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Polemos Focus: Equity and the Resources of Critique: Part I

In his *The Resources of Critique* (Polity, 2006) Alex Callinicos addresses the problem of neoliberal global capitalism as a problem of practices and beliefs, practices and beliefs that have become so ingrained that for some there is thought to be no alternative despite the inequality and suffering such practices and beliefs undoubtedly produce. For Callinicos, critique is concerned with transcendence, not in terms of ‘discovering’ a beyond of human experience but rather in terms of overcoming or superseding limits. Callinicos asks: ‘How are we able to go beyond limits set by existing practices and beliefs and produce something new?’ (p.1). This attitude is not simply one of innovation and imagination, but also one of problematisation, of understanding the limits of existing thoughts and beliefs and how they emerged, what Foucault would call a ‘limit-attitude’. The Focus of this and the following issue of *Polemos* poses this question in the context of equity, a pertinent question in a time when there are renewed calls for ‘equity’, whether as a call to justice more generally, a challenge to the prevalent discourse of rights or a challenge to economic and social inequity, but also a time when other senses of equity permeates our legal, political and economic structures. Each contribution in its own way seeks to address itself to this ‘multiverse of equities’.

A focus is a point of convergence, a gathering of things which in a sense belong together. However there are certain difficulties with a focus on equity and the resources of critique. First is the relation of equity and critique. On the one hand we might approach equity and the resources of critique from the perspective of *equity as a resource* of critique, a way of questioning and perhaps transcending the limits of existing juridical, jurisprudential and political and ethical thought and practices, especially rights-based jurisprudence. On the other hand, practices of equity – particularly English Chancery equity - make up historical and existing structures of inequality and suffering, so we must also consider the resources available for a critique *of* equity.

This points to a second and more fundamental question: what is the object of focus on ‘equity’? Aristotle’s famous, if fleeting, passages on equity are the usual starting point and provide the first limit on our thinking of equity and, for some, constitute the truth of equity. Aristotle’s statements certainly provide us with some of the theoretical questions that have haunted the history of equity, and constitute the antinomies of equity: that equity is something exists in relation to law but is not ‘the’ law – it may be law’s secret, law’s hidden exception, lying within the law but at the same time it appears to be something beyond the law or is perhaps opens law to the beyond, the porous element of law; that equity traverses the universal and the particular, legislation and adjudication, legal justice and ‘universal’ justice; that equity

is concerned with judgment, both in the legal context but also beyond law requiring ethical judgment by individuals.

These ontological questions are further complicated by equity's historicity, that something called equity – whether *epieikeia*, *aequitas* or equity – has existed in different societies which each have distinct political, legal and economic arrangements, and consequently the 'equity' referred to will differ accordingly. Certainly we can discern a play of different registers or surfaces of equity. To give just three examples. First there is the judicial sense, whereby equity is technique of judgment, a hermeneutic. This has existed in a range of different legal traditions, combining with different elements in different systems and by the time of Christopher St. Germain's *Doctor and Student* equity is tied together with Cicero's maxim *summum ius summa iniuria* and Christian notions of mercy. The mention of St. Germain brings us to a second register or surface of equity: the practices, remedies and doctrines emerging from the English Court of Chancery. It was St. Germain who invented the English tradition of equity and began the intellectual and institutional 'capture' of equity in Chancery, a process completed by James I in his famous 1616 speech in the Star Chamber. This is equity as jurisdiction, as institutional-jurisdiction. A third register or surface of equity is that of property, of economic value or substantive value. This emerges most strongly in the context of home ownership (the difference between the mortgage and the value of the property) but also shareholding in financial capitalism. This sense of equity is much neglected in the humanities scholarship, possibly because it comes close to economic discourse, but constitutes an important sense of equity and is connected with other surfaces - this sense of equity probably emerged from the Chancery's treatment of property, particularly the equity of redemption. In other words, while it is important to keep in mind that references to 'equity' may be to an entirely different register, such that it is possible to be talking at cross-purposes, these registers unfold out of one another and the seeds of later developments are immanent to earlier surfaces. These surfaces have always co-existed. One must remember that the short passage on equity in Aristotle's *Nicomachean Ethics* navigated both the juridical and the non-juridical forms of judgment, that it is in Book V which is concerned, primarily, with the measure of justice and in particular economic justice. Equity has always connected the power of judgment, including legal judgment, correct ethical behaviour and the economy, the iconography of which is preserved on the Roman Silver Denarius which combines the image of power of the emperor on the one side with that of good governance of the economy and, therefore, wealth on the other with the image of equity – the apparatus *potestas-aequitas-cornucopia*.

