

THE DREYFUS CASE A CENTURY ON - TEN LESSONS FOR AUSTRALIA*

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It is a century since Captain Alfred Dreyfus was exonerated of passing French military secrets to Germany. The story of his arrest, trials, humiliation and ultimate vindication are retold here. He was the victim of anti-Semitic prejudice and institutional failings. In this article the author reviews the lessons for contemporary Australia of the decade long ordeal. The lessons include many relevant to lawyers. We must be vigilant against miscarriages of justice; alert to stigma against minorities; cautious about closed trials; ready to protect those who question legal outcomes; careful to scrutinize authority; scrupulous in upholding the secular and impartial character of public institutions; attentive to media strengths and weaknesses; ready to consider change where institutions fail; and willing to offer apologies when injustice is proved.

I THE DREYFUS AFFAIR

A A Centenary Reflection

It is exactly a hundred years since Alfred Dreyfus, the French soldier who was Jewish, was finally cleared of the offence of high treason. A hundred years ago, he was described as the most famous man in the world since the death of Napoleon.¹

Yet who today remembers him or the story of the trials he underwent for providing military secrets to his country's most hated enemy, Germany? Who recalls his conviction, punishment, exile and eventual vindication? Who knows of the persistent struggle by his wife Lucie and his brother Mathieu to clear his name and the band of intellectuals and civil libertarians who came to be convinced of his innocence? Who recalls the efforts of military and government leaders and churchmen in France to uphold his guilt, even when they were presented with overpowering evidence that he had been wrongly convicted? What lessons does *L'Affaire Dreyfus* have for liberty in contemporary Australia and for how we handle complaints about the misuse of governmental power? Of prejudice against minorities? Of miscarriages of justice by the very institutions that we entrust to protect society and its members from injustice?

In its day, the Dreyfus trials and their aftermath had similarities to aspects of the

* Text of an address at the opening of the centenary exhibition on the Dreyfus affair at the Jewish Museum of Australia, Melbourne, 26 March 2006.

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¹ Michael Burns, *France and the Dreyfus Affair: A Documentary History* (1999) vii.

Petrov case, the Lindy Chamberlain saga, the ordeal of David Hicks, the *Mallard* case, and the trial of Saddam Hussein, all wrapped into one. Yet none of those events, nor anything we have seen in Australia, is exactly like the ordeal to which Alfred Dreyfus was subjected. In its time, that ordeal became an illustration of how human institutions can go seriously wrong, human justice can fail and pride and patriotism can swamp concern for the individual. All too easily, this can happen when that individual is a member of a minority the subject of irrational hatred - as Dreyfus, the Jew, was and as others in the century that followed have been.

The Dreyfus case was a forewarning of the Holocaust, of the show trials of Hitler, Stalin and Pol Pot, and of the occasional failings of elected democracies that marked the twentieth century. It was a warning that was not sufficiently recognised a century ago. We do well to reflect on it today so that we do not repeat the same mistakes.

Comparatively, few in Australia today remember the details of Dreyfus's case. We know vaguely of the extended controversy that divided France, of his banishment to Devil's Island, of the brave band of supporters who never lost faith in his innocence, of the anti-Semitism that played a part in his conviction and of the long time it took to clear his name. But we do not know the details.

It is in the detail that the wrongs of the Dreyfus affair are to be found. The greatest wrong was not the mistaken conviction of Dreyfus for treason. Human justice makes human errors. No human effort is immune from error.² What was important was how the conviction came about in the first place; how it was reconfirmed in the face of overwhelming evidence; and how ultimately institutions of government and other powerful forces elevated the insistence on maintaining Dreyfus's conviction above the proof of his innocence. Upholding his guilt became a badge of honour for elements in the army, the Church, the government and the population at large. Even today in France, streets and statues that honour Dreyfus are desecrated. In France, murders still happen that are attributed to anti-semitism.³ Closer to home, violence against ethnic and religious minorities shocks Australians who are convinced that the national acceptance of multicultural ideals will spare Australia from the worst of such prejudice.

A hundred years ago, the Dreyfus affair was still on the lips of most informed people in Australia.⁴ How did it happen? Why should contemporary Australians give any thought to events that occurred so long ago and so far away?

² Everett C Hughes, *Men and Their Work* (1958) cited in Oliver Quick, 'Outing Medical Errors: Questions of Trust and Responsibility' (2006) 14 *Medical Law Review* 22, 23.

³ Sebastian Rotella, 'Racism a Factor in Murder of Jew Says Magistrate', *Sydney Morning Herald* (Sydney), 22 February 2006, 13 (concerning the death in France on 13 February 2006 of Ilan Halimi).

⁴ See, eg, *Sydney Morning Herald* (Sydney), 11 September 1899; *The West Australian* (Perth), 12 September 1899 cited in H L Rubinstein, "'A Disgrace to Christendom': Australian Reactions to the Dreyfus Affair' (1994) 12 *Journal of Australian Jewish Historical Society* 467, 467-8.

B Sources of Anti-Semitism

To find the answers to these questions it is necessary to dig deep into an infantile tendency of human beings. A root cause of the Dreyfus affair was anti-Semitism. A fear and hatred of Jews in France arose because of several factors: their minority numbers; their exclusive, counter-majoritarian, habits; their often unusual clothing; their distinct culinary habits; their involvement in money lending and finance; and their disproportionate educational and professional success. Above all, there was the supposed 'blood guilt' of Jews for the death of Jesus Christ. The foundation for this blood guilt was a passage in St Matthew's Gospel, when Pontius Pilate, the Roman Governor of Judea, offered to release Jesus but the Jewish people of Jerusalem chose Barrabas and said to Pilate, of Jesus, 'His blood be on us, and on our children'.⁵ On those nine words was hung a terrible hatred.

The hatred was reinforced, until recent times, by prayers for the conversion of 'the perfidious Jews' at some Christian Churches services at Easter; by deep feelings of animosity towards the Jews amongst many Christians and others; and by governmental, political and church attitudes that fuelled anti-Semitism throughout Europe and beyond.

