Why Equity? Opening Remarks on Launch of Equity Week

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1. Why Equity?

The drafting and eventual approval of Kenya’s 2010 constitution was driven in part by dissatisfaction with the way state power has been used to distribute resources over the course of our history. As then Chief Justice Willy Mutunga wrote in a concurring opinion in the Supreme Court’s Advisory Opinion No. 2 of 2013 on the Division of Revenue Bill, “a reading of the Final Report of the Constitution of Kenya Review Commission (CKRC) shows that, vast segments of the Kenyan population felt that they were victims of the state, either in terms of political repression, or in terms of developmental exclusion.”

The notion that control over resources by an overbearing executive was the problem led to various institutional reforms, including devolution of resources, the creation of the Commission on Revenue Allocation to guide resource allocation, the lionization of Parliament in the budget process, the strengthening of the budgetary independence of the Judiciary, and the detailing of rights and procedures in the constitution to curtail executive control.

If Kenyans were not happy with the ways in which resources were distributed prior to 2010, how did they want resources to be distributed? It is always easier to define what we don’t like than to describe what we would like to see in its place. Thus the details of a better way to distribute resources were not fully defined by the new constitution. Nevertheless, there are a number of key words and principles that provide a direction for distribution under the new dispensation.

Equity is mentioned as a core value in the constitution in Article 10(b), along with equality, social justice and inclusiveness. Equity and equality are both mentioned as binding principles on the Judiciary in its consideration of the application of the Bill of Rights in Chapter 4 of the constitution. Equity is mentioned severally in connection with gender (e.g., gender equity as a core responsibility of the National Gender and Equality Commission).

The word “equitable” also appears in several parts of the constitution, including the principle of “equitable access to land” (60(1)(a)). Later in the same chapter, equitable sharing of “accruing benefits”
from the environment is also mentioned as something the state must pursue (69(1)(a)). Equitable sharing of resources across the country is one of the principle objects of devolution (174(g)). Of course, Chapter 12 of the constitution is replete with uses of the term equitable. One of the principles of public finance is to “promote the equitable development of the country” (201(b)(iii)). Equitable provision of services is also a key principle of the public service (232(1)(c). Even the national security forces must reflect the diversity of Kenya in “equitable proportions” (238(2)(d)).

There can be no question, therefore, that the drafters of the constitution sought to ensure that equity would infuse the new constitutional order. While the constitution requires Kenyans to respect the principle of equity, it provides limited guidance for how to define and use it. There are multiple references to marginalization and affirmative action in the constitution, which suggest that the drafters did not conflate equity and equality, but understood that some Kenyans would need more help than others to participate fully in civic and economic life. But defining marginalization was a task left to the CRA after promulgation, and a broader definition of equity was left to citizens and leaders to articulate. I shall return to the question of whether we are making progress in doing so.

Equity is not just a constitutional issue, however; it is also an ethical issue, one that touches on our deepest beliefs about what is right and wrong. This is so because equity (and inequality) have consequences for people’s lives. It is common to hold that life outcomes for ordinary people are affected by poverty, but inequality is thought to matter less. For example, we tend to believe that as long as people have achieved certain minimum incomes, they are likely to be able to achieve a certain level of welfare. Thus we should focus on “poverty” and worry less about “inequality.”

Data from the last couple of decades has thrown this into question, however. For example, the corpus of work led by British researcher Sir. Michael Marmot has found that there is a substantial social “gradient” with respect to illness around the world and within both developed and developing countries. In simple terms, those at the top of social hierarchies, as defined by their income and position in the labor market, tend to be healthier than those below, even when those below are not poor and are in some ways far better off than those around them. This finding is robust even within a single hierarchy, as Marmot shows by looking only at different ranks of British civil servants and comparing their disease rates.¹ A Swedish study has found that men with a Ph.D. have a lower mortality rate than those with Master’s degrees, who in turn have a lower mortality rate than those with Bachelor’s degrees!²

This is more than another reason to stay in school. This body of literature suggests that stressors that cause illness are more substantial for people that are lower in hierarchies because they lack the

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² Cited in Marmot, but also see data slides here: http://www.kva.se/EventDoc.aspx?eventId=456&docId=737
resources and autonomy (or control) to deal with difficult situations, while those that are higher in the hierarchy have greater capacities to manage their life/work challenges. The findings indicate that greater equality would mean that more individuals in a given society have the resources and autonomy to manage their lives and reduce their risk of illness.

