Sovereign Delegation and the Bifurcation of Due Process: A Holistic Analysis of Article 50 of the Constitution of Kenya, 2010

By: Isaac Aluochier[1]

Table of Contents

Abstract

This article provides a rigorous, text-based constitutional analysis of Article 50 of the Constitution of Kenya, 2010, examining the architectural divide between the right to a fair hearing (Article 50(1)) and the right to a fair trial (Article 50(2)). Rather than treating these provisions as a monolithic procedural code, this paper maps out how sovereign adjudicative power is delegated under Article 1(3)(c) and Article 159(1), distinguishing between independent tribunals established "by" the Constitution and those established "under" it. Utilising Section 2 of the Fair Administrative Action Act (FAAA), we demonstrate how the horizontal reach of Article 50(1) extends constitutional due process into private agreements and customary law. Conversely, we show

1 Isaac Aluochier, S.Adj, S.Arb, CPM is Chief Adjudicator and President of Independent Tribunals at Aluochier Dispute Resolution, P O Box 436-40404, Rongo, Kenya. Email: info@aluochier.co.ke. Web: www.aluochier.co.ke. This article is available at https://www.aluochier.co.ke/article-50.pdf.

that Article 50(2) remains strictly sequestered to formal courts (Article 50(2)(d)) to shield citizens from the state's coercive might. Finally, the article establishes a text-based, non-precedential rationale for incorporating the Article 50(4) exclusionary rule into general fair hearings, and systematically conceptualises the constitutional typologies of justice and thresholds of injustice that define Kenya's transformative jurisprudence.

Introduction

The promulgation of the Constitution of Kenya, 2010, fundamentally altered the country's legal landscape by interring the ghost of parliamentary supremacy and replacing it with a supreme, value-laden constitutional order. At the vanguard of this transformative dispensation is Chapter Four—the Bill of Rights—with Article 50 serving as the pre-eminent safeguard for individual liberty and procedural justice.

In constitutional litigation, the concepts of "fair hearing" and "fair trial" are frequently conflated by practitioners. However, under close jurisprudential scrutiny, they emerge as distinct *sui generis* constructs with separate scopes, different thresholds of limitability, and distinct institutional applications. While Article 50(1) (Fair Hearing) represents a universal, horizontal, and flexible baseline for any dispute capable of legal resolution, Article 50(2) (Fair Trial) constitutes a highly specialised, strictly vertical, and non-derogable zone of protection reserved exclusively for accused persons in criminal proceedings. This article analyses this structural bifurcation, the mechanics of its limitation, the textual rationale of its evidentiary safeguards, and the overarching constitutional philosophy of justice.

I. The Ontology of Adjudicative Power and Sovereign Delegation

Under the Kenyan constitutional imaginary, adjudicative power is not an inherent prerogative of the state, but a sovereign mandate derived from the people and held in public trust. This core principle is operationalised through the structural interplay of Articles 1(3)(c) and 159(1):

1. Article 1(3)(c) delegates the people's sovereign power directly and concurrently to "the Judiciary and independent tribunals".
2. Article 159(1) functionalizes this delegation, stating that "Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution".

This dual-track delegation establishes that adjudication in Kenya is not a monolithic judicial hierarchy, but a distributed framework designed for both specialised technical resolution and broad societal accessibility. Crucially, the Constitution divides these adjudicative bodies into two distinct categories based on their origin and institutional permanence:

Dimension	Tribunals Established “BY” the Constitution	Tribunals Established “UNDER” the Constitution
Legal Origin	Derived directly from the constitutional text itself.	Created via statutory frameworks authorised by the text.
Institutional Nature	Ad-hoc, specialised constitutional organs.	Permanent fixtures of the administrative state.
Primary Examples	Article 144 (Presidential Incapacity), Article 168 (Removal of Judges), Article 251 (Removal of Commission Members)	Article 47 (Fair Administrative Action bodies), Article 60(1)(g) (Land Disputes), Article 159(2)(c) & (3) (ADR and Traditional Dispute Resolution Mechanisms – TDRMs).

Dimension	Tribunals Established “BY” the Constitution	Tribunals Established “UNDER” the Constitution
Jurisprudential Consequence	Stand as direct co-delegates of sovereign power alongside the formal Judiciary; they handle matters of extreme state gravity where immediate legitimacy outweighs permanence.	Subject to the supervisory and review jurisdiction of the High Court; designed to expand access to justice and leverage technical expertise.

