

AFRICA RISK CONSULTING

Country briefing – Kenya

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1 Summary

Inauguration of Uhuru Kenyatta marks key stage in implementation of constitution which codifies weakened powers for president and system of devolution. There will be a period of political slow down as office holders determine roles and responsibilities, while there are concerns about financing of new counties. United Nations and Western diplomats adopt pragmatic approach towards Kenyatta and William Ruto, while the vice president says he would be willing to attend opening and closing hearings at International Criminal Court.

1.1 Kenyatta accedes to weakened office...

While certain provisions of Kenya's 2010 constitution have already been implemented, including an independent supreme court, the inauguration of President **Uhuru Kenyatta** marks a key milestone. Kenyatta acceded to an office whose powers have been curtailed by an empowered parliament and independent judiciary, and dispersed across a newly devolved system of counties. For the first time, the constitution ties presidential authority to *"the principle of service to the people of Kenya and for their well-being and benefit"*. Whether this new political culture of servitude becomes enshrined will depend on how well the constitution is implemented in practice.

"Implemented well, it can reform politics. The reason why politics in Kenya is prone to violence is the premium the elite put on political office, which aggravates the tensions surrounding electoral contests. The devolution structure has introduced new offices. There are now also many legislative seats to be shared by the political elite. If devolution takes root, it will reduce the impact of the winner-takes-all politics and reduce tensions at the national level"¹.

While Kenyatta is yet to name his new cabinet, he will face greater limitations on appointments than his predecessors. The constitution attempts to reduce the opportunity for political patronage and corruption by creating a formal process for political appointments. Cabinet secretaries must be drawn from outside the ranks of elected members of parliament. Parliament now debates and approves all appointments to senior public sector positions, removing the link between political loyalty and future gain.

¹ Source, political analyst, Kenya

“When you are elected in Kenya, you are expected to bring goodies to the electorate...and the president rewards his tribesmen with plum state jobs and inflated contracts. The constitution – through the independent institutions – has attacked the patronage system in a major way. Major appointments must be subjected to confirmation hearings. The number of cabinet positions has been set by the constitution as not more than 24. Until now, the president could undermine the opposition any time by co-opting opposition leaders into the cabinet. The country has a chance of appointing a cabinet made up of technocrats”².

National Assembly speaker **Justice Muturi** has confirmed that positions on parliamentary committees will be determined according to party strength. The opposition is expected to take the leadership of four key financial oversight committees, including public accounts, public investment, budget appropriate and local authorities’ funds³.

1.2 And empowered counties...

Except for a few years after independence from **Britain** in 1963, Kenya has been a highly centralised state with the office of the president at the heart of the hierarchical provincial administration system of governance. The new system of 47 counties each with executive and legislative power to oversee service delivery is therefore as large a shift in political culture as the limited presidency. During his inauguration ceremony, the president reiterated his commitment to devolution which he described as not a choice, *“but a constitutional duty. Our constitution does not suggest devolution. It demands it.”*⁴ Implementation of devolution will not be completed until 2015, but has already proved a political challenge to Kenyatta. The designation of 15% of government revenues for the provinces should significantly reduce grievances over the distribution and political manipulation of resources:

*“This signals the end of the ‘Imperial Treasury’ where the president directs resources to his ethnic community and starves the opposition... The powers of the Treasury have been cut.”*⁵

There is some uncertainty and political contention about the implementation of devolution, particularly with regard to financing. In early April, governors walked out of a meeting with the **Transitional Authority** in **Naivasha** in a dispute over funding. Similar concerns about financing have been a source of tension between the governors and the **Salaries and Remuneration Commission**, with Kenyatta adopting a conciliatory tone and establishing a committee to mediate. The government has established a **Commission for Revenue Allocation (CRA)** to determine county budgets. County revenue bills will be introduced to parliament two months prior to the beginning of the financial year.

