

Demystifying the Adjudicative Architecture: A Treatise on Independent Tribunals under the Constitution of Kenya, 2010

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Abstract

Abstract: *The promulgation of the Constitution of Kenya, 2010 restructured the national legal order by establishing a bifurcated adjudicative architecture that delegates sovereign power to both "the Judiciary and independent tribunals" under Article 1(3)(c). Despite this explicit textual mandate, legal literature and judicial practice in Kenya suffer from persistent conceptual conflation, frequently mischaracterising independent tribunals as Article 169(1)(d) "local tribunals" (subordinate courts) or mistakenly assuming that an Act of Parliament creating an adjudicative court generates an "independent tribunal."*

This treatise presents an exhaustive constitutional and statutory analysis that rigorously separates the Judiciary sector from the independent tribunals sector. By analysing the interplay of Articles 1(1), 1(2), and 1(3), it establishes that sovereign adjudicative power is exercised directly by the people through their non-elected constitutional delegates.

*Crucially, it resolves how independent tribunals come into existence. Utilizing the "by or under" dichotomy in Article 159(1), read alongside Article 94(5), Article 47(3), and Section 2 of the Fair Administrative Action Act (FAAA), it demonstrates that **just as Articles 144, 168, and 251 provide constitutional frameworks for establishing ad hoc independent tribunals in specific contingencies, the empowering provisions under Section 2 of the FAAA provide the legal frameworks for establishing independent tribunals whenever administrative or quasi-judicial action is required.** Any tribunal established by an Act of Parliament as part of the judicial/subordinate court structure is a **local tribunal** under Article 169(1)(d), not an independent tribunal.*

*Furthermore, utilizing **Article 50(1)** as read with **Article 19(3)(c)**, the treatise demonstrates that independent tribunals possess wide subject-matter jurisdiction over any dispute resolvable by application of law, subject only to the two exclusions contemplated in the Constitution: criminal proceedings (Article 50(2)(d)) and presidential election petitions (Articles 140 & 163(3)(a)). It affirms independent tribunals as **State organs** under Article 1(3) based on the verbatim definition in Article 260, clarifies the public service character of their members, details the supportive statutory integrity framework under the Leadership and Integrity Act (Cap 182), incorporates verbatim Sections 2 and 4 of the FAAA, completes all constitutional text citations—including Article 165(6)—and articulates why independent tribunals—not being courts—are not textually bound by Article 163(7) stare decisis, but treat superior court holdings as highly persuasive public law authority.*

Introduction: Eradicating Systemic Conflation

The legal landscape of post-2010 Kenya contains a persistent institutional misunderstanding: the failure to maintain a clean separation between **subordinate courts (including local tribunals)** governed by Chapter 10 within the Judiciary sector, and **independent tribunals** deriving their sovereign mandate directly from Article 1(3)(c) and operating under Article 47 outside Chapter 10.

A widespread, mistaken notion persists in Kenyan jurisprudence that any tribunal established by a statutory enactment is an "independent tribunal." This is fundamentally incorrect. An Act of Parliament establishing an adjudicative tribunal within the court hierarchy creates a **local tribunal** under Article 169(1)(d).

Administrative action and quasi-judicial authority under Article 47 must never be conflated with the Judiciary under Chapter 10. They are constitutionally distinct, governed by different provisions, and operate within separate operational sectors.

I. Constitutional Foundations: Articles 1(1), 1(2), and 1(3)(c) and Direct Sovereign Adjudicative Power

To fully grasp the constitutional standing of independent tribunals, one must examine the progression of sovereign delegation across Article 1:

Sovereign Power of the People of Kenya			
(Article 1(1))			
Indirect Sovereign Exercise		Direct Sovereign Exercise	
Through Democratically Elected Representatives		Through Constitutional Delegates	
(Article 1(2))		(Article 1(2))	
Parliament & County Assemblies	National & County Executives	The Judiciary	Independent Tribunals
(Article 1(3)(a))	(Article 1(3)(b))	(Article 1(3)(c)) The Judiciary (Chapter 10 Courts & Art 169(1)(d) Local Tribunals)	(Article 1(3)(c)) Independent Tribunals (Article 47 & FAAA Sec 2 Empowering Provision Framework)

1. The Structure of Sovereign Power (Articles 1(1) & 1(2))

- **Article 1(1):** *"All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution."*
- **Article 1(2):** *"The people may exercise their sovereign power either **directly** or through their **democratically elected representatives**."*