C Revolutionary and Military Context

It was a mark of the embrace of notions of universalism and rationality after the French Revolution that they eventually gave rise to an edict of liberation for the Jews of France. Although prejudice still existed, it waned in nineteenth century France. Gradually, notions of secularism began to prevail, reserving religion to a private zone. This was a feature of France in the Belle Epoch that reassured Dreyfus that he would be protected by the French legal system against any lingering attitudes of prejudice against Jews. After all, decades earlier, Christian symbols had been removed from French courthouses. The French *Declaration of the Rights of Man and of the Citizen* drew no distinctions on the grounds of race or religion. At first, Dreyfus's confidence was to prove misplaced.

The seeds of the affair were planted by the military humiliation of France in the Franco-Prussian War of 1870. The defeat of the army, that still boasted of the Napoleonic conquest of Europe, was a great blow to French honour and pride. The defeat was commonly attributed to German spies. Only spying, it was believed, could explain the collapse of an army and nation so historical, glorious and unique. Paranoia over superior German spying capacity was never far from the surface in the last years of the nineteenth century. Financial collapses, economic depression and the political instability of the Third Republic turned conservative politicians and newspapers into messengers of fear and suspicion of the supposed enemies of the nation in its midst. The loss of Alsace and Lorraine made those who stayed behind in France suspect in the eyes of some fellow

⁵ St Matthew's Gospel, ch 27, v 25. See also C Thornton-Smith, 'Reactions of the Australian Catholic Press to the Dreyfus Case' (1997) 14 *Journal of Australian Jewish Historical Society* 57, 64.

citizens and the newspapers that pandered to their fears. This was especially so if they were German-speaking, with German-sounding names. It was particularly so if they were of the Jewish minority.

D Discovery of the bordereau

Into this potent mix of fear and suspicion intruded a remarkable event.⁶ A document was discovered, probably by a French concierge working in the German embassy in Paris. The document was handed to French security who then worked in a section of the General Staff of the army. Torn into six pieces, this memorandum (*bordereau*) was a communication in French with a German contact about military secrets, including details about a new French field gun. It was signed with the initial 'D'. It suggested that a senior military official of France was providing secrets to the German military attaché in Paris.

The *bordereau* led immediately to a search for the culprit. That search led the senior members of the French army to suspect Alfred Dreyfus. He was descended from a wealthy Jewish family from Alsace. He had made the French army his career. He was a non-observant Jew who enjoyed an income many times greater than his military salary. He had been a top student. At the age of thirty, his outstanding service led him to be assigned to work in the Ministry of War in Paris, with the rank of captain. For a soldier of the time, he lived an unusually quiet family life. His misfortune was that the leaders of the General Staff were openly anti-Semitic. They were determined, without delay, to rid the army of the author of the inculcating document.

The *bordereau* was discovered in late September 1894. By late October 1894, the intensely conservative and right-wing Christian newspaper, *La Libre Parole*, was fed the news that the suspect in the spying was a Jewish officer. Dreyfus had been asked, on a pretext, to write a letter based on the wording of the *bordereau*. Because of perceived similarities between the handwriting in the two documents, he was arrested and imprisoned. The Dreyfus affair had begun.

E Conviction and Exile

In December 1894 Dreyfus was put on trial for treason before a court martial. He had an excellent lawyer who was convinced of his innocence and who demanded a trial in public. However, the military judges insisted on a trial held in closed court. They said that this was essential to preserve national security. Handwriting experts called by the army attested to the similarity of the writing in the *bordereau* and Dreyfus's writing. However, two superior experts called for the defence pointed to many dissimilarities. Dreyfus's lawyer was sure that his client would be free at the end of the trial.

As is now known, contrary to procedural fairness and the French law governing courts martial, an officer of the War Ministry provided a secret dossier to the

⁶ Martin P Johnson, *The Dreyfus Affair: Honour and Politics in the Belle Epoque* (1999).

members of the court martial whilst it was deliberating. The dossier contained a letter from an Italian military attaché inculcating Dreyfus. Neither Dreyfus nor his lawyer were given access to this secret evidence. Nor did they know of its provision. The course adopted was later justified in the name of national security.⁷ Vehemently professing his innocence, Dreyfus was unanimously convicted of treason. He was condemned to military degradation and perpetual deportation.

In a memorable scene in the courtyard of the *École Militaire* in the centre of Paris, Dreyfus had his military insignia torn from his uniform and his sword broken in his presence. A famous cartoon of the time showed him bowed and humiliated. But photography had arrived by 1894. A photograph showed him unbowed and erect. He declared in a voice that those nearby could hear: 'I forbid you to do this to me'. And because the square was so large, Dreyfus was led around its perimeter to be humiliated in front of the assembled army officers and antagonistic citizens. He was far from bowed. Repeatedly, he declared '*Innocent! Innocent! Vive la France!*'. It was an unsettling response that led some who witnessed it to quit the assembly in a state of disquiet.

But disquiet was not present in the vast majority of witnesses and citizens. Dreyfus's protestations were drowned out by cries 'Death to the Jew!'. In the legislature, politicians of all persuasions welcomed the outcome of the court martial and the eradication of a blemish on the honour of the French army. Uncovering so swiftly the treasonous spy was a cause for congratulations to the government and the army. Even the radical politician, Georges Clemenceau, who was later to become a supporter of Dreyfus, asked Parliament why an ordinary soldier would be condemned to death for treason but a captain spared of his life? Politicians of the right, the left and the centre, jumped on the bandwagon of excoriation. As soon as his petition for appeal was rejected, Dreyfus was exiled to Devil's Island off the coast of French Guiana. On that island, he spent his time in solitary confinement in a malarious environment. However, his spirit was not broken; nor that of his wife and brother.

A saga of iniquity then began that represents the essence of the Dreyfus affair. The army had wanted no publicity for the case and a quick conclusion to the matter. However, no motive had been shown why a wealthy captain, with a promising career, would have acted as claimed. The motive that was hinted was Dreyfus's origin in Alsace, his knowledge of the German language and his Jewishness. Religious newspapers like *La Libre Parole* and *La Croix* supported the conviction whenever it was questioned. As the growing evidence of wrongdoing mounted, these forces in government, in the army and the Church railed against the questioners. For them, patriotism demanded unquestioning loyalty. However, the questioners would not let up.