II. The Elasticity of Jurisdiction: FAAA Section 2 and the Scope of Administrative Action

To prevent the distributed exercise of sovereign power from sliding into administrative arbitrariness, the Fair Administrative Action Act (FAAA), No. 4 of 2015, serves as the primary statutory conduit translating Article 47 and Article 50(1) principles into enforceable, day-to-day administrative obligations.

The FAAA achieves this through an exceptionally broad definition of "empowering provision" and "administrative action" under Section 2. Under the Act, jurisdiction to adjudicate or make decisions is no longer confined to formal parliamentary statutes. An "empowering provision" includes:

- Parliamentary and subsidiary statutory law;
- Rules of the Common Law;
- Customary Law; and
- Agreements, contracts, instruments, or other private documents.

Furthermore, "administrative action" is defined to encompass both the formal powers exercised by quasi-judicial tribunals and any act, omission, or decision of any person, body, or authority that affects the legal rights or interests of any person.

The constitutional impact of this statutory definition is revolutionary:

1. ***Erosion of Private Insulation***: By defining "agreements" as an empowering provision, the FAAA effectively tethers private arbitration under the Arbitration Act (Cap 49) to constitutional due process standards. Litigants cannot utilise "contractual autonomy" to contract out of the core fair hearing requirements of Article 50(1).
2. ***Constitutionalisation of Informal Spaces***: Decisions made within traditional dispute resolution mechanisms or private boardrooms are brought under the supervisory umbrella of Article 50(1). Whenever a private body or customary elder makes a decision affecting an individual's legal rights, they are exercising delegated adjudicative power and must comply with the minimum procedural baselines of the FAAA and Article 50(1).

III. Coherent Integration and the Architectural Divide

The Constitution establishes a rigorous, structural divide between the general right to a fair hearing and the strict, vertical sequestration of a fair trial.

1. Universal Horizontal Reach of Article 50(1)

Article 50(1) is characterised by its universal, horizontal, and flexible application. Because judicial authority is distributed across diverse forums under Article 159, and because of the broad reach of Section 2 of the FAAA, the right to a fair hearing applies horizontally across all civil, administrative, and private dispute resolution arenas. Whether a dispute is resolved before an ad-hoc Constitutional Tribunal (established "by" the Constitution), a statutory land board (established "under" the Constitution), a private arbitrator, or a traditional community council, the minimum requirements of Article 50(1)—such as natural justice, access to the forum, independence, and publicity—apply as a non-negotiable threshold of legitimacy.

2. Strict Vertical Sequestration of Article 50(2)

Conversely, Article 50(2) is strictly vertical and quarantined exclusively to the criminal process. Under Article 50(2)(d), every accused person has the right to a public trial before a "court established under this Constitution".

This sequestration acts as an absolute constitutional firewall:

- Civil and administrative disputes may be delegated to specialised statutory tribunals or private arbitrators to enhance speed and efficiency.
- However, the power to determine criminal liability and deprive a citizen of their physical liberty through state-sanctioned incarceration cannot be outsourced or delegated to any independent tribunal (such as those under Articles 144, 168, or 251), or administrative body.
- Criminal justice remains an absolute, formal monopoly of the Judiciary. This guarantees that where the coercive power of the state is deployed in its most severe form, the highest levels of institutional independence and procedural rigidity are applied without compromise.

IV. Comparative Framework of Protections: Core Components and Limitations

The procedural expressions of Article 50 differ profoundly in their components and susceptibility to limitation based on this structural divide.

1. The Derogability Matrix and the Article 24 Test

- ***The Absolute Shield (Article 50(2))***: Under Article 25(c), the right to a fair trial is declared non-derogable. It is an absolute protection that cannot be limited, restricted, or suspended under any circumstances—not even during a state of emergency declared under Article 58.
- ***The Flexible Standard (Article 50(1))***: Unlike the fair trial, the general right to a fair hearing under Article 50(1) is not listed in Article 25; it is a derogable right subject to the limitation framework of Article 24 and the limitation requirement of Article 19(3)(c). However, the state cannot limit Article 50(1) arbitrarily. Under Article 19(3)(c), any limitation must be "contemplated in this Constitution". Furthermore, under Article 24, any limitation must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom," taking into account the nature of the right, the importance of the purpose of the limitation, and the existence of less restrictive means.