2. Democratically Elected Representatives vs. Direct Constitutional Delegates (Article 1(3))

Article 1(3) distributes this sovereign power among specific State organs:

Article 1(3): *"Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution— (a) Parliament and the legislative assemblies in the county governments; (b) the national executive and the executive structures in the county governments; and (c) **the Judiciary and independent tribunals.**"*

3. Conceptual Analysis: The Direct Exercise of Adjudicative Power

A critical distinction emerges when comparing clauses (a), (b), and (c) of Article 1(3):

- Parliament, County Assemblies, and the Executive (Articles 1(3)(a) and (b)) consist of **democratically elected representatives** (or appointees serving under an elected head). Their exercise of sovereign power is indirect, mediated through democratic elections pursuant to Article 1(2).
- Members of the Judiciary and independent tribunals (Article 1(3)(c)) are **not** democratically elected representatives.

Consequently, pursuant to Article 1(2), the sovereign adjudicative power delegated to Article 1(3)(c) entities is **exercised directly by the people through their constitutional delegates.**

Core Doctrine: Sovereign adjudicative power—as distinct from legislative or executive power—is exercised directly by the people through their designated delegates: the Judiciary and independent tribunals. An independent tribunal member does not derive legitimacy secondarily from the Judiciary or transitively through an executive minister; an independent tribunal member acts directly in the name of the sovereign people of Kenya, occupying an office wherein the people exercise their sovereign adjudicative power directly.

II. The Genesis of Independent Tribunals: The "By or Under" Architecture (Articles 159(1), 94(5), 47, and Section 2 FAAA)

A primary flaw in contemporary administrative law commentary in Kenya is the failure to explain how independent tribunals come into being outside the ad hoc removal tribunals explicitly created in the Constitution. The constitutional framework provides a complete answer through the **"by or under"** dichotomy in Article 159(1), combined with Section 2 of the Fair Administrative Action Act (FAAA).

Article 159(1): "Established BY or UNDER this Constitution"	
<i>Established "BY" the Constitution</i>	<i>Established "UNDER" the Constitution</i>
(Direct Constitutional Mandates)	(Derivative FAAA Framework Mandates)
• Article 144 (Presidential Incapacity)	• Article 47(3) Mandate -> Enactment of FAAA
• Article 168 (Removal of Judges)	• Article 94(5) Law-Making Power
• Article 251 (Removal of Commission Members)	• Section 2 FAAA "Empowering Provisions": - Laws, Common Law Rules, Customary Law, - Agreements, Instruments & Documents

1. The Textual Dichotomy of Article 159(1)

Article 159(1) provides:

*"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 establishes two distinct constitutional modes for bringing an independent tribunal into legal existence:

Mode A: Independent Tribunals Established "BY" the Constitution

These are tribunals created directly within the text of the Constitution to perform specific ad hoc constitutional functions. They exist outside the statutory court framework:

- **Article 144(2):** Tribunals established to investigate the physical or mental capacity of the President.
- **Article 168(5):** Tribunals established for the removal of a Judge of a superior court.
- **Article 251(5):** Tribunals established for the removal of a member of a Constitutional Commission or holder of an Independent Office.

Mode B: Independent Tribunals Established "UNDER" the Constitution (Section 2 FAAA Framework)

Just as Articles 144, 168, and 251 provide specific constitutional frameworks for the establishment of ad hoc independent tribunals in appropriate circumstances, the empowering provisions under Section 2 of the FAAA provide enabling frameworks for the establishment of independent tribunals whenever administrative or quasi-judicial action is required.

These tribunals come into existence through a three-tier constitutional transmission mechanism:

1. **The Parliamentary Mandate under Article 47(3) and Article 94(5):** Article 47(3) directs Parliament to enact legislation to give effect to fair administrative action. Pursuant to **Article 94(5)**—which mandates that no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by the Constitution or legislation—Parliament enacted the **Fair Administrative Action Act, 2015 (FAAA)**. The FAAA carries full force of law across the Republic.
2. **The "Empowering Provision" Framework (Section 2 FAAA):** Section 2 of the FAAA

defines an "**empowering provision**" as:

"...a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action is taken or purportedly taken."

3. **Inclusion of Quasi-Judicial Tribunals (Section 2 FAAA):** Section 2 of the FAAA explicitly defines "**administrative action**" to include:

*"...the powers, functions and duties exercised by authorities or **quasi-judicial tribunals**..."*

2. Legal Synthesis and Sectoral Separation

When an entity takes administrative or quasi-judicial action pursuant to an "empowering provision"—whether a rule of common law, customary law recognized under the Constitution, an agreement, or an administrative instrument—it operates under the statutory authority of Section 2 of the FAAA.