Inequality can also undermine our shared ethical understanding of the world we live in. When inequalities deepen, those who are at the bottom of the social hierarchy find it harder and harder to believe that getting ahead is about following the law and demonstrating your merits. Some cross-national evidence suggests that this is more than perception: societies with greater inequality do have less social mobility, meaning that it is indeed harder for young people born into poverty and working class families to get ahead in such contexts (this is known as the “Great Gatsby Curve” in the literature). As people begin to feel that getting ahead is increasingly out of reach, they begin to question the basic social contract that relates what citizens put in to society to what they get out of it. We have seen this erosion of ethics in Kenya already, and inequality is likely to exacerbate it. A survey released earlier this year, the Kenya Youth Survey Report, found that half of Kenyan youth “do not care what means one uses to make money as long as they do not end up in jail.”

The study also found that only half of those with post-graduate education believe that they will succeed if they work hard.

These findings offer a segue to the final reason we must care about equity: its implications for the stability of the society we live in. Inequality per se is not necessarily a cause of instability; nations and communities can tolerate inequality for long periods of time without social upheaval. But as societies develop and as the nature of people’s perceptions of where they stand in society changes, increasing inequality can lead to increased instability. In a famous essay from 1973, Albert Hirschman, the eminent social scientist, argued that increasing inequality can actually increase stability in the short run, if it is perceived as a signal that everyone will soon join in the benefits of economic development. Over time, however, if people see that only certain sectors of society are advancing, then their tolerance for inequality can plummet. Paradoxically, even those who are getting ahead may feel that they are not getting ahead fast enough, encouraging frustration among both those who are advancing and those who are not. This can be deeply destabilizing.

Hirschman pointed out that the positive short-run impact of rising inequality is also unlikely to materialize in societies that are ethnically divided and where only certain groups are perceived to benefit from economic development. He was not thinking specifically of Kenya, but he might well have been when he wrote:

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“If, in segmented societies, economic advance becomes identified with one particular ethnic or language group or with members of one particular religion or region, then those who are left behind….will be convinced almost from the start of the process that the advancing group is achieving an unfair exploitative advantage over them. The nonmobile group may thus make the prediction...[that]...as a result of another group’s advance, it will expect to be worse off.”

If as a country, we are committed to a capitalist economic growth model, with all of its dynamism, instability and inequality, we must also consider the potential impact of that model on a society that is already deeply unequal and in which perceptions of increasing inequality are likely to be interpreted through regional and ethnic lenses. This suggests a need to be very deliberate about how we approach inequality and equity in our policies.

2. What is equity?

I have noted that the constitution expected us to debate the meaning of equity, rather than prescribing exactly what it meant. While we have moved ahead to share resources, we have not really had the debate we should have had over how the new “equity” is different from the way we used to do things. Debating the meaning of equity requires us to engage with our history, but also to plot our future.

Sessional Paper 10 of 1965 is often cited as Exhibit A in explaining where the country went wrong on defining equity in the post-colonial period. While the historical record after the release of the paper is consistent with this claim, the language in the paper is more ambiguous. Sessional Paper 10 did indeed state that it was better to invest in an area that was more productive and then redistribute than to invest in areas with low yield, a point Chief Justice Mutunga also made in his concurring opinion in Advisory Opinion No. 2 of 2013. This provided intellectual support to the view that productivity should be the main determinant of investment, and may have led in part to favoring certain parts of the country over others.

However, the same paper also stated that equal opportunities should be “provided for people in less developed parts of the country” and that “the needs of less developed areas will be given special consideration.” This language is not dramatically different from the 2010 Constitution Section 201(b) (iii) which states that “expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas.” From this, we can conclude that vague and general language in key legal and policy documents can only take us so far in making policy.

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decisions. We must ultimately engage with these ideas and interpret them for ourselves in the process of making policy.

Which brings us back to equity. What do we as Kenyans mean by equity? In general, equity means looking at the relative position of people in society when deciding how to treat them. Because people start from different positions, we cannot always treat them equally if our ultimate goal is some kind of equality of opportunity or outcome.

There are a number of principles to consider when we deliberate about equity. The most widely acknowledged is need: those who need more should receive more from our shared resources. We also usually think that those who can contribute more (the wealthier) should do so and should receive less (on net) than those who are not in a position to contribute. On the other hand, those who make more of an effort to generate resources should be rewarded for that. Those who use resources well (efficiently, productively) should be rewarded and not punished for that. We also usually think that no matter how people score in terms of need, capacity, effort, efficiency, etc. everyone should at least get something, a minimum share.