The point is that we must pay attention to which surface we are discussing and for what reason, but also the play of these surfaces, how they interact and they forms assemblages of justice and injustice. The essays in this Focus cut across these surfaces and registers of equity, some with an emphasis on judgment, some on the Chancery jurisdiction, and others on property – and numerous on more than one. The essays emerge from a series of workshops inaugurating a new network for critical explorations of equity

and trusts.¹ What gathers them together, despite their divergence, is that they address the limits of our thinking and practices of equity and aim to transcend, in the sense of overcome, the limits of such thought and practice. In doing so a wide range of ‘resources’ is drawn upon from a range of critical scholars - Agamben, Arendt, Deleuze, Derrida, Freud, Lacan, Levinas, Marx, Nancy, Serres and Stiegler – and various concepts and modes of problematisation – in addition to equity itself, exscription, *pharmakon*, *jouissance*, decorum and office, hauntology, materialism and temporality – drawn from various disciplines and bodies of knowledge, including literature, history, law, political economy and psychoanalysis.

The Focus is arranged as a diptych. On this, the first panel, literature, images and the dead – the haunting of equity’s present – open onto questions of the office of jurist and critic alike; the other panel (the second part of this focus in the next issue) paints an image of equitable property and inequity in the life of equity. The diptych hinges on questions of burial and the life of the jurist (Mussawir), which closes this first part, and re-opens in the next with Aristotle’s Pharmacy (Piška) where questions of burial are central to the equity of Aristotle’s Antigone. The first image of the diptych, Gary Watt’s essay on ‘True Equity in Trollope’s *The Warden*, uses literature as a resource for exploring the different senses of equity to see if he can find ‘true equity’, which Watt conceives in Aristotelian terms as a personal ethical quality, rather than an institutional jurisdiction. This personal ethical quality is one of humility and requires the painful sieve of conscience. The final image of the diptych doubles back to questions of equity, with Riccardo Baldissone making a plea not for true equity, but for a multiverse of equities. While Watt focuses on the personal ethical quality of the warden, the warden can also be understood as holding a specific office with certain public aspects. This is the sense which Piyel Haldar explores in his essay on equity, decorum and conscience in the context of the public office of the Chancellor, the second image on the first panel. Cristina Costantini also refers to the doubled nature of the Chancellor, what she calls the Chancellor’s two bodies with reference to Kantorowicz, in her essay which considers equity as the hinge between theological order and legal faith. Drawing on a wide range of theoretical, historical and literary resources, Costantini argues equity must prevail over the common law in order for equity to fulfil its promise of salvation, a promise which is redeemed in the *Earl of Oxford’s* case in 1616. Anne Bottomley picks up where Costantini’s essay ends, with the *Earl of Oxford’s* case, more specifically the images associated with that case which is pivotal in the formation of a specific tradition of equity. Bottomley presents a history of equity through six images, from a gargoyle’s head in Cambridge to Piero della Francesca’s ‘The Flagellation of Christ’ in Italy; not necessarily a ‘true’ history but rather one that provokes thought, a provocation to think differently. For Bottomley this means thinking equity topologically and through questions of temporality – how equity can embed time in law. She ends with reference to the role – or perhaps ‘office’ – of critic, arguing the critic should not be ‘seduced into the pursuit of the exotic Other’

¹ For further information about the Equity & Trusts Research Network please visit: <https://www.kent.ac.uk/law/research/centres-and-groups/equity.html>. Also see R. Herian, ‘Equities: A Review of the Equity & Trusts Research Network Workshop’ (4 August 2015) <http://criticallegalthinking.com/2015/08/04/equities-a-review-of-the-equity-trusts-research-network-workshop/>.

but instead as an artisan who ‘mines and follows and diagrams’ potential. In the final essay in the first panel of this diptych comprising ‘equity and the resources of critique’, Edward Mussawir returns us to the office of jurist, a theme that runs through each of the essays in this first part and appropriately, if we consider this two part Focus as a diptych, brings us to questions of life and death. Here Mussawir explores the office of jurist through the life of the great historian and scholar of equity, Frederic Maitland where the life of the jurist can be understood as a resource for a critical understanding of law, legal scholarship and a life in law as a way of ‘resisting the purely dogmatic function of law’.

Nick Piška, University of Kent, UK

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Author biography: Nick Piška is a Lecturer in Law at the University of Kent, UK. His research pursues a critical engagement with private law, particularly in the area of equity and trusts. He is currently writing a book on the fate of equity in modern law and society. He is the founding member with Rob Herian of the Equity & Trusts Research Network (<https://www.kent.ac.uk/law/research/centres-and-groups/equity.html>) as well as a member of the advisory board of the University of Kent’s transfaculty Centre for Critical Thought (<https://www.kent.ac.uk/cct>). He has previously been a researcher at the Law Commission for England and Wales.