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## Calling to Account

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# BOOK REVIEWS

## CALLING TO ACCOUNT

George Bizos *No One to Blame? In Pursuit of Justice in South Africa*. David Philip and Mayibuye Books, 1998. x and 246 pp.

This is a book about justice. It is a sombre and sometimes an angry book, with few moments of triumph and many more of frustration and bitterness. Yet in its own way it is also about the achievement of justice and the promise of the law.

The book is primarily about some of advocate George Bizos's cases, but it is not primarily about Bizos himself. (Let me say, at once, that I am an admirer of George Bizos, and I would welcome a book that *was* primarily about him.) The author's focus, rather, is almost relentlessly on the cases, and the cases he chooses to discuss are not a random sample of those in which he has pursued justice. Instead, these are the cases of the detainees who died at the hands of the security forces of apartheid. Some of the dead, such as Steve Biko and Mathew Goniwe, were charismatic political leaders. Others were also ANC activists, such as Looksmart Ngudle, an MK commander who died in jail by hanging in 1963, and was the first person to die under the newly legal system of detention without trial (9). One, James Lenkoe, who died in security police custody in 1969, may well have had no political involvement whatsoever (15). Some died by murder; some may have been driven to suicide. Even now, apparently, no one has been convicted and criminally punished for these crimes.

Bizos's account of these cases is gripping. The facts remain appalling, and the testimony of those who conspired in or contributed to these deaths remains shameful. The professions of goodwill are absurd; for example, Bizos asks Lt Whitehead, the officer who oversaw the final stretch of Neil Aggett's interrogation:

Q: Did anybody warn you that detainees require to be away from their interrogators so that the anxiety that is created in the interrogation situation may be wiped out by peaceful sleep away from the interrogator? Did anybody tell you that?

A: Your Worship, no one told me that, but I just want to correct that a detainee does not feel anxious while in detention.

Q: Oh, I see, you as an interrogator thought that no anxiety whatsoever comes about in the persons that you interrogate on the tenth floor, is that your answer?

A: Your Worship, I merely said no anxiety is created. (110, 112)

Some of the admissions are equally disturbing; for example, Sydney Kentridge asks Dr Tucker, one of the Biko doctors:

Q: In terms of the Hippocratic Oath, to which I take it you subscribe, are not the interests of your patient paramount?

A: Yes, Your Worship.

Q: But in this case they were subordinated to the interests of security? Is that a fair statement?

A: Yes. (66)

And the clash of lies and truth in the process of cross-examination is sometimes so stark that it is hard to imagine that anyone could have missed it. Mohamed Navsa's cross-examination of a police witness in the 1993–94 inquest into the death of Simon Mthimkulu contributed to the magistrate's comment that 'It astonishes one that one can receive such answers' (159), and to a rare judicial finding that the police were actually to blame for Mthimkulu's killing (161). Decades earlier, in an emergency proceeding to protect Mohammed Salim Essop from his captors in 1971, Isie Maisels listened to a senior police officer, Colonel PJ Greyling, saying that 'he and his fellow police officers regarded people like Essop as their children'. With Maisels putting his questions in English, and Greyling responding in Afrikaans, Maisels asked:

Q: Tell me, Colonel, after Dr Kemp examined Essop in your presence [Essop at the time of this examination was, according to Dr Kemp, 'lying comatose in a passage' at Security Police headquarters], did you ask Dr Kemp any questions?

A: No, M'Lord, what question should I have asked him?

Q: [Here, Bizos observes, Maisels 'could not resist the temptation of putting it in Afrikaans'] Tell me, doctor, what is wrong with my child?

A: I didn't do it.

Q: Was that because it wasn't necessary for you to ask? You knew that he had been beaten up by your men? (23)

This particular case ended in a measure of victory: the Supreme Court ruled in Essop's favour, and he survived. In inquests, of course, it was already too late, though occasionally the families of victims were able to obtain modest financial settlements when they later brought civil suits against the state. But there were other victories to be won. During the Biko inquest, Sydney Kentridge refused to cross-examine in Afrikaans, and, as Bizos recounts, declared:

'May I say it is not a question of being unable to cross-examine this witness in Afrikaans. Let me say at once that I am quite capable of cross-examining him in Afrikaans. I do not choose to do so.' There was a chorus of approval from the packed court. . . . Hearing the leader of the Bar stand up for his right to speak English was viewed as an expression of solidarity with their cause. The court adjourned while an interpreter was found. A song of praise reverberated as the spectators filed out to join those who could not get inside. (55)

Before history, and before the world, and before the many South Africans who sympathised with the victims of the security police, truth could be spoken and power be challenged.