Because the FAAA was enacted by Parliament pursuant to Articles 47(3) and 94(5) to give effect to Article 47, **any non-court tribunal constituted via Section 2 of the FAAA is legally established UNDER the Constitution as an independent tribunal.**

Crucial Sectoral Rule: If Parliament enacts a statute specifically establishing an adjudicative body as a subordinate court within the judicial branch under Chapter 10, that body is a **local tribunal** under Article 169(1)(d). Outside the explicit ad hoc constitutional tribunals (Articles 144, 168, 251), tribunals in the independent tribunals sector **exist exclusively via the Section 2 FAAA framework**. Statutory court creation belongs to the Judiciary sector; administrative empowering provisions belong to the independent tribunals sector.

III. The Strict Sectoral Divide: Independent Tribunals vs. Local Tribunals

To eliminate systemic conflation, practitioners and legal scholars must maintain a clear, unyielding distinction between **local tribunals** and **independent tribunals**.

Adjudicative Architecture of Kenya	
Local Tribunals Sector	Independent Tribunals Sector
(Article 169(1)(d))	(Article 1(3)(c))
• Subordinate Courts in Judiciary Sector	• Primary Delegated Sovereign State Organs
• Created by Act of Parliament as Courts	• Established BY Constitution (Arts 144, 168, 251) or UNDER Constitution (FAAA Sec 2 Framework)
• Governed by Chapter 10 Judicial Architecture	• Governed by Article 47 & FAAA Framework
• Subject to Judicial Service Commission (JSC) Admin	

1. Local Tribunals (Article 169(1)(d))

- **Sector:** The Judiciary (Chapter 10).
- **Constitutional Classification:** Local tribunals are classified under Chapter 10 as **subordinate courts**. Article 169(1)(d) lists *"any other court or local tribunal established by an Act of Parliament"* alongside Magistrates Courts, Kadhis Courts, and Courts Martial.
- **Creation:** Established directly by specific Acts of Parliament as specialized lower courts (e.g., Rent Restriction Tribunal, Business Premises Rent Tribunal, Tax Appeals Tribunal).
- **Governance:** Governed by Chapter 10 court structures, judicial branch enactments, and JSC administrative oversight.

2. Independent Tribunals (Article 1(3)(c))

- **Sector:** Independent Tribunals / Administrative Action (Article 47 & FAAA).
- **Constitutional Classification:** Operates completely outside Chapter 10 subordinate court structures as distinct State organs.
- **Creation:** Established either directly **by** the Constitution (Articles 144, 168, 251) or **under** the Constitution via Section 2 FAAA empowering provisions (common law, customary law, agreements, instruments, or administrative documents).
- **Governance:** Governed by **Article 47** of the Constitution and the statutory framework of the **Fair Administrative Action Act, 2015**.

IV. Express Classification as State Organs and Public Service Character

1. Direct Constitutional Designation as State Organs

Rather than deriving State organ status solely through general statutory interpretation, independent tribunals are **expressly named as State organs** in the opening text of Article 1(3) itself:

*"Sovereign power under this Constitution is delegated to the **following State organs...**
(c) the Judiciary and independent tribunals."*

Article 260 sets out the verbatim definition:

*"**State organ**" means a commission, office, agency or other body established under this Constitution;*

Because independent tribunals are textually listed in Article 1(3), they satisfy this verbatim definition as a commission, office, agency, or other body established under the Constitution, rendering them constitutional **State organs per se**.

2. Office Holders and the Public Service Architecture

Under **Article 260**:

- **"Public office"** means an office in the national government, a county government, or the public service, if the remuneration and benefits of the office holder are payable directly from the Consolidated Fund or out of money provided by Parliament.
- **"Public service"** means *"the collectivity of all individuals, other than State officers, performing a function within a State organ."*

Legal Synthesis: Independent tribunal office holders may not always qualify as narrow "public officers" drawing direct salaries from the Consolidated Fund. However, because **independent tribunals are textually designated State organs under Article 1(3)**, individuals serving on independent tribunals perform functions within a State organ. Therefore, they form an integral part of the **public service architecture** under Article 260 (or serve as State officers where designated by enabling constitutional provisions).