⁷ H T Tamplin (ed), 'The Dreyfus Case' (1898) 15 *The Cape Law Journal* 23.

F A Second Letter is Discovered

The case against Dreyfus began to collapse in March 1896 when another letter was intercepted by the same concierge in the German embassy. This could not have involved Dreyfus, safely locked away on Devil's Island. Because a new government had taken office in Paris, the Dreyfus file was reopened. A military official, Georges Picquart became convinced, against his earlier belief, of the innocence of Dreyfus and of the guilt of another army officer, Major Ferdinand Walsin-Esterhazy. Esterhazy, a big spending soldier, originally from Hungary, with a weakness for women and gambling, was identified by his stockbroker, de Castro, who saw a photographic reproduction of the incriminating *bordereau* in a newspaper. It had been published to confirm Dreyfus's guilt. Instead, it shifted a spotlight onto Esterhazy.

Esterhazy demanded a court martial to clear his name. In the heated atmosphere of the times, the army pulled out all the stops to reaffirm the guilt of Dreyfus and to clear Esterhazy. False rumours were circulated that, before departing France, Dreyfus had confessed his guilt to military colleagues. In the face of his astonishing performance at the *École Militaire*, this proved unconvincing. A leak from military headquarters to a sympathetic newspaper contained a mention, for the first time, of the existence of the incriminating file secretly provided to the court martial in 1894. This unintended slip propelled the Dreyfus family to petition the Chamber of Deputies for review of the proceedings. Picquart was transferred to a dangerous post in Tunisia, presumably in the hope that he would die or disappear. He did not oblige. Another conservative newspaper, *Le Matin*, unsympathetic to Dreyfus, boastingly published the *bordereau* as evidence of Dreyfus's guilt and de Castro saw it. The biggest mistake that then occurred was the interference by military operatives in the evidence that had been used to convict Dreyfus.

Forged messages were inserted in the military file, naming Dreyfus as the spy. Eventually these forgeries were revealed as such. One of them, prepared by a master forger, came undone when examination under magnification showed a discrepancy between the size and colour of the lines in the paper at different parts of the reconstructed page. The express identification of Dreyfus's name appeared on paper that had obviously been skilfully inserted in the original page that had contained no such identification. It was like a modern case of reconstruction by photocopying. It showed the extent to which the senior members of the army would go to keep the Dreyfus case closed.

G Émile Zola's Accusation

Unsurprisingly, Esterhazy was acquitted by his court martial. Lucie Dreyfus's petition was rejected by the French legislature. At the end of 1897, the French Prime Minister declared to the National Assembly 'There is no Dreyfus affair whatsoever'. However, by this time, a group of civil libertarians and intellectuals had taken up the Dreyfus cause.⁸

⁸ Winthrop E Dwight, 'An Episode in the Affaire Dreyfus' (1898) 8 *Yale Law Journal* 272, 272.

Émile Zola published the first of a series of public letters urging his fellow citizens to interest themselves in the wrongful conviction of Dreyfus. International handwriting experts denounced the opinion that Dreyfus was the author of the *bordereau*. Zola stepped up his public campaign. On 13 January 1898, in Clemenceau's newspaper *L'Aurore*, Zola wrote a letter to the President of the French Republic. It appeared under a full-page headline, composed by Clemenceau, '*J'accuse ...!*' Writers of great distinction, such as Marcel Proust and Anatole France joined the campaign. However, anti-Semitic hoodlums took to the streets to defend France against 'Masons, Protestants and Jews'.

By February 1898, the French League for Human and Civil Rights was founded to provide a focus for the voices asserting that the Dreyfus conviction was a miscarriage of justice. Contemporaneous with these developments was a heightened resolve by officials to affirm Dreyfus's conviction and to keep his file firmly closed. Their resolve was evidenced by the outcome of Zola's letter. Instead of the reopening the Dreyfus case, it resulted in a long prosecution of Zola for criminal libel. He was convicted and, after appeal, retried and reconvicted. He fled to Switzerland and then to England where he awaited the outcome of his campaign. He was denounced personally and, not content with this, his critics also traduced his father.

Yet by August 1898 senior army officers were also beginning to share some of the doubts about the forged materials discovered in the army files. They moved to dismiss Esterhazy from the army. His dismissal was not for treason, but for 'habitual misconduct'. Even in the face of plain forgeries, the army leadership continued to cover up. Indeed, an inquiry was initiated against Picquart, working for a reopening of the Dreyfus case within the army. He was arrested and imprisoned. Still more violent anti-Semitic demonstrations broke out in Paris. Mobs took to the streets to assert the guilt of Dreyfus and to condemn the lack of patriotism of those who questioned it. Evidence was not the concern of these people. Fear of German spies and of Jewish aliens was what drove them. By December 1898, in response to the League for Human and Civil Rights conservative forces founded the League of French Patriots. It was to survive the outcome of the Dreyfus case and to laud the 'patriotic' officers who had forged documents in order to uphold the army's honour. Eventually, this body was to provide many of the personnel who initiated the anti-Semitic campaigns of Vichy France during the Second World War.

H The Second Trial and its Outcome

All of this notwithstanding, by 1899, despite the passions and the cover-up, it had become impossible to keep the lid on the errors of the Dreyfus trial. A Court of Appeal in June 1899, overturned the court martial verdict of 1894. Dreyfus was summoned back to France for a new court martial. He was remanded in custody at Rennes. Foreign journalists noticed that, in the second court martial, conducted in a local high school, Christian symbols remained on the walls, as if to indicate that in military affairs, secularism would not intrude too far. In August

1899, a fanatic shot Dreyfus's lawyer in an attempt to kill him. But the second trial proceeded a week later. To the astonishment of foreign observers, Dreyfus was not acquitted but, for the second time, this time by majority, he was found guilty of treason. The verdict was qualified by a rider of 'extenuating circumstances'. Dreyfus's imprisonment was reduced to ten years detention.⁹

The outcry against this verdict was enormous and instantaneous. Within days the French Cabinet had recommended that Dreyfus should be pardoned by the President. Dreyfus only accepted the pardon on condition that he could continue to assert and prove his innocence. The President agreed to this stipulation. The pardon issued. The Minister of War declared: 'The incident is over'.¹⁰ Paris was preparing for the inauguration of the Universal Exhibition of 1900. The Chamber of Deputies passed an amnesty law. Many hoped that Alfred Dreyfus would quietly disappear into old age. But the turmoil was not so easily put to rest.