Because these principles can contradict one another, they require careful balance. And because implementing any one of them is complex, they require deliberation. For example, when we assess the needs of different people in our society, do we put more weight on historical injustices or more weight on the costs of meeting everyone’s needs today? This is not an abstract question. With limited resources, we must decide how much to invest in infrastructure in areas with few roads or health facilities, and how much to set aside for the cost of basic services for highly populated areas of the country with better infrastructure.

Fairness therefore demands more than principles of sharing; it also demands a fair, open and democratic process of making decisions and balancing competing values. There is no one right answer to what is the most equitable way to share resources. But the process of making that decision in the political arena should be legitimate. This points again to the need for a broad social debate about what we mean by equity.

Looking around, we have more work to do. From the foregoing, it is obvious that equity is not equality. Obvious though it may be, public policy in the last few years has tended to conflate the two. Research to be presented during Equity Week shows that we tend to put a heavier emphasis on equality than equity in many national and county distributive programs, and the way we do so can lead to both inequality and inequity. Around the country, county assemblies are demanding that ward development funds be shared equally across their counties. While it is right and proper that assembly members demand justice for their wards, the great inequalities between wards cannot be addressed through equal sharing. In many cases, this equal sharing does not even lead to basic equality, given that the
population of wards differs so that equal shares result in unequal per capita allocations. When we see these kinds of decisions, citizens should ask hard questions about how we share fairly.

3. Equity and devolution

What does equity mean in the context of devolution? Devolution does not automatically lead to an improvement in equality. Returning to Advisory Opinion No. 2 of 2013, Chief Justice Mutunga wrote:

“Devolution was predicated on the understanding that even though equality of opportunity may not necessarily lead to equality in development outcomes inevitably, inequality of opportunity (which is Kenya’s historical experience) would necessarily result in inequality in outcomes. This is the logic behind giving every Kenyan and every region a fair and equal chance, to succeed or fail.”

This captures the promise of devolution, but also the reality that it does not inevitably lead to greater equity. Indeed, decentralization can be associated with growing inequality, and it should be obvious why this is so. Assuming an unequal society at the outset under a centralized regime, the decentralization of power and resources to the local level allows ordinary people a greater say in decision-making. But in order to take advantage of this, several factors must hold:

1. The capacity of the different regions must be high enough to permit all of them to manage their affairs equally well
2. The distribution of resources must be changed sufficiently to ensure that areas with historically limited resources receive greater transfers to allow them to provide services at levels comparable to richer regions
3. The degree to which regions rely on their own resources relative to national transfers should not exacerbate inequalities in overall access to funding

It is easy to think of resources in terms of money, but it is obvious that we are also referring to the distribution of human resources, such as health workers, as well. These conditions can only be met through deliberate policies, as they are unlikely to hold in any society, especially one with a high degree of historical inequality.

If we move from assuming that “all good things go together,” and that devolution will automatically reduce inequality, to understanding that devolution will only reduce inequality if we take deliberate steps to ensure that it does, then we can begin to have the serious conversation about equity we need to have.

This conversation will take note of several facts. First, capacity and resources are not evenly distributed across the country and the Equalisation Fund in the constitution is too small to address this issue, even if used properly. Two, the very limited taxing powers of counties means that they will tend to rely on

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government transfers for most of their funding. The overall distribution of these transfers must be equitable, meaning we must pay attention not just to the distribution of the equitable share which is recommended by the CRA, but also to the distribution of conditional grants and other national programs in counties that affect overall distribution. Finally, in spite of the former, there are counties with significant revenue raising capacity. Transfers should take into account the capacity of the regions receiving them to raise their own revenue so that, over time, we do not end up providing much more to those areas that already have the most. At the same time, we must recognize that the country’s population and growth centers have high service costs and we must ensure they have enough to meet them.

Coming to a position on how to share resources fairly is not an easy task. But it is one we have given ourselves as citizens as part of the agenda of constitutional reform. We must rise to the challenge and participate in these difficult conversations.

4. From Equity Week to Equity Forever

This week of events, organized by a number of civil society organizations, is intended to kick-start a conversation about equity that is long overdue and that requires citizens to inform themselves and engage. There will be lectures, panels, open discussions, poetry and film, all looking at the issue of equity in Kenya.

But the reality is that the debate over equity is not something that can or should be confined to a week. It is something that the constitution demands that we do all year round, as key decisions are taken about sharing resources by major institutions.

I therefore welcome you to the week’s events, but also encourage all of you to see this as the beginning of a much longer conversation.