind of cross-fertilization of ideas between the United States and South Africa."
and they are not encouraged by what they see in the American experience."

But despite many academics’ high regard for South Africa’s political advances and progressive constitution, as well as its obvious economic strides, the country still faces a host of serious problems. Extremes of wealth and poverty, continuing ethnic tensions, and very high rates of violent crime and HIV/AIDS continue to plague the country.

Danchin observes that, despite the groundbreaking Supreme Court decision declaring a justiciable right to housing, "on the ground, not that much has been done about the vast numbers of homeless people." Danchin also expresses concern about "the effect of the AIDS crisis on the fabric of South African life. How does a society deal with 500,000 to a million children without parents?"

Because of these massive problems, Danchin says, "the post-transition optimism of the nineties has faded a bit. I’d call the current mood ‘tempered enthusiasm.’"

Nonetheless, with its combination of economic growth, inter-group reconciliation, and free, democratic government, South Africa still stands as a widely admired success story.

As Ifill notes, "From the perspective of a human rights lawyer and a constitutional lawyer, South Africa may be the most exciting country in the world today."

A longtime writer/editor in civil rights, foreign affairs, and higher education, Bob Gouldin lives in Takoma Park, Md.

A Gift of Global Learning

When leading Baltimore real estate developer Howard Brown honored the memory of his father by establishing the David S. Brown (’33) Fund for Excellence, his major unrestricted gift was also an expression of support for the School of Law’s vision.

Brown’s generosity coincided with a growing need for the law school to increase international and comparative law offerings. In particular, current and prospective students were expressing interest in expanded study opportunities abroad.

The result was the creation of the innovative David S. Brown International Fellows Program. The program provides support for several School of Law students each semester to pursue public interest work at agencies around the world. The number of placements has already grown to seventeen in just the program’s second year.

"My unrestricted gift was intended to allow the School of Law to seize unexpected opportunities as they arose," says Brown. “It is tremendously gratifying that the result has been the creation of such an innovative program that has helped the law school address a pressing need.”

Jessica George (’08), who worked at a Cape Town public interest firm on constitutional litigation relating to women’s rights, says, “After working for a domestic violence center in Baltimore, it’s fascinating to see similar challenges facing women in South Africa and impressive to see how women attorneys are fighting for women’s rights.”

Externships in South Africa are just the beginning: The Brown International Fellows Program also supports those pursuing externships with the World Health Organizations in Geneva, Switzerland, and to those with internships at the Law Reform Commissions of England and Australia, and the Inter-American Court of Human Rights in Costa Rica.

Robin Clark (’07) headed to the Australian Law Reform Commission, working on a critique of how free speech rights have been impacted by the nation’s recently enacted anti-terrorism act.

"It was an incredible experience to see another country’s governmental system at this level,” she says, “working with its best legal minds on one of the preeminent issues of the day.”