

The "By or Under" Architecture: How Section 2 of the Fair Administrative Action Act Generates Independent Tribunals

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A central question in Kenyan administrative law is how an **Independent Tribunal** comes into legal existence outside the specific ad hoc removal panels explicitly named in the constitutional text.

The Constitution of Kenya 2010 provides a complete, elegant answer through the **"by or under" dichotomy** in Article 159(1), combined with the "empowering provision" framework of Section 2 of the Fair Administrative Action Act, 2015 (FAAA).

ARTICLE 159(1) GENESIS ARCHITECTURE	
ESTABLISHED BY OR UNDER THIS CONSTITUTION	
Established "BY" the Constitution (Direct Constitutional Text) * Art. 144(2): Presidential Incapacity * Art. 168(5): Removal of Judges * Art. 251(5): Removal of Commissioners	Established "UNDER" (Derivative FAAA Path) * Art. 47(3) & 94(5) Parliamentary Law * Section 2 FAAA Empowering Provisions

The Textual Dichotomy: "BY or UNDER" (Article 159(1))

Article 159(1) of the Constitution dictates that judicial and adjudicative authority derives from the people and vests in courts and tribunals *"established by or under this Constitution."* This establishes two distinct operational modes for bringing an independent tribunal into 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 operate entirely outside the statutory court framework:

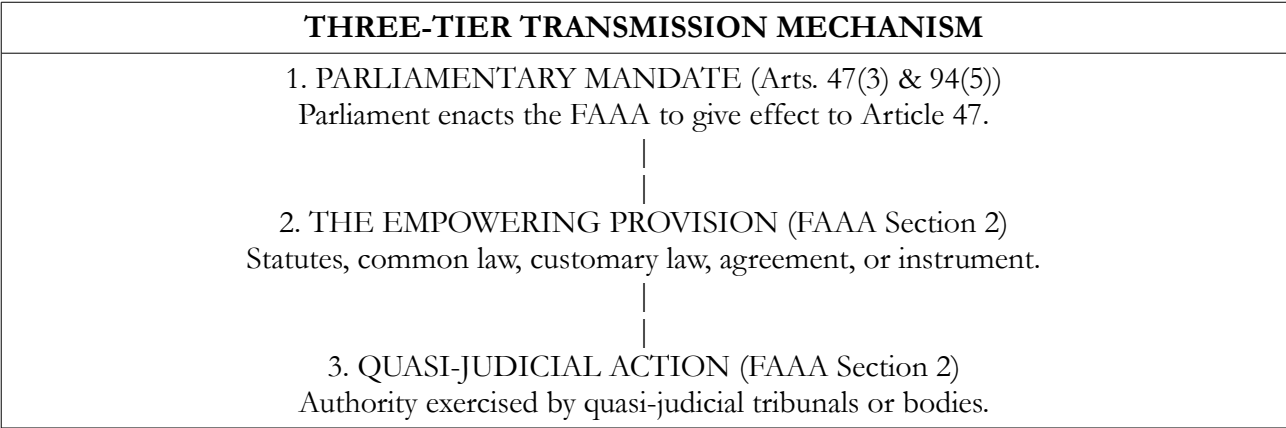
- **Article 144(2):** Tribunals established to investigate the physical or mental capacity of the President.
- **Article 168(5):** Tribunals established for the removal of a Judge of a superior court.
- **Article 251(5):** Tribunals established for the removal of a member of a Constitutional Commission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

Mode B: Independent Tribunals Established "UNDER" the Constitution

Just as Articles 144, 168, and 251 provide specific constitutional frameworks for ad hoc removal tribunals, the empowering provisions under Section 2 of the FAAA supply the general legal framework for establishing independent tribunals whenever administrative or quasi-judicial action is required.

This creation occurs via a three-tier constitutional transmission mechanism:

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- 1. **The Parliamentary Mandate (Article 47(3) & Article 94(5)):** Article 47(3) commands Parliament to enact legislation giving effect to fair administrative action. Pursuant to Article 94(5)—which mandates that no body other than Parliament has law-making authority except under constitutional or statutory delegation—Parliament enacted the Fair Administrative Action Act, 2015.
- 2. **The "Empowering Provision" Definition (Section 2 FAAA):** Section 2 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 Bodies:** Section 2 explicitly defines "administrative action" to include *"the powers, functions and duties exercised by authorities or quasi-judicial tribunals..."*

The Legal Synthesis and Sectoral Rule

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

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

THE GOLDEN SECTORAL RULE
IF an adjudicative body is created by an Act of Parliament AS A COURT under Chapter 10, it is a LOCAL TRIBUNAL (Art. 169(1)(d)).
IF a body takes quasi-judicial action under an EMPOWERING PROVISION via Section 2 FAAA, it is an INDEPENDENT TRIBUNAL (Art. 1(3)(c)).

The Empowering Provision Framework in Practice

Outside the ad hoc constitutional removal tribunals (Mode A), independent tribunals in Kenya come into being through four distinct category sources anchored in Section 2 of the FAAA:

Empowering Provision Category	Operational Framework & Source	Institutional Application
Rules of Common Law	Common law rules establishing administrative or quasi-judicial dispute processes.	General administrative review tribunals.
Customary Law Frameworks	Customary dispute resolution mechanisms recognised under Article 159(2)(3).	Traditional and ancestral land partition panels.
Agreements & Contracts	Private arbitration or adjudication submission agreements.	Institutional frameworks like AITAR and AISTAR .
Administrative Instruments	Official instruments or rule-sets regulating statutory or sectoral duties.	Specialist frameworks like AIETAR .

Core Takeaway for Practitioners

Independent tribunals do not require a stand-alone, bespoke Act of Parliament for every new subject-matter panel.

Parliament has already enacted the overarching statutory framework through the **Fair Administrative Action Act, 2015** pursuant to its mandatory constitutional duties under Articles 47(3) and 94(5). When private parties, institutions, or communities adopt structured rule-sets (such as AITAR, AISTAR, or AIETAR) via contract, customary law, or administrative instruments, they tap directly into the Section 2 FAAA empowering provision architecture.

This derivative mechanism legally constitutes the panel **UNDER** the Constitution as an Article 1(3)(c) Independent Tribunal, exercising direct delegated sovereign adjudicative power to deliver fair administrative justice.