As this account suggests, Bizos's book illustrates the power that anti-apartheid lawyers had, and the limits on it. Lawyers have the remarkable prerogative of asking questions and (often) being able to insist that their questions are answered. They also have a less explicit power, which is to put their questions sharply, insistently and sarcastically. This power is important, not just because it enabled lawyers to speak to, and for, the

sympathetic spectators in the court, but also because it enabled them to denounce, and to mock the state before the audience of the world. In these inquests, anti-apartheid lawyers could not only speak truth to power, but also proclaim it.

But there were severe limits on this power as well. Truth could not be stated without evidence – which the guilty sought vigorously to conceal – and even where evidence existed other dangers lurked. Bizos writes that in 1989, when Arthur Chaskalson handled the first inquest into the deaths of the Cradock Four and declared that although the evidence did not show who the killers were, it did reveal that they had ‘constituted themselves into an illegal group which can only be described as having lain in wait for the Cradock Four, constituting themselves as it were into a death squad’, Chaskalson was on the edge of exposing himself to ‘serious danger’ (171).

Moreover, evidence to show the truth could only be introduced if it was legally relevant. If the security police had murdered one of their detainees, then evidence that prior to the murder they had interrogated the victim at agonising length might be excludable, because the interrogation could not be said to have caused the death, and the inquest was an inquiry into the death. This logic drove lawyers for victims’ families to consider the strategic value of arguing that the victims had committed suicide, rather than been murdered, because then all evidence of mistreatment could be admitted for its impact on the victim’s suicidal state of mind. This strategic logic may well have coincided with factual truth in many cases. This seems very plausible in the case of Neil Aggett, where counsel, with the family’s consent, proceeded on this basis (104). But obviously this theory would have been a bitter pill for victims’ families to accept, and some families apparently refused to permit its use in court (104). Moreover, the ironic result of employing this theory is that while more of the truth could come out about the mistreatment a detainee had suffered, the precise truth about how he died might have been obscured. The dead cannot speak; nor can their families and their lawyers speak unobstructedly for them.

Bizos’s book is in one sense the last act of these inquests, a final effort to speak on behalf of the dead: the assurance that before history the truth will remain accessible rather than being lost in old newspapers and court files or even in the strategic choices which dedicated lawyers had to make. But Bizos’s book is not just history, or for history’s sake. Instead, it has to be read as part of the transition from apartheid to democracy, and specifically as part of the amnesty process. Bizos supports amnesty. Indeed, he helped draft the amnesty statute (233). But I do not think he *likes* amnesty. Bizos is too conscious, even now, of the wrongs that have been done. And he certainly does not welcome amnesty in the form of amnesia. For Bizos, the only possible path toward reconciliation is truth, and he will not rest while that truth is withheld. He pursued the truth in inquest after inquest during the apartheid years, and he has continued to

pursue it in these same cases when the erstwhile rulers of the security netherworld have turned into halfhearted supplicants for amnesty before the Truth and Reconciliation Commission. This book records the efforts Bizos, together with other remarkable lawyers, made to unearth the truth over the years, and what they succeeded in revealing – up to and including what they extracted from amnesty applicants in the hearings before the TRC's Amnesty Committee itself.

As such, it is a kind of supplement to the report of the Truth and Reconciliation Commission, and to the decisions of the Amnesty Committee. It is, itself, a contribution to the record of truth. Moreover, it is a compelling demonstration that the truth has not yet been fully found out. The victims' families, and the nation, and the world, still wait for candour and confession. Bizos still hopes that the men who committed the killings in detention in the 1960s and 1970s, whose 'conspiracy of silence has held', will reveal the truth. 'Old men now,' he writes, 'most of them have receded into obscurity, but they carry the knowledge of their crimes, with only a magistrate's words to salve their conscience.' (236)

And it seems clear that if he could use his stern cross-examining skills to wrest this information from them, he would do so now. This book is dedicated '[t]o all for whom before and after their deaths justice was not only blind but also deaf and dumb' (vi), and Bizos would heed their calls today. He ends the book by declaring:

The search for the truth will continue. Why, how and by whose hand so many died in detention is not yet fully known. We owe it to their memory to keep the dockets on their deaths open in the hope that those who know will not take their secrets to their graves. (239)

Here, in effect, Bizos dissents from the idea that South Africa's transition can be a single moment, or even a single period of years, during which the truth will be laid out as fully as possible and after which the country will turn to other business. Bizos will not consider this business finished until the truth is out.

