

Relatoría

Título del evento	Seventh Seminar of Professors 2026 "Protecting Constitutional Democracy in South Africa through Fourth Branch Institutions: The Track Record of the Public Protector and the Human Rights Commission"
Fecha del evento	July 15, 2026
Moderadora	Gabriela Barbosa Villa
Ponente invitado:	
Professor Bradley Slade (University of Stellenbosch, South Africa)	
Temas abordados en la presentación:	
1. Introduction and Framing Gabriela Barbosa opened the seminar as moderator, introducing Professor Bradley Slade and framing the session's central theme: how South Africa's constitutional order relies on independent oversight bodies — commonly called "Chapter 9 institutions" — to safeguard democracy, and specifically the performance of two of the most prominent among them, the Public Protector and the South African Human Rights Commission (SAHRC). Professor Slade thanked Professor Andrés Gutiérrez for facilitating the lecture and Gabriela Barbosa for the introduction, and outlined the structure of his talk: (1) an introduction to the constitutional context; (2) a theoretical discussion of Chapter 9 institutions as potential "fourth branch" institutions; (3) an analysis of the Public Protector; (4) an analysis of the SAHRC; and (5) closing remarks on institutional effectiveness. He situated the discussion within South Africa's post-apartheid constitutional transition. The 1996 Constitution replaced parliamentary supremacy with constitutional supremacy, embedding an extensive system of checks and balances designed to transform a deeply unequal society. Persistent poverty, inequality, maladministration, and corruption remain major obstacles to realizing the Constitution's transformative vision, and the institutions established under Chapter 9 were created specifically to hold public power accountable and act as intermediaries between the state and the public, in a context where the traditional branches of government had historically been used as tools of oppression. Chapter 9 of the Constitution establishes six institutions: the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, and the Electoral Commission. Slade referenced two landmark Constitutional Court decisions to underscore the constitutional weight of these bodies: • Economic Freedom Fighters v. Speaker of the National Assembly (2016) ("EFF1"), which described the Public Protector as "a constitutional gift" essential to the fight against corruption, unlawful enrichment, and impropriety in state affairs. • The South African Human Rights Commission case (decided earlier in 2026), in which the Court reaffirmed that the establishment of Chapter 9 institutions was a deliberate choice by the constitutional drafters aimed at restoring trust and rebuilding public institutions after apartheid. 2. Chapter 9 Institutions as "Fourth Branch" Institutions A substantial portion of the presentation was devoted to the theoretical debate over whether Chapter 9 institutions constitute a "fourth branch" of government, alongside the legislature, executive, and judiciary.	

Historical origins: Slade traced the conceptual roots of these institutions to the African National Congress's 1990s policy document, "A Bill of Rights for a New South Africa," which proposed an ombudsperson-type figure to ensure fair execution of constitutional duties, as well as a human rights commission and an independent electoral commission (the latter created to oversee South Africa's first democratic elections in 1994, given the apartheid government's lack of legitimacy to do so). These proposals reflected an early recognition that new, independent institutions would be necessary to support the country's transformative constitutional vision.

Design features: The institutions are constitutionally guaranteed to be independent, subject only to the Constitution and the law, and required to act impartially, without fear, favor, or prejudice. They are explicitly *not* part of the traditional three branches of government — a point the Constitutional Court itself has confirmed, noting these institutions must be, and be seen to be, outside of government.

Academic debate: Several scholars (referred to by Slade as Fowkes, Ndlovu/"Nani," and Mohamed, among others) argue that the unique constitutional character of Chapter 9 institutions justifies classifying them as a "fourth branch" of government, representing an evolution and adaptation of the separation of powers doctrine to modern constitutionalism rather than a failure of it.

The Court's position: Despite this academic momentum, the Constitutional Court has consistently declined to formally categorize Chapter 9 institutions as a fourth branch, holding that "there are only three branches of government." Instead, the Court interprets each institution's powers according to its specific constitutional purpose, not according to a generalized "branch of government" framework.

Slade's own position: Professor Slade argued that the "fourth branch" label, while theoretically appealing, may do "less work than one might think" and could obscure more than it reveals. He suggested it is more useful to understand each institution's distinct design and function — distinguishing, for example, between "integrity institutions" and "guarantor institutions" — than to lump them under a single overarching label. He noted that even proponents of the fourth-branch framing acknowledge it does not resolve difficult questions about how these institutions relate to the existing branches within the broader system of checks and balances.

3. The Public Protector

3.1 Constitutional Mandate and Design

The Public Protector is established under Section 181 of the Constitution (referred to in the transcript, with the speaker's number possibly mistranscribed) and has three core functions: **investigating**, **reporting on**, and **taking remedial action** regarding improper conduct in state affairs or public administration at any level of government. The office is modeled on the classic ombudsperson concept and is further empowered by the Public Protector Act, which provides detailed procedural rules.

