

Eradicating Systemic Conflation: Why Article 1(3)(c) Independent Tribunals Are Not Chapter 10 Local Tribunals

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In contemporary Kenyan administrative law and judicial practice, a persistent institutional misunderstanding endures: 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 legal commentary 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.

SOVEREIGN POWER DELEGATION MATRIX	
ARTICLE 1(1) & ARTICLE 1(2) All Sovereign Power Belongs to the People	
INDIRECT EXERCISE (Art. 1(2))	DIRECT EXERCISE (Art. 1(2))
Elected Representatives * Parliament & Assemblies (Art. 1(3)(a)) * Executive Structures (Art. 1(3)(b))	Non-Elected Constitutional Delegates * The Judiciary (Chapter 10) (Courts & Art. 169(1)(d) Local Tribunals) * Independent Tribunals (Art. 1(3)(c) & Art. 47)

Constitutional Foundations: Direct Sovereign Delegation

To grasp the standing of independent tribunals, one must examine the progression of sovereign delegation across Article 1 of the Constitution of Kenya 2010:

- **Ownership of Sovereignty (Article 1(1) & 1(2)):** All sovereign power belongs to the people of Kenya and may be exercised either directly or through democratically elected representatives.
- **The Tripartite Delegation (Article 1(3)):** Sovereign power is delegated to three distinct sets of State organs: (a) Parliament and county legislative assemblies; (b) the national and county executives; and (c) **the Judiciary and independent tribunals**.
- **Direct Exercise by Constitutional Delegates:** While Parliament and the Executive consist of democratically elected representatives (or their appointees) exercising indirect power, members of the Judiciary and independent tribunals are not elected representatives. Consequently, pursuant to

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

An independent tribunal member does not derive legitimacy secondarily from the Judiciary or transitively through an executive cabinet secretary; 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.

The Strict Sectoral Divide: Independent Tribunals vs. Local Tribunals

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

THE STRICT SECTORAL SEPARATION	
LOCAL TRIBUNALS SECTOR	INDEPENDENT TRIBUNALS SECTOR
* Article 169(1)(d) * Subordinate Courts Sector * Chapter 10 Judicial System * Created as Courts by Statute * Subject to JSC Administration	* Article 1(3)(c) & Article 47 * Primary Delegated State Organs * Operates Outside Chapter 10 * Established BY or UNDER Constitution * Governed by FAAA Framework

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

- **Sector Classification:** The Judiciary (Chapter 10).
- **Constitutional Status:** Local tribunals are explicitly 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 & Governance:** Established directly by specific Acts of Parliament as specialised lower courts (e.g., Rent Restriction Tribunal, Business Premises Rent Tribunal, Tax Appeals Tribunal) and governed by Chapter 10 judicial structures, court enactments, and Judicial Service Commission (JSC) oversight.

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

- **Sector Classification:** Independent Tribunals / Administrative Action Sector (Article 47 & Fair Administrative Action Act).
- **Constitutional Status:** Operates completely outside Chapter 10 subordinate court structures as distinct, textually designated State organs under Articles 1(3)(c) and 260.
- **Creation & Governance:** Established either directly **BY** the Constitution (ad hoc removal tribunals under Articles 144, 168, and 251) or **UNDER** the Constitution via Section 2 of the Fair Administrative Action Act (FAAA) enabling frameworks (common law, customary law, agreements,

instruments, or administrative documents). Governed by Article 47 of the Constitution and the statutory framework of the Fair Administrative Action Act, 2015.

Comparative Analysis: Courts vs. Independent Tribunals

Operational Feature	Courts & Local Tribunals	Independent Tribunals
Sector Classification	The Judiciary Sector (Chapter 10)	Independent Tribunals Sector (Article 47 & FAAA)
Sovereign Delegation	Article 1(3)(c) & Chapter 10 (Arts. 159, 165, 169)	Article 1(3)(c) & Article 1(2) (Direct Sovereign Exercise)
Creation Mechanism	Act of Parliament establishing a subordinate court under Art. 169(1)(d)	Established BY Const. (Arts. 144, 168, 251) or UNDER Const. (Sec. 2 FAAA Framework)
Constitutional Status	Chapter 10 Subordinate Courts	Textually Named State Organs (Arts. 1(3) & 260)
Office Holder Status	Judicial Officers / Subordinate Bench	Perform functions within a State Organ (Public Service, Art. 260)
Subject-Matter Scope	Full Civil & Criminal Jurisdiction (Subject to statutory caps)	Expansive Civil/Administrative Scope (Art. 50(1)); Excludes Criminal & Presidential Petitions
Precedent Framework	Strictly BOUND by Supreme Court decisions (Art. 163(7))	Highly PERSUASIVE public law authority (Not textually bound by Art. 163(7))

Core Takeaway for Practitioners and the Bench

Independent tribunals are neither subordinate courts nor secondary judicial creations; they are distinct State organs directly delegated sovereign power by the people of Kenya under Article 1(3)(c).

Achieving structural clarity in Kenya's adjudicative landscape requires recognising that statutory court creation belongs strictly to the Judiciary sector under Chapter 10, whereas administrative enabling frameworks (such as AITAR, AISTAR, and AIETAR operating via Section 2 of the FAAA) belong to the independent tribunals sector under Article 47. Bypassing colonial court monopolies and delivering administrative justice requires maintaining this constitutional boundary without compromise.