In defining our debt to the memory of the dead, Bizos does not assure us that it will ever be paid. Bizos has seen too many witnesses lie and get away with it, too many magistrates render shameful decisions, to be confident that the law will always protect those it should protect. And yet this book is not the book of someone indifferent to law's claims. On the contrary, it seems more accurate to say that Bizos is himself a devoted servant of the law, despite the many times it has failed to deserve his faith.

To be sure, Bizos is not only a servant of the law but an employer of it. He writes at one point, for example, that he was subpoenaed by the Security Police after his intention to defend Barbara Hogan became known:

As I stepped out of court an attempt was made to serve the subpoena on me by the very Deetlefs [a security police officer] to whom it was claimed [in the Neil Aggett inquest] the

vital information had been disclosed by Aggett. I told him to go away. It was improper to serve a process on counsel whilst in his robes at the door of the court. I had read this in some book. Deetlefs was taken aback. (128)

It would hardly have been possible to prevent service of the subpoena altogether, and Bizos reminded Deetlefs that he (Deetlefs)

no doubt knew where my office was. He was there at the end of the day. I let him wait in the reception area until I had disrobed in my office. I took the subpoena and he left.

The point of this invocation of the mysterious majesty of the law, rather, was to deny the security police the ‘respect, if not awe’ that they expected.

As to the subpoena itself, however, there was more to be done, and what was done also invoked, less mystically, the prerogatives of the bar. Bizos ‘immediately dictated an affidavit’ denouncing the subpoena, and declaring that:

To require me at this stage, having been briefed for the defence, to be interviewed by persons whom I may be obliged to cross-examine in that very defense is calculated to embarrass me in the exercise of my duties as an advocate.

Nice language, but more than language was required to resist the security police. Fortunately, more than language was available, in the person of Johann Kriegler, at that time chairman of the Bar Council, who took the matter up with the senior prosecutor. The senior prosecutor ‘had no answer’ to Kriegler’s questions and told Kriegler that Bizos ‘could ignore the subpoena’.

What gives law this power? Clearly the mere fact that someone knows the law, even knows it well, is not enough to assure fidelity to it. ‘The Security Police really called the tune,’ Bizos writes, ‘even in relation to prosecutors, few of whom could stand up to them’ (128). Similarly, ‘[t]he regional magistrates who usually conducted political trials were not chosen at random but by the Security Police’ (124), and the process of appointing and training these magistrates was not ‘likely to produce independent and legitimate judicial officers’. Instead, these men did not rise above their background, and their background was frankly, and multiply, racist:

They were all white, almost all of them Afrikaners. . . . From an early age they were taught that South Africa belonged to them. The likes of Aggett, Floyd and Smithers were their guests, the Naidoos and Nanabhais less welcome, and the Ngwenyas, Lerumos and Njikelanas their servants known only by their first names. (125)

Bizos himself felt the sting of this prejudice. He arrived in South Africa as a Greek refugee from World War II at the age of 13, but when he came to apply for South African citizenship he was informed by the Minister of the Interior (FW de Klerk’s father) that ‘it was not in the public interest for me to become a South African citizen’ (14). Bizos describes a striking moment in the late 1980s when Laurie Ackermann spoke of the oppression Afrikaners had suffered in their past, and ‘rightly assumed that we all knew that the tar brush should not be directed at all

Afrikaners' (230), but this book is also a reminder of how blunt the ethnic and racial divisions in South Africa have been.

Still, in challenging this prejudice, against himself and more horrifically against his clients, Bizos finds protection in the law. Fierce as this book is in its accounts of the inquest decisions of magistrates, the story it tells of the Supreme Court is often more benign. In the Mohammed Essop case, for example, Judge Bekker intuited – before any evidence on the matter had been heard – that Essop was moved from Johannesburg to Pretoria to ensure that he would be under the 'care' of a doctor who would not disturb the security police (21–22). In another case, Judge Howard found in 1977 that a detainee most probably suffered 'all or most' of his injuries at the hands of the Security Police (40). Judge Boshoff, who presided at the trial of the SASO Nine, was impressed by Steve Biko's testimony (44). The inquest verdict in Biko's case was 'a terrible disappointment, to the family, to the legal and medical profession, and to some judges, not only those opposed to the apartheid policies of the regime' (72).