2. Component Analysis: Compatible vs. Incompatible Rights

When Article 50 is read as a harmonised whole, we can compile a comprehensive "Fair Hearing Toolkit" by identifying which fair trial components of Article 50(2) are compatible with—and must be imported into—general fair hearings, and which are strictly reserved as criminal shields.

A. Core Attributes Explicitly in Article 50(1)

1. **Access to Adjudication**: The right to have any dispute that can be resolved by the application of law decided by a neutral body.
2. **Publicity**: The default requirement that hearings must be open to the public to prevent clandestine, arbitrary abuses of power.
3. **Independence and Impartiality**: Structural and decisional neutrality of the adjudicator.

B. Compatible "Imported" Components from Article 50(2)

These are fundamental tenets of natural justice and procedural fairness that must apply to all general fair hearings under Article 50(1):

1. **Right to Clear Notice (Art. 50(2)(b))**: The right to be informed of the allegations or claims with sufficient detail to prepare an answer.
2. **Right to Adequate Time and Facilities (Art. 50(2)(c))**: Prevention of snap judgments; allowing reasonable time to secure representation and prepare a defence.
3. **Right to be Present (Art. 50(2)(e))**: The right to attend and actively participate in one's own hearing.

4. **Right to Legal Representation (Art. 50(2)(f))**: The right to be represented by an advocate or chosen advisor.
5. **Right to a Speedy Decision (Art. 50(2)(e))**: The right to have proceedings conclude without unreasonable, dragging delay.
6. **Right to Present and Challenge Evidence (Art. 50(2)(j))**: The right to adduce proof and cross-examine opposing witnesses.
7. **Right to an Interpreter (Art. 50(2)(m))**: The right to translation if the language of the proceedings is not understood.

C. Incompatible Components (Strictly Criminal Shields)

These are highly specialised procedural protections that cannot be imported into general civil or administrative fair hearings:

1. **Presumption of Innocence (Art. 50(2)(a))**: Inapplicable to civil or administrative disputes, which are determined on a balance of probabilities.
2. **Right to Silence (Art. 50(2)(i))**: Self-incrimination protections do not prevent civil or administrative tribunals from drawing adverse inferences from a party's refusal to testify or produce documents.
3. **State-Funded Counsel (Art. 50(2)(h))**: The public expense obligation to provide an advocate applies strictly to criminal defendants facing substantial injustice, not to civil litigants.
4. **The Principle of Distinct Legal Disputes (Art. 50(2)(o) vs. Art. 50(1))**: The constitutional protection against double jeopardy under Article 50(2)(o) is strictly a criminal shield. From a harmonised reading of Article 50, where a single transaction of facts gives rise to both criminal and non-criminal dimensions, these constitute separate and distinct legal disputes. The criminal dispute must be addressed exclusively in a court with criminal jurisdiction under Article 50(2)(d). However, the non-criminal dispute (such as an employer's disciplinary inquiry into breach of contract or professional misconduct) is an independent dispute falling under the purview of Article 50(1), to be decided in a fair and public hearing before a court or other appropriate independent and impartial tribunal or body. Because these disputes are legally distinct, the resolution of the criminal dispute does not trigger the doctrine of *res judicata* or double jeopardy. The right to the resolution of the non-criminal dispute remains undischarged and is not exhausted by the resolution of the criminal proceedings; hence, a criminal acquittal does not bar subsequent civil or administrative adjudication of the non-criminal aspects of those same facts.
5. **Non-Retroactivity (Art. 50(2)(n))**: The prohibition on retroactive offences and punishments is strictly confined to criminal law.

V. Text-Based Constitutional Rationale for the Evidentiary Exclusionary Rule (Article 50(4))

Article 50(4) dictates:

> *"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."*

While the text utilises the word "trial," a pure, text-based constitutional analysis—independent of any judicial precedent—proves that the exclusionary rule is an intrinsic component of a fair hearing under Article 50(1) and applies universally to all non-criminal proceedings. This textual rationale rests on three self-executing constitutional pillars:

1. Constitutional Supremacy and the Invalidation Chain (Articles 2(4) & 23(3)(d))

- Under Article 2(4), any law, act, or omission in contravention of the Constitution is invalid to the extent of its inconsistency. Obtaining evidence by violating a right in the Bill of

Rights (e.g., an illegal search or unauthorised wiretap) is an unlawful act. Consequently, the resulting evidence is an unconstitutional outcome and is void *ab initio*.