I Vindication and Innocence

Many members of the Chamber of Deputies were gravely disquieted by the official conduct during the affair. This disquiet grew when the army itself, in October 1903, raised the possibility of a further retrial of Dreyfus. In March 1904, the Criminal Chamber of the Court of Cassation granted Dreyfus's request for a reinvestigation of his case. That investigation concluded with an outcome favourable to Dreyfus. The decision was referred to an extraordinary sitting of the Supreme Court of Appeal in November 2004. On 12 July 1906, after still further inquiry, the Supreme Court of Appeal, with all three Chambers of France's highest court sitting jointly, annulled the Rennes verdict. It pronounced the total rehabilitation of Dreyfus. It proclaimed his innocence. A week later in the same courtyard of the *École Militaire* in Paris, Dreyfus was decorated a Knight of the Legion of Honour. When the crowd shouted 'Long live Dreyfus!', he replied in the words he had used in that place twelve years earlier: '*Vive la France!*'¹¹ Picquart was there to witness the scene.

J The Vichy Aftermath

Some observers declared that the ultimate outcome of the Dreyfus affair was a delayed vindication of French institutions and a reaffirmation of civic equality in the face of stigma and discrimination. Yet the legacy of the case was a deep sense of disquiet both by supporters and opponents of Dreyfus. His supporters noted the long interval of denial, forgery and cover-up to which, even in a democratic country like France, great governmental institutions would stoop. His opponents continued to hate those who had supported Dreyfus. They considered that their damaging campaign had questioned the honour of the French army and the nobility of the nation: values that were to be maintained at all costs - even, if necessary, at the sacrifice of a person like Dreyfus. Some of the anti-Dreyfusards

⁹ See Burns, above n 1, 176 describing the Rennes verdict and its immediate annulment.

¹⁰ Jean-Denis Bredin, *The Affair: The case of Alfred Dreyfus* (Jeffrey Mehlman trans, 1986) [trans of: *L'affaire*]; Andrew David, *Famous Political Trials* (1980) 45.

¹¹ Arthur L Goodhart, 'Three Famous Legal Hoaxes' (1968) 6 *Alberta Law Review* 1, 9.

would never believe his innocence. A number of them took their vengeance in the anti-Semitic laws of Vichy France. After 1942, that regime tightened the noose around the lives of the Jewish refugees in France and, ultimately, even French citizens of Jewish origin.

On the perimeter wall of one corner of the *École Militaire* in Paris, where the beginning and the end of the Dreyfus drama played out, is a memorial. It records a group of French Jews ordered to assemble there, who were deported to the Nazi death camps with almost total loss of life and true loss of national honour. Anti-Semitism did not die in France with the rehabilitation of Alfred Dreyfus. It lay in wait for further victims.

What are the lessons for today that we should derive in Australia, as we reflect on the story of Alfred Dreyfus in France a century ago?

II TEN LESSONS FOR TODAY

A *Vigilance Against Miscarriages*

The first lesson is that we must be vigilant against miscarriages of justice. It is easy for the mind, especially the lawyer's mind, to slip into formalism. Easy to forget the ultimate purpose of law and of its institutions: to do justice according to law. The fact that a trial has gone through all the correct procedures does not relieve us of the duty to consider any flaws that are alleged in the process or the outcome that amount to a miscarriage of justice.

Human justice is imperfect. Most serious injustices happen long before cases come before courts. If police investigation is defective or partisan, justice may never be rescued. If the prosecutor does not act fairly, the accusation may never be properly tested. If officials lie and falsely claim (as in the Dreyfus case) that confessions have been made, great wrongs can follow.¹² This is why the High Court of Australia ultimately insisted on verification of confessions to officials, leading Parliaments throughout the country to provide for sound and video recording of them.¹³ Vulnerable and inexperienced witnesses can undermine their own cases.¹⁴ In such instances, it is not enough for a court to admit to lingering 'anxiety'.¹⁵ This was what the High Court did at the beginning and end of its reasons dismissing the appeal of Rupert Max Stuart, an Aboriginal accused of, and sentenced to death for, the murder of a young girl based on a flawed confession.¹⁶ In the end, it was a media campaign, the agitation of civil

¹² *McKinney v The Queen* (1991) 171 CLR 468. Also relevant is the decision upholding the right to legal representation of the indigent in serious criminal trials: *Dietrich v The Queen* (1992) 177 CLR 292.

¹³ See, eg, *Kelly v The Queen* (2004) 218 CLR 216 considering the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 8(1) and *Nicholls v The Queen* (2005) 219 CLR 196 considering the *Criminal Code* (WA) s 570D(2).

¹⁴ *Tuckiar v The Queen* (1934) 52 CLR 335.

¹⁵ *Stuart v The Queen* (1959) 101 CLR 1.

¹⁶ *Ibid* 3, 10 (Dixon CJ, McTiernan, Fullagar, Taylor and Windeyer JJ); cf Michael D Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23 *Adelaide Law Review* 195.

libertarians and the disquiet of some politicians that saved Mr Stuart's life - not the Australian courts of justice.

More recently, there have been other instances of suggested miscarriages of justice where the courts have been divided. The Lindy Chamberlain case is an instance.¹⁷ The eventual outcome of that saga was also outside the courts. Ultimately, it followed a Royal Commission. Yet more recent examples show the increased vigilance of Australian courts against the risks of miscarriage. This is usually a central issue in most criminal appeals.¹⁸

In the *Mallard* case,¹⁹ the importance of the fair conduct of the prosecution was given fresh emphasis by the High Court. In our system of law, the prosecutor for the Crown is not just another litigant, determined to win its case. Like the court itself, the prosecutor is subject to duties of fair conduct, which includes fairness to the accused. This is a universal feature of a just system of criminal procedure.²⁰ We are not exempt from it. Yet the *Mallard* case had earlier come to the High Court and been refused leave to appeal.²¹ I was a party to that refusal. It was only when further evidence was accumulated and analysed by supporters who believed in Mr Mallard's innocence, that the matter was returned to the courts on a petition of mercy: reopened, re-explored and found wanting.