Appointment and independence safeguards:

- Appointed by the President, but only on the recommendation of the National Assembly, requiring 60% support among members.
- Candidates must be South African citizens and must meet specific qualifications (e.g., having served as a judge, senior advocate for 10+ years, or member of parliament for 10+ years).
- The appointment process typically includes public participation, with the National Assembly calling for public nominations.
- Serves a **non-renewable seven-year term**, designed to remove incentives to moderate investigations in pursuit of reappointment.

- Removal requires findings of misconduct, incapacity, or incompetence, and a two-thirds vote of the National Assembly.

Investigative powers: The Public Protector can compel witnesses to appear, demand production of documents, and enter and inspect premises. Investigations may be initiated by public complaint or on the Protector's own initiative, and may extend to any organ of state — including the Presidency, Cabinet, government departments, and state-owned entities.

3.2 The Binding Nature of Remedial Action

For years, it was contested whether the Public Protector's "remedial action" was merely advisory or legally binding. This was resolved in **EFF1 (2016)**, where the Constitutional Court confirmed that remedial action is binding and creates enforceable obligations on organs of state, unless successfully challenged through judicial review. Slade emphasized that this is what distinguishes the Public Protector from a purely advisory body, giving the office real constitutional teeth. He noted, however, that this ruling has drawn academic criticism, with some arguing it effectively turned the Public Protector into "cop, prosecutor, judge, and jury," and that this was not the drafters' original intention. The binding nature of remedial action has also led to a marked increase in litigation challenging the Protector's findings.

3.3 Case Examples

- **State Capture Report (Advocate Thuli Madonsela):** Directed the President to establish a judicially-led commission of inquiry into state capture. The President's attempt to have this set aside on separation-of-powers grounds failed; the court found the remedial action rationally connected to addressing large-scale corruption the Protector lacked resources to fully address. This led to the establishment of the **Zondo Commission**, later described as one of South Africa's most significant accountability processes.
- **Free State Department of Agriculture report (Advocate Busisiwe Mkhwebane):** Set aside by the courts, which found the Protector had failed to investigate key complaints — a failure deemed "plainly irrational" — rendering the remedial action similarly irrational.
- **Report on recovery of misappropriated funds:** Set aside because it improperly directed Parliament to amend the Constitution, violating separation of powers, since only Parliament holds constitution-amending power. In a related Constitutional Court decision, the Court imposed a **personal costs order** against the Public Protector, finding her investigative model "flawed," criticizing her lack of candor during the investigation, and her failure to engage the affected party before publishing findings — conduct the Court said fell "far short of the high standards required of her office."

3.4 Institutional Performance Over Time

Slade drew a sharp contrast between two tenures:

- **Advocate Thuli Madonsela (2009–2016):** Widely regarded as the most effective period in the office's history. Her tenure produced the "Secure in Comfort" report (requiring President Zuma to repay costs of non-security upgrades to his private residence) and the State Capture report, both of which had major constitutional and political consequences, ultimately reinforced by the Constitutional Court's EFF1 ruling.
- **Advocate Busisiwe Mkhwebane (2016–2023):** Exposed the vulnerability of the office to political compromise and incompetence. Numerous court proceedings found her investigations procedurally flawed, factually unsound, and at times lacking independence and impartiality. Following extended impeachment proceedings (including attempts to delay them), the National Assembly voted by an overwhelming majority to remove her — the first such removal of a Chapter 9 institution head — causing significant reputational damage to the office.

Key takeaway: The Public Protector's track record shows that strong constitutional design and legal protections are necessary but not sufficient; effective exercise of these powers ultimately depends heavily on the competence, integrity, and impartiality of the individual office-holder.

4. The South African Human Rights Commission (SAHRC)

4.1 Constitutional Mandate and Design

Established under Section 184 of the Constitution, the SAHRC has a tripartite mandate:

1. **Promote** respect for human rights and a culture of human rights;
2. **Promote** the protection, development, and attainment of human rights;
3. **Monitor and assess** the observance of human rights nationally.

Institutional design: Up to eight commissioners (at least six full-time, up to two part-time), who must be South African citizens with relevant expertise, serving seven-year terms (renewable once), removable for gross misconduct, serious neglect, or incapacity by a simple majority of the National Assembly.