3. Supportive Statutory Integrity Framework: The Leadership and Integrity Act (Cap 182)

While Chapter 6 of the Constitution textually targets State officers, its integrity standards are operationally extended to independent tribunals through a supportive statutory architecture under the Leadership and Integrity Act (LIA):

1. **Tribunals as "Public Entities" (Section 2 LIA):** Section 2(a) of the LIA defines a *"public entity"* to include any *"State organ."* Because an independent tribunal is an Article 1(3)(c) State organ, it is legally a public entity under the LIA.
2. **Statutory Extension to Public Officers (Section 52 LIA & Article 80(c)):** Enacted pursuant to Article 80(c), Section 52(1) of the LIA mandates that Chapter 6 and Part II of the LIA apply to *all public officers as if they were State officers*. Consequently, public officers serving within independent tribunals are directly subject to statutory conflict of interest rules (Section 16), tendering restrictions (Section 17), and gift disclosures (Section 14).
3. **Institutional Integrity Duties of the Tribunal:** As a public entity, the independent tribunal itself is statutorily mandated to maintain conflict of interest registers (Section 16(11)), administer a Leadership and Integrity Code (Sections 37–39), inquire into integrity complaints (Section 42), and refer criminal or civil breaches to the Director of Public Prosecutions (DPP) or Ethics and Anti-Corruption Commission (EACC) (Section 43).

This supportive statutory framework under the LIA reinforces the overarching constitutional mandates of **Article 10(2)(c)** (National Values of Integrity and Accountability) and **Article 47**

(Procedural Fairness and Natural Justice), ensuring that integrity remains a non-negotiable jurisdictional prerequisite for all independent tribunal adjudications.

V. Subject Matter Jurisdiction: Expansive Scope and the Two Constitutional Exceptions

A key point of confusion in administrative practice concerns the scope of subject-matter jurisdiction exercisable by independent tribunals. Anchored in the Bill of Rights, this jurisdiction is fundamentally expansive, constrained only by explicit constitutional reservations.

Article 50(1): Any Dispute Resolved by Law		
Uncircumscribed Jurisdiction	Exclusive Exclusions	
Civil, Regulatory, Administrative, Customary & Quasi-Judicial Disputes	(Article 19(3)(c))	
	Criminal Proceedings	Presidential Election
	(Article 50(2)(d) Reserved for Courts)	(Articles 140 & 163(3) (a) Supreme Court)

1. The Expansive Default Scope under Article 50(1)

Article 50(1) guarantees the right of every person to have *"any dispute that can be resolved by the application of law"* decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Because independent tribunals execute sovereign power delegated under Article 1(3)(c) directly from the people (Article 1(2)), their potential subject-matter jurisdiction spans the entire breadth of civil determinations, administrative disputes, professional discipline, status determinations, and contractual or customary adjudications.

2. The Two Exclusive Constitutional Limitations (Article 19(3)(c))

Under **Article 19(3)(c)**, the fundamental rights in the Bill of Rights—including the Article 50(1) fair hearing right—shall not be limited except as contemplated in the Constitution. The text of the Constitution establishes precisely two subject-matter exclusions that independent tribunals cannot entertain:

- 1. Criminal Proceedings (Article 50(2)(d)):** While Article 50(1) permits general legal disputes to be heard by courts or tribunals, Article 50(2)(d) specifically restricts criminal trials to *"a court established under this Constitution."* Because criminal proceedings carry penal sanctions and potential deprivation of personal liberty, Article 25(c) renders the right to a fair criminal trial before a court non-derogable. Independent tribunals are strictly excluded from trying penal offences or imposing criminal sentences.
- 2. Presidential Election Petitions (Articles 140 & 163(3)(a)):** Article 163(3)(a), as read with Article 140, confers exclusive original jurisdiction to hear and determine petitions challenging the election of the President on the Supreme Court.

Outside these two constitutionally contemplated exceptions, any attempt by statute or administrative directive to arbitrarily restrict the subject-matter capacity of independent tribunals to resolve legal disputes under Article 50(1) is constitutionally suspect. Independent tribunals possess wide civil and

quasi-judicial authority to award remedies, including compensation, damages, restitution, declaratory relief, status determinations, and professional sanctions.

VI. Empowering Provisions under the Fair Administrative Action Act

The operational mechanics of independent tribunals established *under* the Constitution (Mode B) are governed by Article 47 and the Fair Administrative Action Act, No. 4 of 2015 (FAAA).