The lesson of the Dreyfus case, and of countless cases since, is that decision-makers who have control over important decisions on behalf of society, must always preserve an open mind. They must never join a popular bandwagon. Society must maintain a questioning attitude towards officialdom. The supporters of Dreyfus elevated a 'duty to question' over the 'duty to obey'.²² Some patriots and institutional conservatives at the time resented this. But in the end, the questioners were proved right.

B Alert to Stigmatised Minorities

The second lesson of the Dreyfus case is that we should be alert to the dangers of prejudice towards stigmatised minorities.

There is no doubt that Dreyfus suffered - and was kept on Devil's Island long after grave doubts about his guilt were demonstrated - because he was a member of such a minority. He was a Jew in a society with widespread and latent anti-Semitism. There are other such minorities, including in Australia. The Aboriginals, like Max Stuart. The communists. Arabs and Muslims. A minority I know well, of roughly the same proportion in society as the Jews: the homosexual minority, still hated, feared and discriminated against, often at the behest of the same religious people who hated the Jews. Convicted prisoners, the mentally disabled and the unconventional are also easy to target.

¹⁷ *Chamberlain v The Queen (No 1)* (1983) 153 CLR 514; *Chamberlain v R (No 2)* (1984) 153 CLR 521.

¹⁸ *Weiss v The Queen* (2005) 80 ALJR 444 where the relevant cases concerning criminal appeals are collected.

¹⁹ *Mallard v The Queen* (2005) 80 ALJR 160.

²⁰ *Ibid* 180-1.

²¹ *Mallard v The Queen* (1997) 191 CLR 646.

²² Burns, above n 1, viii.

The lesson of the Dreyfus affair is that we must be on our guard that prejudices do not affect official decision-making. The objective evidence against Dreyfus was extremely weak. There was no motive, simply contested handwriting evidence. What filled the evidentiary deficit was anti-Semitism. In Australia, we must make sure that we never make up an evidentiary deficit in a case with attitudes of fear or loathing against members of a minority. Everyone in Australia is equal before the law. Attitudes of prejudice sometimes exist on the streets. They have no place in a court of law or other independent tribunal. These institutions do not answer to populism or prejudiced opinion. The commitment to equality before the law is tested by the way we treat vulnerable minorities. Members of the great majority do not generally face this problem.

C Beware of Military Tribunals

Dreyfus was twice convicted by a military tribunal. The first conviction was reached on the flimsiest evidence. The second occurred in the face of demonstrable proof of innocence. Loyalty to the army swamped the evidence on both occasions. One member of the first court martial admitted that he had scarcely looked at the handwriting tendered to secure the conviction. Accusation by the most senior officials of the nation was enough for him to prove the accusation.

Loyalty, love of nation and belief in its institutions are marvellous things. In the modern world, patriotism has its place, at least in sporting contests. But there is a danger of tribunals that operate outside the independent courts deciding questions of liberty. It is why the independence of the courts, and the tenure of the judges, is so important for our freedoms.

An examination of outcomes in the Australian Refugee Review Tribunal, after members were not regularly reappointed, shows a fall-off in decisions favourable to applicants for refugee status.²³ This is what can happen where decision-makers do not enjoy guaranteed tenure. It is true that such guarantees sometimes entail disadvantages and cloak individual inadequacies. But over the centuries, judicial tenure has been a great protection for our liberties. It did not exist in the first or second tribunals that tried and convicted Dreyfus. Those military tribunals were not really independent. They displayed loyalty for their conception of the nation and for their military superiors. An affirmation of civilian rule is crucial to the just trial of serious accusations. It is ironic to read the American comments on the Dreyfus trials in the 1890s and the asserted superiority of American civil courts,²⁴ contrasting those comments with the official defence of military commissions today.

²³ Mary Crock, 'Reviewing the Merits of Refugee Decisions: An evaluation of the Refugee Review Tribunal' (Paper presented at the *Retreating from the Refugee Convention*, Northern Territory University, Darwin, February 1997).

²⁴ Seymour D Thompson, 'The Revision of the Dreyfus Case' (1899) 11 *Green Bag* 9, 13, pointing to the need to 'maintain the supremacy of the civil over the military power, and to purge themselves of the rank corruption and gross injustice which fester in the Dreyfus case'.

In Australia, courts martial are an exception to the general principle of civilian courts for contested federal accusations.²⁵ In this, Australian law normally reflects a longstanding British tradition that restricts courts martial, essentially to military accusations arising out of conduct on the battlefield.²⁶ A recent High Court decision has had the effect of expanding this exceptional military jurisdiction. It was my opinion in that case, and still is, that this is not a good time to be expanding the jurisdiction and powers of military tribunals.²⁷ Doing so is contrary to our constitutional history and, in my view, to the constitutional text.

Anyone in doubt about the defects that can intrude into military tribunals in fraught circumstances should consider the Dreyfus case, and especially the second trial at Rennes. They provide a reason for deep concern, mentioned by many observers, about the proposed military commissions in the United States for trying the prisoners kept for four years in the military base at Guantanamo Bay.²⁸ The subordination of military power to civilian power is one of the key elements in a successful modern democracy. We must keep it unimpaired in contemporary Australia.

D Beware of Secret Trials

The Dreyfus case also teaches the great care that must be observed in deciding serious accusations behind closed doors. Hearing and deciding cases in secret, based on secret evidence not made available to an accused or the public, was a serious flaw in Dreyfus's first trial. It was only repaired when, later, mistakenly hoping that it would condemn Dreyfus, a facsimile of the document on which he had been condemned, the *bordereau*, was published by a newspaper aiming to satisfy its readers of his guilt.