4.2 The Three Mandates in Detail

- **Promotion mandate:** Advocacy, awareness campaigns, engagement with government policy on human rights, community empowerment, and public education through the media.
- **Protection mandate:** Strategic impact litigation, human rights inquiries and hearings, and investigation of complaints (self-initiated or received). When violations are substantiated, the Commission issues directives to the parties involved.
- **Monitoring mandate:** Includes the significant **Section 184(3)** obligation, requiring the Commission to obtain annual reports from all organs of state (national, provincial, and local) on measures taken to realize socio-economic rights — housing, healthcare, education, food, water, environment, and social security. Slade compared this to a domestic analogue of UN human rights reporting procedures, describing it as systemic and forward-looking.

4.3 The "Binding Powers" Question — Recently Resolved

A key legal question — whether the SAHRC's power to "take steps to secure appropriate redress" for human rights violations was binding, similar to the Public Protector's remedial action — was finally settled in **May 2026** by the Constitutional Court in the SAHRC case. The Court held that:

- The Commission was designed to **facilitate, engage, and influence**, not to control or compel.
- It exercises "**cooperative control**" rather than "**coercive control**."
- Its role is to help *secure* redress (e.g., via courts or other forums), not to itself issue binding directives or compel implementation — a clear distinction from the Public Protector's binding remedial action.

Despite lacking binding powers, the Court emphasized the Commission is "far from toothless," noting its strength lies in its capacity to act in ways courts cannot — through investigation, reporting, education, promotion, and systemic monitoring. The SAHRC Act empowers it to provide financial assistance to complainants seeking to approach courts, refer complainants to other forums, and institute legal proceedings in its own name on behalf of complainants or classes of complainants.

4.4 Institutional Performance and Challenges

Achievements: Impactful investigations and public hearings exposing systemic issues such as discrimination in workplaces and schools, and failures in basic service delivery affecting vulnerable populations; numerous influential reports proposing remedial measures.

Challenges:

- **Chronic resource shortages**, particularly affecting the demanding Section 184(3) reporting mandate. The Commission acknowledged a striking **10-year gap** in fully complying with this reporting

requirement — the report covering 2012–2013 was not followed by another comprehensive report until one covering 2024–2025. A positive recent development has been partnering with university research chairs to help compile these reports.

- **Non-responsiveness from state institutions**, with government departments failing to provide requested information, providing irrelevant information, or simply ignoring the Commission's engagement efforts — raising broader questions about Parliament's obligation to ensure departments meet their constitutional duties toward the Commission.

5. Closing Remarks

Professor Slade closed by returning to the Constitutional Court's own words (from the SAHRC judgment): the Constitution's transformative vision is unattainable without institutions specifically designed to support constitutionalism and democratic functioning. Each Chapter 9 institution plays a distinct, indispensable role — a diversity of function that risks being flattened by a single "fourth branch" label. He reiterated his preference for functional classifications (e.g., "integrity" vs. "guarantor" institutions) over broad structural labeling.

Preguntas realizadas por el público

1. The questioner reflected on the fourth branch's role in promoting public participation, asking how local communities — particularly Black communities or those affected by specific state measures — can use these institutions as allies to have their voices heard. Drawing a comparison with Colombia and other countries, the questioner noted that while these institutions often support public hearings and community engagement, their decisions are frequently non-binding or insufficiently compulsory to effectively address the problems identified. The question asked Professor Slade to reflect on this tension between (1) the institutions' role in promoting participation and (2) the more limited legal/binding nature of their procedures, and how this affects the fulfillment of their protective function.
2. What role should the Public Protector and the Human Rights Commission play in addressing new challenges to constitutional democracy, specifically disinformation and political polarization?
3. What does "appropriate remedial action" mean in a concrete case, in relation to the Public Protector's role?
4. What guarantees the independence of the Human Rights Commission, and how exactly is it financed?

Conclusiones del evento:

His key overarching conclusions:

1. **Design matters, but so does execution.** Strong constitutional and legislative frameworks, combined with structural independence protections, are necessary but not sufficient conditions for institutional effectiveness.
2. **The Public Protector's record** illustrates both the potential of these institutions to hold powerful actors accountable (Madonsela era) and the risk of institutional failure through inconsistent or improper use of power (Mkhwebane era, culminating in her removal for gross misconduct and incompetence).
3. **The SAHRC's effectiveness** is constrained less by leadership failures and more by a mismatch between an extremely broad constitutional mandate and chronically insufficient resources — a structural

problem requiring Parliament to either better resource the Commission or reconsider the scope of its mandate.

4. **Institutional reform proposals**, such as merging certain Chapter 9 institutions (as recommended by a parliamentary committee as far back as 2007), remain relevant to improving overall effectiveness.
5. Regardless of theoretical labeling, all Chapter 9 institutions — exemplified by the Public Protector and the SAHRC — remain essential "gifts to the nation" in the ongoing project of building a just and equal South African society.

Asistente a cargo de la relatoría:

Gabriela Barbosa Villa.