² Source, political analyst, Kenya

³ Daily Nation, 11 April 2013

⁴ Daily Nation, 10 April 2013

⁵ Source, political analyst, Kenya

For the 2013-2014 fiscal year beginning in July, the CRA has recommended the allocation of \$2.6m to county governments.⁶

According to **World Bank** estimates, counties will be responsible for functions that cost about 30% of total revenues, or more than double the 15% that the constitution guarantees them. Some counties will be able to bridge the gap between costs and revenues. However, while **Nairobi** and **Mombasa** will attract investment, the same cannot be said of the towns of the **Northeastern Province**. The central government will retain control over taxes with a sizeable base including income tax, customs duties and VAT but county governments are responsible for taxes with immobile and narrow bases such as property. The CRA, however, has confirmed that counties will have a say in determining how they manage trade with neighbouring states. This leads the **East African Community** integration secretary **Barak Ndegwa** to warn of the dangers of counties with ports or national borders increasing tariffs. Local authorities in Kenya have typically been poor fiscal managers, with excessive borrowing, poor record keeping and punitive penalties on debt arrears. If county revenue collection is not able to cover expenditure – a likely scenario, at least initially – government borrowing could rise at a time when Kenyatta is committed to addressing Kenya's budget deficit and debt to GDP ratios. The constitution says that the government may provide additional funds through conditional or unconditional grants, but provides no information about how this will work in practice. In practice, given the dependence of counties on taxes with limited bases, the Auditor General will need to control county borrowing through regulation and careful oversight.

Vice president **William Ruto** apparently disagrees with Kenyatta over the necessity and pace of devolution, which may well be a source of tension within the ruling coalition over the next couple of years.⁷ One notable side effect of devolution may be the emergence of a new generation of political leaders.

"Devolution has many critics and many problems will have to be confronted during the implementation of the new constitution. Putting those problems to one side, one potential benefit is that the new posts of county governors and other positions within devolved institutions will allow for different sorts of people to enter the political arena. This might present an opportunity for younger leaders with new power-bases and new ideas to influence political debate and behavior."⁸

⁶ The East African, March 2013

⁷ Source: Oil executive, London

⁸ Source: Senior academic, UK

1.3 Diplomats adopt pragmatic approach towards Kenyatta

At Kenyatta's inauguration, **Ugandan** president **Yoweri Museveni** described the **International Criminal Court (ICC)** as "*a foreign tool to get rid of African leaders*"⁹. Cooler heads, however, seem to be prevailing. A diplomatic source in **Nairobi** confirmed that western governments had agreed on a pragmatic approach toward Kenyatta¹⁰. **US** ambassador **Robert Godec** attended the inauguration and met privately with Kenyatta, while **British** and other **EU** embassies have also requested meetings. Despite media reports to the contrary, Kenyatta did not invite fellow ICC accused **Sudanese** president **Omar al- Bashir** to his inauguration in what would have been an overt show of defiance to the west. William Ruto said that he would be willing to appear in person at opening and closing hearings at the ICC, and be tried in absentia for the rest of the trial. Pragmatic cooperation followed by some form of deal whereby the charges are dropped remains the most likely option.¹¹

In April, the *Foreign Policy* website reported that the **United Nations** had updated its guidelines for senior officials to consort with political leaders facing ICC charges.¹² The protocols reiterate existing restrictions on engaging with **Sudanese** president **Omar al- Bashir**, but there is no similar constraint on those who might meet with Kenyatta. The distinction between the two is partially that Kenyatta has recognised the legitimacy of the court, appearing in person at **The Hague** in April 2011. The UN policy is an attempt to reward those suspects who cooperate with the ICC and who have – so far, at least – not required the issuing of a formal arrest warrant. The privilege can, however, be removed if Kenyatta stops cooperating with the ICC. The same source in Nairobi said that future relations with Kenyatta would continue to depend upon his willingness to cooperate with the ICC.¹³ Kenyan officials are testing the boundaries of this pragmatic approach. Kenya's deputy UN ambassador, **Koko Muli Gringnon**, in April told the General Assembly that the ICC has no right to prosecute Kenyan nationals without the prior consent of the government, and that the case of Kenyatta should be referred to a Kenyan court.

⁹ Business Day, 9 April 2013

¹⁰ Source: Western diplomat, Nairobi

¹¹ Source: Journalist, Nairobi

¹² Foreign Policy, 15 April 2013

¹³ Source: Western diplomat, Nairobi

2 Implications

The need for Kenyatta to cooperate more closely with parliament and concerns about financing at county level could trigger disputes between office holders about their precise roles and responsibilities. This could impede the passage of legislation at a national level and service delivery at a county level as officials and politicians become conversant with the new political structures and processes. While devolution is a necessary rebalancing of political power that had become too concentrated in the centre, politicians and bureaucrats will need to make sure that the networks of patronage which for so long characterised central government are not simply replicated at county level.