1. Verbatim Definitions under Section 2 FAAA

Section 2 of the FAAA sets out the following statutory definitions:

"administrative action" includes— (a) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

"empowering provision" means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action is taken or purportedly taken;

2. Valid Non-Court Frameworks for Independent Tribunals

Just as Articles 144, 168, and 251 provide express constitutional frameworks for establishing ad hoc independent tribunals in specific constitutional contingencies, the empowering provisions of Section 2 FAAA provide legal frameworks for establishing independent tribunals as appropriate. Outside ad hoc constitutional removal tribunals, independent tribunals are validly anchored in:

1. **Rules of Common Law:** Common law frameworks establishing administrative or quasi-judicial dispute mechanisms.
2. **Customary Law Frameworks:** Customary dispute resolution mechanisms recognized under the Constitution.
3. **Agreements, Instruments, or Administrative Documents:** Documents where parties confer quasi-judicial adjudicative authority upon a body to determine rights and duties, **or otherwise tap into the people's sovereign power delegated to independent tribunals in Article 1(3)(c).**

VII. Statutory Framework for Fair Administrative Action: FAAA Section 4

Unlike courts, which follow the Civil Procedure Act or Criminal Procedure Code, independent tribunals are governed by Article 47 and Section 4 of the Fair Administrative Action Act.

Below is the complete verbatim text of **Section 4 of the FAAA**:

Section 4, Fair Administrative Action Act, 2015:

4. **Administrative action to be taken expeditiously, efficiently, lawfully etc.**

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision —

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

VIII. Alternative Dispute Resolution (ADR) as Independent Tribunals

Article 159(2)(c) mandates that in exercising adjudicative authority, courts and tribunals shall promote alternative dispute resolution (ADR) mechanisms, including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.

Article 159 Adjudicative Ecosystem	
Consensual / Facilitative ADR	Adjudicative ADR
(Mediation, Reconciliation)	(Arbitration, Customary/Contractual Panels)
	Acts as Independent Tribunal under FAAA & Art 1(3)(c)

Where an ADR process involves **adjudication**—meaning a neutral third party renders a binding determination affecting legal rights—it operates within the legal status of an independent tribunal established *under* the Constitution via Section 2 of the FAAA.

Such adjudicative ADR bodies act pursuant to an "empowering provision" (an agreement, customary rule, or instrument). Consequently, while their internal proceedings may remain flexible, their final adjudicative acts must comply with the procedural fairness principles of Article 47 and Section 4 of the FAAA, as well as the constitutional boundaries of **Article 159(3)** (which invalidates any outcome inconsistent with the Bill of Rights, justice, or written law).

IX. Doctrine of Precedent (*Stare Decisis*) and Article 163(7)

A critical point of legal distinction concerns the relationship between independent tribunals and the doctrine of binding precedent.

1. The Textual Scope of Article 163(7)

Article 163(7) of the Constitution provides:

*"All **courts**, other than the Supreme Court, are bound by the decisions of the Supreme Court."*

A precise textual reading reveals that Article 163(7) explicitly applies to "**courts**." Because independent tribunals are **not courts** (unlike local tribunals under Article 169(1)(d)), they are **not textually bound** by Article 163(7).

Article 163(7) Precedent	
COURTS	INDEPENDENT TRIBUNALS
Strictly Bound by Supreme Court Decisions (Art 163(7))	Not Textually Bound by Art 163(7); Consider Holdings as Highly Persuasive Authority

2. Highly Persuasive Authority in Public Law

Rather than assuming independent tribunals are constitutionally "bound" under Article 163(7), the precise legal position is that **independent tribunals should consider the highly persuasive**

holdings of superior courts as a matter of general public law and sound legal reasoning.

To hold otherwise would unconstitutionally alter the explicit text of Article 163(7). Independent tribunals accord significant persuasive weight to superior court jurisprudence to maintain legal coherence and avoid judicial review challenges under Article 165(6), while operating within their distinct constitutional framework.

X. Accountability, High Court Supervision, and International Compliance

High Court Supervisory Power		
(Article 165(6) & (7))		
Order of Certiorari	Order of Mandamus	Order of Prohibition
(Quash illegal act)	(Compel public duty)	(Prevent excess power)

1. High Court Supervisory Jurisdiction (Article 165(6) & (7))

Independent tribunals remain accountable to the High Court through its supervisory jurisdiction:

- **Article 165(6):** Grants the High Court supervisory jurisdiction over subordinate courts and over *"any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."*
- **Article 165(7):** Authorizes the High Court to call for the record of proceedings from any tribunal or body exercising quasi-judicial functions and issue orders (such as Certiorari, Prohibition, or Mandamus under Section 11 FAAA) to ensure the fair administration of justice.