So, too, the behaviour of members of the Bar – the private bar, made up of advocates not in the state's employ – is often, though not always, honourable and even collegial. (This is not to say that Bizos finds virtue only among advocates; he writes of anti-apartheid attorneys with respect as well (e.g. 9, 21, 103, 175), and praises the deputy attorney-general in the 1993 Goniwe inquest, 'the first attorney-general in any inquest I had ever been involved in who seemed to have a genuine desire to get to the truth' (189).) Perhaps the most striking example of such honourable action by opposing advocates is the conduct of Fanie Cilliers, who represented the police in the Ahmed Timol inquest in the early 1970s. Bizos reports (27) that Cilliers

came to Maisels and me, to say that he considered it his duty to bring to our attention the fact that the police had handed him a document, with instructions to use it, but he had refused to do so.

This document purported to be instructions from the Communist Party to its members, and concluded with a list of 'comrades' that included Bizos himself. The document did not disappear, but Fanie Cilliers had trusted his fellow counsel more than his police clients, and acted accordingly.

Being a lawyer during these years was not easy. One security police officer, testifying in the Aggett inquest, claimed that Aggett had linked 'a very respected person in this Court today' to the Communist Party, and threatened to get that person yet – a threat meant for Bizos himself (116). On occasion, Bizos's chambers were bugged (121). He and his wife feared for their children's safety – although, happily, the one time the children crossed the path of the security police, it was the police who seemed more dismayed (129–30). Why, in the face of all this, did Bizos – who could not even get a South African passport – throw himself into the most intense courtroom confrontations with the security forces, again and again?



No doubt he hoped that these confrontations would actually force the police to obey the law. At times, this did happen – though in the long run, Bizos sadly comments, the impact of continued legal efforts was to convince the security forces to live altogether beyond the law, at Vlakplaas and no doubt elsewhere (5). No doubt, too, Bizos hoped that all this work would contribute in an incremental way to removing the apartheid regime's claims to moral legitimacy, and so would help end apartheid itself (cf 53, 72). But as recently as the mid-1980s, the end of apartheid looked far away indeed, and Bizos pressed on then, and for that matter pressed on later, when the end of apartheid was already accomplished.

In the end, only the book on Bizos himself, rather than his cases, will tell us what sustained him in this work. Perhaps he, like many other people in South Africa and elsewhere, learned from his own experiences in World War about the duty to confront racism and evil. He avoided social contact, even in the form of having a cup of coffee, with his security police adversaries (127; cf 114), a course that may have saved him from being compromised in his clients' eyes, but which Bizos himself says resulted from his 'instinctively feel[ing] that it was wrong to have social contact with anyone involved with detention without trial' (127). But the path Bizos found for accomplishing what instinct or experience taught him he should do was the law. He seems to have harboured little sense that the law would do what it ought to do, and perhaps that skepticism provided him with some armour against the disappointment that some South African lawyers felt as one injustice followed another. At the same time, he did not overlook virtue and integrity where he encountered it, and he encountered it in some quarters of the law. Where he did not encounter it, he has made a career of demanding it nonetheless. In that sense, at least, George Bizos is a faithful servant of the law – because he sees what it can sometimes be, and insists on it.

Bizos's book, however, is not a testament to the majesty of the law. For Bizos himself, it is an account of cases where 'the relatives, friends and society as a whole were let down by the administration of justice' (6). For the reader, it is also an account of the struggle to secure justice in the midst of injustice for these dead victims of the South African security state. Moreover, this is a struggle that has had some success. If those who killed the detainees or ignored their suffering and death have not been punished, they have to some extent been found out, and their lies and cover-ups have long since lost their capacity to convince. Dedicated, brave, and resourceful lawyers, both black and white – George Bizos a leader among them – contributed to this achievement. Moreover, the state these deaths and lies were supposed to protect is gone, and it seems right to say that these outstanding lawyers contributed to that victory as well.

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