A feature of our legal system, inherited from Britain, is a revulsion against secret trials.²⁹ Even where there is confidential information, courts must ordinarily be trusted to adopt expedients to keep the trial, and the evidence, open whilst treating sensitively material truly recognised as sensitive. The light of public scrutiny must be shone on all serious trials. Otherwise, they may become a cosy self-fulfilling enterprise denying fundamental rights to the accused.

The fact that national security was repeatedly asserted as the reason for the secrecy of the Dreyfus trial should teach us the need for appropriate caution about such claims. But for the gradual emergence of the truth, the army and many other powerful interests in France, would have closed the Dreyfus case. Most people

²⁵ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

²⁶ Discussed in *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 341 ('*Re Aird*') citing *Re Tracey* (1989) 166 CLR 518, 558 and *Burdett v Abbot* (1812) 4 Taunt 401, 449-50 [128 ER 384, 403].

²⁷ *Re Aird* (2004) 220 CLR 308, 350-355 [134]-[152].

²⁸ Cf *Hamdi v Rumsfeld*, 159 L Ed 2d 578 (2004); *Hamdan v Rumsfeld* 126 S Ct 2749 (2006); Ian Barker, 'Human Rights in an Age of Counter-Terrorism' (2005) 26 *Australian Bar Review* 1, 10

²⁹ See, eg, *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 50-8; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465; *Re an Application by the Chief Commissioner of Victoria Police* (2005) 79 ALJR 881, 900; cf *Scott v Scott* [1913] AC 417, 437-8.

would quickly have forgotten him. He would have rotted away on Devil's Island. Politicians of all persuasions, and the demonstrators on the streets, would have continued to denounce Dreyfus as a traitor. It was only a band of supporters, and the gradual emergence of the truth, that saved this innocent man from that fate. That was not the outcome of the closed and secret trial which officialdom supported and defended.

E Protection for People of Conscience

The Dreyfus case also demonstrates the importance of protecting, and honouring, people of conscience. Protests might have been expected from Dreyfus's wife and brother: declaring his innocence and working for his vindication. Families are like this. Often they cling to claims of innocence in the face of overwhelming evidence to the contrary. The community tends to discount family claims, as the French community originally did in the case of the Dreyfus family's pleas.

What changed the outcome of the Dreyfus case was the adherence to the Dreyfus side of intellectuals and civil libertarians. In Australia, we do not much like the notion of intellectuals. They are called 'egg-heads'. They often fall as the first victims to the tall poppy syndrome that has existed in Australia since the earliest convict days. Further, there are people in our own society who condemn civil libertarians and reject their role. On some occasions, it is true, civil libertarians buck the system and challenge authority with its important tasks to perform. Yet, it was the Dreyfus case that led to the establishment in 1898 of the French League for Human and Civic Rights, the equivalent of the Australian Councils for Civil Liberties. Writers, philosophers, journalists and lawyers joined the League. It focussed the gathering disquiet about the Dreyfus conviction. It mobilised the belief that a serious wrong should be righted.

A British admiral who brought his nuclear fuelled warship into Sydney Harbour had to combat Australian protestors, one of whom tried to clamber on board. Far from joining in the local denunciations of the protestors, voiced by embarrassed local authorities, the admiral defended their right to protest and to object. He said that, indeed, this was the ultimate role of the defence forces: to protect a free society in which people could protest. As Justice Murphy once put it, the world has been greatly improved by protestors objecting to injustice as they saw it. Sometimes they have brought the world around to their persuasion. Mr Neal, he famously declared, was 'entitled to be an agitator'.³⁰

It is necessary to acknowledge that, eventually, some of the crucial converts to the Dreyfus cause were officers of the French army. Commandant Georges Picquart became convinced that Dreyfus had been framed. He paid for his conviction, and the publication of the reasons for his anxiety, by being arrested, court martialled and imprisoned. Fortunately, he lived to see the vindication of his suspicions. He was present when Dreyfus was welcomed back to the *École Militaire* in 1906.

³⁰ *Neal v The Queen* (1982) 149 CLR 305, 317 (Murphy J).

Yet when he acted as he did, Picquart could not have known the outcome.

Some whistle-blowers are obsessive, misguided, intolerant people who will never accept overwhelming evidence. But, as Picquart illustrates, some are vital agents for truth. Where it is important, and a person is suffering loss of liberty and reputation, society must protect conscientious officials and others who adhere to their understanding of the truth, even if sometimes they later prove wrong and misguided.

Picquart was not alone. A decade after Dreyfus's conviction and following his pardon, more senior army officers began to have, and to express, doubts. True, the army leadership was complicit in the cover-up. Most of its leaders never accepted Dreyfus's innocence. But there were military people and officials of conscience and integrity who were eventually won round. Sadly, it took a very long time.

F *Scrutiny of Authority*

The Dreyfus affair is a story about spies. Acting on partial information, embracing a theory, defending national security and honour as they saw it, their 'intelligence' and 'proof' took a great democratic republic, France, down the road where it seemed willing to sacrifice an individual to defend the honour of the nation and its army.

The cover-up was remarkable. When a military officer prepared forged documents, and slipped them into the military file, he thought his ploy would never be discovered. It would help prove what he 'knew', in any case, was the truth. But the forgery was discovered. When this perfidy was revealed, the army officer committed suicide. Immediately, he was praised for his actions. They were excused as patriotic. A national collection was invited for the support of his widow.³¹

There are people who are so blinded by their concept of duty and patriotism or distorted by their participation in espionage, that they forget society's commitment to truth and justice. A civil society, respecting liberty, must always be on its defensive against such honour-blind people. It must beware of their cover-ups. It must retain a healthy scepticism about their accusations of anti-State activity. The terrible wrongs of the Gestapo in Germany, of the NKVD, Stalin's secret police, of Pol Pot's Khmer Rouge, and even of the Un-American Activities Committee in the United States show what grave wrongs can be done in the name of patriotism and national security.

