

Vertical vs. Horizontal Application: Why Kenya's Article 20(1) Stands Alone Among 19 World Legal Systems

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In global administrative law, procedural justice rests on the foundational principle of *audi alteram partem*—the right to prior notice and an opportunity to be heard before an adverse decision is made. Yet, across major common law, civil law, and mixed legal systems, a structural ceiling persists: procedural fairness guarantees are overwhelmingly **vertical**. They protect individuals against the state, public authorities, or private actors exercising delegated public functions.

A comprehensive world survey of nineteen legal jurisdictions—spanning common law systems (the UK, US, Australia, India, Canada), civil law regimes (Germany, Spain, France, Italy, Brazil, Mexico, Japan), and specialised or transitioning systems (South Africa, Nigeria, Indonesia, China, Russia, Egypt)—reveals that Kenya stands apart.

GLOBAL LEGAL LANDSCAPE	
Vertical Only (State & Public Powers)	Horizontal & Constitutional
* UK,US, Australia, India, Canada * Germany, Spain, France, Italy, Japan * South Africa, Nigeria, Brazil, Mexico * China, Russia, Egypt, Indonesia	* KENYA - Article 20(1) Bill of Rights binds all persons - FAA Act 2015 ss. 2-3 - Referendum protected

The Global Vertical Baseline

Most of the world's leading administrative law frameworks confine their procedural fairness mandates exclusively to public power:

- **Judge-Made Common Law (UK, USA, Australia, India, Canada):** In the UK (*Ridge v Baldwin* [1964] AC 40 (UK)) and Australia, common law natural justice binds public bodies, while in the US, Due Process requires state action. India's Supreme Court (*Maneka Gandhi v Union of India* (1978) 1SCC 248, *A.K. Kraipak v Union of India* (1969) 2 SCC 262) extended Articles 14 and 21 to cover any decision affecting rights, but this remains judge-made doctrine confined to state and public-function actions. Canada's contextual test (*Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817) similarly governs public administrative decision-makers.
- **Codified Civil Law Frameworks (Germany, Spain, France, Italy, Indonesia, Japan):** Codified codes like Germany's *Verwaltungsverfahrensgesetz* (VwVfG § 28), Spain's LPACAP (Ley 39/2015), France's CRPA, Italy's Legge 241/1990, Indonesia's Law No. 30/2014 (AUPB), and Japan's Administrative Procedure Act restrict their pre-decision hearing requirements to government organs or entities fulfilling a public service mission.

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- **Constitutionally Entrenched Systems (South Africa, Nigeria, Brazil, Mexico):** Even where pre-decision safeguards carry constitutional status—such as South Africa’s PAJA (enacting Section 33), Nigeria’s Constitution (Section 36(2)), Brazil’s Constitution (Article 5, LV), or Mexico’s *garantía de audiencia* (Article 14)—the scope remains vertical, governing organs of state or actors exercising statutory public power.
- **Specialised & Fragmented Systems (China, Russia, Egypt):** China’s Administrative Penalty Law, Russia’s KAS RF, and Egypt’s *Majlis al-Dawla* (Council of State) jurisprudence provide real procedural checks, but exclusively within the realm of public law and executive action.

Kenya’s Unique Horizontal Architecture

Kenya breaks this global pattern by extending administrative justice protections **horizontally** to reach purely private conduct, and anchoring that reach at constitutional rank:

- **The Constitutional Command (Article 20(1)):** Chapter Four of the Constitution of Kenya 2010 provides that the Bill of Rights "*applies to all law and binds all State organs and all persons.*" Because the right to fair administrative action sits within Chapter Four (**Article 47**), it inherently binds private individuals and corporate entities, not merely the state.
- **Statutory Confirmation (FAA Act, 2015):** When Parliament enacted the Fair Administrative Action Act (FAA Act) under Section 2 and Section 3, it defined "administrative action" to include decisions made by *any person or body* affecting legal rights. Parliament was giving statutory effect to a horizontal mandate already commanded by Article 20(1).
- **The Referendum Entrenchment (Article 255(1)(e)):** Unlike statutory horizontal provisions in other jurisdictions that can be repealed by a simple legislative majority, Kenya’s horizontal reach is protected by a constitutional wall. Under Article 255(1)(e), any amendment touching Chapter Four and the Bill of Rights requires approval by a national referendum.

Comparative Summary: Administrative Justice Regimes

Jurisdiction	Primary Legal Basis	Structural Form	Scope of Application	Amendment / Override Threshold
United Kingdom	Common Law (<i>Ridge v Baldwin</i>)	Uncodified Case Law	Vertical (Public Bodies)	Simple Parliamentary Act
United States	5th/14th Amendments; APA	Constitutional / Statutory	Vertical (State Action)	Federal Statutory / Const. Amendment
Germany	VwVfG § 28; Basic Law Art. 103(1)	Codified General Clause	Vertical (Public Authorities)	Federal Legislative Majority
South Africa	PAJA 2000; Constitution s. 33	Enacted Checklist Code	Vertical (State Organs/Public Power)	Parliamentary Supermajority (66%)

Jurisdiction	Primary Legal Basis	Structural Form	Scope of Application	Amendment / Override Threshold
India	Constitution Arts. 14, 21	Judge-Made Constitutional	Vertical (State & Quasi-Public)	Judicial Precedent / Const. Amendment
KENYA	Const. Arts. 20(1), 47; FAA Act s. 4	Entrenched Checklist Code	Vertical AND Horizontal (All Persons)	National Referendum (Art. 255(1)(e))

The Contractual Bridge: AITAR, AISTAR, and AIETAR

While Kenya's statutory and constitutional framework natively commands horizontal application within its domestic jurisdiction, the **AITAR, AISTAR, and AIETAR** frameworks provide a secondary, independent path for transnational practitioners: **contractual submission**.

TWO INDEPENDENT PATHS TO SECTION 4(3)	
Section 4(3) FAA Checklist - Prior Notice - Right to be heard - Written reasons - Legal Counsel	
STATUTORY ROUTE	CONTRACTUAL ROUTE
Applies via Const. Art. 20(1) & FAA Act ss. 2-3 to all persons within Kenya	Applies via AITAR/AISTAR/AIETAR submission agreement anywhere in the world by consent

When private parties—whether a Kenyan cooperative, a Delaware corporation, or foreign commercial entities with no geographic nexus to Kenya—contractually agree to submit their disputes to AITAR or AISTAR, they incorporate Kenya's **Section 4(3)** notice-and-hearing checklist by agreement.

This contractual bridge decouples the procedural protections from domestic territorial bounds. Under international arbitration principles and the 1958 New York Convention, parties may select Nairobi as their arbitral seat and adopt Kenyan administrative-justice procedural standards while keeping their substantive governing law, identity, and assets entirely foreign.

Kenya's legal framework offers a dual mechanism: it establishes horizontal administrative justice at constitutional rank domestically, and exports that same standard globally through private contractual submission.