- Under Article 23(3)(d), adjudicative bodies are empowered to issue a declaration of invalidity for any outcome resulting from a rights violation. Since evidence is simply the physical outcome of a factual search, any evidence secured via a constitutional breach must be declared invalid.
- Admitting unconstitutional evidence into an adjudicative record requires a formal act of reception by the tribunal. If a court or tribunal under Article 50(1) admits void evidence, it elevates an unlawful act into a legally recognised process, causing the state organ itself to violate Article 2(4).

2. The Disjunctive Syntax of Article 50(4)

The narrow argument—that unconstitutionally obtained evidence can be admitted if its admission does not compromise the immediate fairness of the hearing—is textually defeated by the disjunctive syntax of Article 50(4). The provision establishes two separate, independent standards separated by the disjunctive coordinator "or": *Exclusion Requirement = Unfair Trial ∨ Detriment to the Administration of Justice*

- **Limb 1 (Procedural Fairness)**: Under Article 50(1), a fair hearing requires the rules of natural justice (Article 22(3)(d)). Admitting evidence obtained through an unconstitutional breach by one party destroys the "equality of arms" and procedural fairness, violating Limb 1.
- **Limb 2 (Detriment to the Administration of Justice)**: Even if an adjudicator holds that the admission of unconstitutionally obtained evidence does not compromise immediate procedural fairness under Limb 1, the evidence must still be excluded under Limb 2. Admitting evidence obtained by violating the Bill of Rights compromises the systemic integrity of the legal order, bringing detriment to the administration of justice as a whole.

3. The Textual Definition of "Administration of Justice"

The "administration of justice" is not a vague moral concept; it is explicitly defined by the structural values of the Constitution:

- **Integrity over Truth**: Article 159(2)(e) mandates that judicial authority must be exercised to "protect and promote the purpose and principles of this Constitution". A dispute resolution process or outcome that legitimises a constitutional breach is "repugnant to justice" under Article 159(3)(b).
- **The Adjudicator's Oath**: Pursuant to the Third Schedule, every judicial officer takes an oath to "impartially do justice in accordance with this Constitution". Because justice is defined as a constitutional process rather than an unconstrained search for facts, evidence secured by violating the Constitution cannot be used to yield an outcome that is "in accordance with this Constitution".

Thus, Articles 2(4), 10, 23(3)(d), and 159 operate concurrently to integrate the exclusionary rule of Article 50(4) directly into the Article 50(1) fair hearing framework.

VI. A Systematic Constitutional Conceptualisation of Justice and Injustice

Read holistically, "justice" in the Kenyan constitutional order is the systemic alignment of all state and private actions with the Bill of Rights, human dignity, and the rule of law. The Constitution defines several specific typologies of justice and thresholds of injustice:

1. The Typologies of Justice

- **Natural Justice (Article 22(3)(d))**: The irreducible procedural duties of fairness, encapsulating the twin common-law pillars of *audi alteram partem* (the right to be heard) and *nemo judex in causa sua* (the rule against bias and conflict of interest).
- **Social Justice (Articles 10(2)(b) & 19(2))**: The structural redistribution of opportunity, resources, and institutional protection to eliminate marginalisation, poverty, and systemic vulnerability, thereby ensuring that all Kenyans can live in human dignity.
- **Administrative Justice (Article 47 & FAAA)**: The mandate requiring all administrative actions by state and non-state organs to be expeditious, efficient, lawful, reasonable, and procedurally fair.
- **Access to Justice (Article 48)**: The affirmative duty of the state to remove physical, financial, and procedural barriers, ensuring that judicial and extra-judicial remedies are available and affordable to all persons.

2. The Thresholds of Injustice

- **Substantial Injustice (Article 50(2)(h))**: An evidentiary, procedural, or structural breach severe enough to compromise the integrity of a proceeding, cause real prejudice to fundamental rights, or make a fair outcome impossible.
- **Manifest Injustice (Article 59(2)(i))**: A rights violation or institutional failure that is self-evident, blatant, and obvious on the face of the record, requiring no extensive inference or extrapolation to prove.
- **Repugnance to Justice (Article 159(3)(b))**: Any dispute resolution process, traditional mechanism, customary practice, or final outcome that directly violates human rights, public order, or basic human dignity.
- **Historical Land Injustices (Article 67(2)(e))**: Systemic, historically documented dispossessions or illegal land takings arising from colonial policies or post-independence state misrule, which require specific restitution and redress.