Every society has a right and duty to protect its citizens against genuine affronts to security. But often, in the long run, the best guarantee against attacks on society is a steady adherence to the institutions and ways of a temperate democracy. This steady adherence was demonstrated in Australia in 1951 by the

³¹ Pierre Quillard, 'The Henry Monument' cited in Burns, above n 1, 130.

decision of the High Court in the *Communist Party* case.³² That decision invalidated the law designed to outlaw Australian communists. That case will always stand in marked contrast to the decision of the Supreme Court of the United States, at the same time, upholding a similar law to deprive communists in that country of their rights to assembly and to free speech, although expressly guaranteed in the American Constitution.³³

G Maintenance of Secularism

Another lesson of the Dreyfus case is the importance of keeping religious and like beliefs separate from the institutions of the State. It is not a coincidence that, in December 1905, in the aftermath of the vindication by the Criminal Chamber of the Court of Cassation of Alfred Dreyfus's appeal, a law was enacted by the French legislature establishing clearly the separation of Church and State in France.³⁴

France had been moving in the direction of secularism throughout the nineteenth century. However, the strong support for the forces lined up against Dreyfus by anti-Semitic elements in the Church, army and politics of France, led to a feeling of revulsion against these institutions when the injustice and cover-ups of the Dreyfus case were laid bare. Secularism was reinforced in France. It is still strong.

A study of Australian Church journals in the years of the Dreyfus affair shows that they never reflected the antagonistic attitude to Dreyfus revealed in various Church-supported newspapers and other publications in France.³⁵ Instead, the Australian religious press noted the suggested double standards of the English media towards the French trials and the trials of the Irish and Boer accused in the British Empire. But the strong bias against secret military tribunals, that has long existed in English-speaking countries, was evident in Australia.

The institutions that grew up supposedly to defend patriotism and the honour of the army and the nation in the Dreyfus case, were later to flourish and to spawn the extremist politicians and officials who led the anti-Semitism of the Vichy period of French history. It was not a noble time for Christian adherents or for the universal principles of their faith. It was a lesson of the need to keep the religious dimension private and for the State to protect, and defend equally all people in its jurisdiction, whatever their religion, ethnicity or other features of special difference.

If anything, the separation of religion and the State has become more important and urgent as the decades have passed. In the modern age, insistence upon legal

³² *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

³³ *Dennis v The United States*, 341 US 494 (1951), Vinson CJ for the Court; Black and Douglas JJ dissenting.

³⁴ See Thornton-Smith, above n 5, 76ff for the concerns in the Australian Catholic community about the secular movement in France as it affected the Church.

³⁵ Thornton-Smith, above n 5, 76ff.

enforcement of religious beliefs is again intruding into law and governance.³⁶ Demands that religious law should predominate over the laws made by a civilian Parliament need to be resisted where they affect the basic civic rights of others. We know, from contemporary experience, that religious majorities sometimes target vulnerable minorities. Those minorities may be Jews. But they may also be gays. Or members of the Baha'i faith. Muslims. Or in some countries, Christians. In a modern, democratic and pluralistic State, the law should be there for everyone. People should not be punished for changing their religion or renouncing religion altogether. These are fundamental individual human rights.

Respect for the right to religion and for the dignity of each religion does not extend to punishing people because they are of a different religion or because of characteristics attributed to that religion. I hope that we have grown out of sectarian attitudes in Australia. Such attitudes, between Catholics and Protestants and against Jews, were still present in the Australia of my youth. The wrongs of the Dreyfus accusations demonstrated the perils of anti-Semitism.

Witnessing them, Theodor Herzl, a founder of modern Zionism, reporting for the Viennese newspaper, *Der Judenstaat*, came to the conviction that a separate national homeland for the Jews was essential. If Jews could not be protected effectively in their liberties, even in comparatively liberal and secular France, Herzl believed they were in peril everywhere. The State of Israel was thus an indirect outcome of the affront to justice of the Dreyfus affair. In all societies, lawyers and other citizens must build a protection for religious and like minorities. However, there must equally be an insistence on respect, under the law, for religious freedom. Religious freedom includes the right to change one's religion or to renounce religion altogether. The killing of apostates and of gays, women or other groups on supposed religious grounds has no place in the modern world. Respect for religious or cultural values must not involve the deprivation of the fundamental human rights of non-adherents or minority adherents.³⁷

H Ambivalent Role of the Media

The media played an ambivalent role during the Dreyfus affair. On the one hand, in the earliest years, sections of the media inflamed the anti-Semitism so evident in the news reports and editorials of the Church-supporting newspapers *La Libre Parole* and *La Croix*. These journals played their part in suppressing the early attempts to right the wrong of the Dreyfus conviction. They affirmed his guilt substantially because of his Jewishness.

On the other hand, the publication in *L'Aurore* of the famous letter by Émile Zola,

³⁶ See, eg, Rachel A Fenton, 'Catholic Doctrine Versus Women's Rights: The new Italian law on assisted reproduction' (2005) 14 *Medical Law Review* 73, 75 concerning recent polarisation in the Italian Parliament over a law on assisted reproduction. There are many examples in many countries on many issues.

³⁷ See, eg, the provision on this subject in the *Universal Declaration on Cultural Diversity* of 2 November 2001 ('UNESCO') and the *Universal Declaration on Bioethics and Human Rights* of 19 October 2005 (art 12); cf Ronald Inglehart and Pippa Norris, 'The True Clash of Civilisations' (2003) March/April 2003 *Foreign Policy* 63.

'*J'accuse ...!*' was a turning point in the campaign for justice for Dreyfus. Liberal newspapers took up his cause. So did journalists from overseas.³⁸ In a sense, the case became an early global illustration of infotainment. Part of the media attention arose out of the genuine concern of journalists and editors, affronted by the cover-up and injustice. Others just liked a good story. Not a few, in Australia and England, enjoyed pontificating about the superiority of British justice.

Ultimately, as Lord Russell of Killowen reported to Queen Victoria in 1899, the rehabilitation of Dreyfus was 'brought about mainly by the efforts of Frenchmen'. His trial had not occurred in the civil courts where his conviction would much earlier have been quashed.³⁹ Even Lord Russell felt obliged to acknowledge that 'with all his grossness and exaggeration, the name of Zola ought not to be omitted'. Where the media failed was in identifying the systemic and deep-seated problems which the Dreyfus case illustrated. Amongst these, the issues of ultra-patriotism, the misuse of claims of national security and the ubiquity of anti-Semitism were inadequately addressed.