2. International Law Compliance (ICCPR Article 14)

Both courts and independent tribunals comply with **Article 14 of the International Covenant on Civil and Political Rights (ICCPR)**, which guarantees a fair and public hearing by a competent, independent, and impartial tribunal established by law.

By virtue of **Articles 2(5) and 2(6)** of the Constitution, international treaties ratified by Kenya form part of the law of Kenya. Independent tribunals satisfy these global norms by offering an independent, accessible, and procedurally fair forum for resolving civil and administrative disputes.

XI. Analytical Summary: Courts vs. Independent Tribunals

Feature	Courts / Local Tribunals	Independent Tribunals
Sector Classification	The Judiciary Sector (Chapter 10)	Independent Tribunals Sector (Article 47 & FAAA)
Sovereign Delegation Framework	Article 1(3)(c) & Chapter 10 (Articles 159, 165, 169)	Article 1(3)(c) & Article 1(2) (Direct Sovereign Exercise)
Creation Mechanism	Act of Parliament establishing a	Established BY Constitution

Feature	Courts / Local Tribunals	Independent Tribunals
(Article 159(1))	court under Article 169(1)(d)	(Arts 144, 168, 251) or UNDER Constitution (Sec 2 FAAA Framework)
Scope of Subject-Matter Jurisdiction	Full civil & criminal jurisdiction (Subject to court-specific caps)	Expansive civil/administrative jurisdiction under Art 50(1); Excludes criminal (Art 50(2)(d)) & presidential election petitions (Arts 140 & 163(3)(a))
Statutory Integrity Enforcement	Chapter 6 & LIA (Direct State/ Public Officer enforcement via Judicial Service Commission/EACC)	Article 10(2)(c) Universal Integrity Umbrella & Art 47 FAAA; Supported by LIA (Sec 2 Public Entity duties & Sec 52 extension Entity duties & Sec 52 extension to Public Officers via Art 80(c))
Primary Governing Law	Civil/Criminal Procedure Codes, Judicature Act, JSC Oversight	Article 47, FAAA (Sec 2 & 4), Section 2 Empowering Provisions
Constitutional Status	Judicial Branch (Chapter 10) Subordinate Courts	Textually Named State Organs (Article 1(3) & Article 260)
Office Holder Status	Judicial Officers / Subordinate Bench	Perform functions within a State Organ (Public Service, Art 260)
Precedent Framework	Strictly BOUND under Article 163(7)	Highly PERSUASIVE authority (Not textually bound by 163(7))

Conclusion

Independent tribunals represent a primary pillar of Kenya's constitutional architecture under **Article 1(3)(c)**. They are neither subordinate courts nor secondary judicial creations; they are distinct **State organs** directly delegated sovereign power by the people of Kenya.

Because their members are non-elected constitutional delegates, sovereign adjudicative power is exercised **directly by the people** through independent tribunals pursuant to Article 1(2).

Achieving total clarity in Kenya's adjudicative landscape requires adhering to these constitutional principles:

1. **Local tribunals** are Article 169(1)(d) subordinate courts established by Parliament within the Judiciary sector under Chapter 10.
2. **Independent tribunals** are State organs under **Article 1(3)** drawing sovereign legitimacy directly from **Article 1(2)** and **Article 1(3)(c)**, operating completely outside the Judiciary sector.
3. Under **Article 159(1)**, independent tribunals are established either **BY** the Constitution (Articles 144, 168, 251) or **UNDER** the Constitution via Section 2 FAAA empowering

provisions (common law, customary law, agreements, or administrative instruments) enacted under Articles 47(3) and 94(5).

4. Under **Article 50(1)** as read with **Article 19(3)(c)**, independent tribunals possess wide subject-matter jurisdiction to resolve any legal dispute, subject only to the two express constitutional exclusions: criminal proceedings (Article 50(2)(d)) and presidential election petitions (Articles 140 & 163(3)(a)).
5. Office holders of independent tribunals perform functions within a State organ, placing them squarely within the **public service architecture** under Article 260. Their integrity is enforced through the Article 10(2)(c) universal umbrella, Article 47 procedural fairness, and supportive Leadership and Integrity Act (Cap 182) public entity mechanisms.
6. Independent tribunals are not textually bound by Supreme Court decisions under **Article 163(7)**, but treat superior court holdings as **highly persuasive authority** within general public law.

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