3. The "Interests of Justice" and State Oaths

The phrases "interests of justice" (Article 50(7)) and "interests of the administration of justice" (Article 157(11)) require an adjudicator to balance individual constitutional rights against the preservation of institutional integrity, public order, and the prevention of process abuse.

This systemic integrity is reinforced by the National Anthem ("Justice be our shield and defender") and the Oaths of Office in the Third Schedule. These oaths bind state and judicial officers to impartially administer justice without "fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence," elevating justice into a non-negotiable constitutional shield.

VII. Specific Jurisdictional Assessments

1. Is Article 163(3)(a) a Limitation of the Fair Hearing Right?

No. Article 163(3)(a) grants the Supreme Court exclusive original jurisdiction over presidential election petitions, which must be resolved within the mandatory 14-day timeline prescribed by Article 140(2).

Rather than acting as a limitation, Article 163(3)(a) is a supreme, constitutional explanation of the "if appropriate" qualification within Article 50(1). The Constitution pre-emptively determines that due to the immense public interest, national security implications, and the necessity of political stability, it is inherently inappropriate for a presidential election dispute to be resolved by any lower court, statutory tribunal, or independent tribunal. The Constitution constructs an absolute jurisdictional carve-out, defining the Supreme Court as the only appropriate forum to resolve a dispute of such national gravity with high-speed, definitive finality.

2. Is Article 50(2)(d) a Limitation of the Fair Hearing Right?

No. Article 50(2)(d) guarantees an accused person the right to a "public trial before a court established under this Constitution".

Rather than a limitation, Article 50(2)(d) acts as a complementary reinforcement and institutional extension of the fair hearing right. It ensures that for criminal liabilities, the "public hearing" element is given maximum institutional legitimacy. It structurally debars the state from bypassing judicial independence by creating ad-hoc or administrative tribunals to try criminal offences, reserving criminal adjudication exclusively for the formal, structurally independent Judiciary.

Conclusion: The Unified Theory of Due Process in Kenya

The Constitution of Kenya, 2010, constructs a sophisticated due process architecture that successfully balances specialised, flexible dispute resolution with the absolute protection of individual liberty.

Through the concurrent delegation of sovereign power under Article 1(3)(c) and Article 159, and its statutory extension under the FAAA, the Constitution ensures that every adjudicative body in Kenya—whether a court, a constitutional tribunal, a statutory board, a traditional community council, or a private arbitrator—remains bound by the universal minimum standards of a fair hearing under Article 50(1).

At the same time, the Constitution draws an unyielding line at the threshold of criminal justice, reserving the rigid, non-derogable protections of Article 50(2) as an unbreakable sanctuary for those facing the coercive might of the state. Guided by the supremacy of Article 2(4), the invalidation of unconstitutional evidence under Article 50(4) applies as a structural shield across both domains, ensuring that the delegative exercise of sovereign power remains a true instrument of the people's will and the absolute defender of human dignity.

References / Grounding Sources (Constitutional and Statutory Mapping)

1. The Constitution of Kenya, 2010
    - Article 1(3)(c) (Sovereign delegation)
    - Article 2(4) (Constitutional supremacy)
    - Article 10 (National values and principles)
    - Article 19(3)(c) (Limitation mapping)
    - Article 23(3)(d) (Declarations of invalidity)
    - Article 24 (Limitation clause)
    - Article 25(c) (Non-derogability of fair trial)
    - Article 47 (Fair administrative action)
    - Article 48 (Access to justice)
    - Article 50(1) (Fair hearing)
    - Article 50(2) (Fair trial)
    - Article 50(4) (Exclusionary rule)
    - Article 50(8) (Exclusion of public/press)
    - Article 140(2) (Presidential petition timeline)
    - Article 159 (Judicial authority and guiding principles)
    - Article 163(3)(a) (Supreme Court election jurisdiction)
    - Article 169(1)(d) (Subordinate courts/local tribunals)
    - Article 172(1) (JSC mandate)
    - Third Schedule (Oaths of office)
2. The Fair Administrative Action Act, No. 4 of 2015
    - Section 2 (Definitions of "administrative action" and "empowering provision")

- Section 3 (Scope of application)
- Section 4 (Core procedural fairness and written reasons)
- Section 5 (Public participation)
- Section 6 (Request for reasons)
- Sections 7, 8, & 11 (Judicial review grounds, timelines, and remedies)

3. The Arbitration Act, Cap 49
   - Operational guidelines for private consensual tribunals.