I Need for Institutional Changes

The need for institutional changes and improvements are illustrated by what happened to Alfred Dreyfus. His case sounded a warning about anti-Semitism. Inadequately attended, that scourge was to produce unparalleled suffering fifty years later, including in France.

Thinking on the Dreyfus case today, we can conclude that improvements in society's institutions are needed, including sometimes in the attitudes of officials who constitute those institutions. Minimising the role of military tribunals; resisting secret trials; examining closely claims of national security; protecting stigmatised minorities: upholding secularism. All of these are shown in stark relief by what happened to Alfred Dreyfus.

In many countries the awful happenings of the first half of the twentieth century, including the Dreyfus affair, led ultimately to the acceptance after 1945 of notions of legally enforceable fundamental human rights. In Australia, we have accepted those notions as binding on the country, in the form of international treaty law. In some instances, we have also translated the notions into enforceable Australian law - such as the law on refugees, the law against racial discrimination, against sex discrimination and on the ground of sexuality, and on other topics. But we have still not taken the final institutional step of adopting, nationally, an enforceable Australian charter of fundamental rights. Even Britain, Canada and New Zealand, in their different ways, have done so, as has India, South Africa and, long since, the United States of America. Of course, such charters are no guarantee against wrongdoing, cover-up and official mistakes. But they are an

³⁸ See, eg, *The Times of London* (London), 23 December 1894 in Burns, above n 1, 46-8.

³⁹ Letter from Lord Russell of Killowen to Queen Victoria, 16 January 1899, extracted from R Barry O'Brien, *The Life of Lord Russell of Killowen* (1901) in Burns, above n 1, 152.

institutional protection for what are partly institutional problems. At the least, they shore up the values that set society's standards which need to be given weight when cases like Dreyfus come along.

J Proffering Apologies for Wrongs

There is one final point. It is also illustrated by the Dreyfus affair.

In France, there was a persistent reluctance of the old anti-Dreyfusards to acknowledge the wrongs done to Alfred Dreyfus. These people would blame everything and everyone except the elements that they adored - in the government, the army and the Church who had assailed Dreyfus and played on anti-semitic sentiment to keep him imprisoned as an embarrassment who had attracted 'unpatriotic' and 'suspect' supporters. That sentiment came to the fore again in France under the Vichy regime between 1940 and 1944.

By 1985, the French government, at its highest level, determined on a corrective. The socialist President, François Mitterand, commissioned a statue of Alfred Dreyfus. It was presented to the army for placement in the *École Militaire*. The army declined to accept it.⁴⁰ In 1988 it was placed in a corner of Tuileries Gardens in Paris. Soon after, it was covered with painted swastikas. Anti-Semitic profanities were marked on Dreyfus's tomb at the Montparnasse cemetery in Paris.

On the centenary reflections on Dreyfus's arrest in 1994, an official military history was published. Whilst literally accurate, it omitted many details and ignored the crimes committed by supposed 'patriots' in the name of the honour of the French army. The official account, written by Colonel Paul Gaujac, declared that 'Dreyfus's innocence is the thesis generally accepted by historians'.⁴¹ That observation showed that some people will never admit error. For them Dreyfus's guilt is still an open question - an equal hypothesis or an arguable theory.

In 1998, President Jacques Chirac took a bold and healing step. A conservative politician, he commemorated the centenary of Émile Zola's public letter '*J'accuse...*'. It had been written by Zola as a letter to the President of the French Republic. At last, a President of the Republic responded. He took the occasion to remind his fellow citizens of the 'sinister forces, intolerance, injustice' that can 'creep into the State's highest level'. Half a century after Vichy, and a century after Dreyfus's ordeal, it was timely to make that acknowledgment frankly, openly and humbly. It was an acknowledgment of 'what Émile Zola and Alfred Dreyfus are saying to us across the years'.⁴²

⁴⁰ Burns, above n 1, 189.

⁴¹ Paul Gaujac, 'A Theory of Innocence' quoted from *Le Monde* (Paris), 10 February 1994 in Burns, above n 1, 189-90.

⁴² Jacques Chirac, Letter of the President of the Republic on the Centenary of '*J'accuse*', January 1998, in Burns, above n 1, 192.

President Chirac emphasised the suffering of Alfred Dreyfus. He also pointed out that Dreyfus had known how to forgive. He declared that it is patriots of this kind, not shallow, prejudiced, discriminating, covering-up nationalists, who constitute 'the conscience of humanity'. It is they who teach their fellow citizens that love of country includes rejection of intolerance and hatred.⁴³ Blind patriotism and unquestioning belief in the nation, whatever its wrongs, is not the ethos of a modern civic society.

We in Australia have not condemned a fellow citizen for treason to an equivalent of Devil's Island or Guantanamo Bay. Indeed, accusations of treason are exceedingly rare in this country's history. But Australians have certainly made mistakes. Some we have repaired. Others we have failed to repair. We have shown discrimination against vulnerable minorities. Discrimination still exists. It exists not just in the streets. It exists in the law, in legal ways and in our hearts. We must learn to recognise these mistakes and, like President Chirac, where wrongs are shown, to acknowledge them, to express regret for them, to learn from them and to teach the next generation. That is the way to sustain the movement towards greater human enlightenment.

The Dreyfus case speaks powerfully to Jewish people everywhere, including in Australia. This is especially so because of the genocide that followed. But it also speaks clearly of wrongs done to Aboriginals, to Asian Australians, to Arab and Islamic Australians, to gays and other sexual minorities, to women, to the very old and young, to the mentally and physically disabled, to prisoners, refugees and to unconventional people. We must not think that these wrongs are over or that full enlightenment has arrived. Dreyfus belongs to Jewish people. But he also belongs to all human beings. Down the years, and even down the centuries, his cry as he was sent to exile from the courtyard of the *École Militaire* in Paris will ring out as a warning against miscarriages of justice:

'Innocent! Innocent! Vive la France!'

⁴³ Ibid 193.