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HUMAN RIGHTS LECTURE 2006

DUBLIN IRELAND 29 JUNE 2006

THE DREYFUS CASE A CENTURY ON -  
TEN LESSONS FOR IRELAND & AUSTRALIA

The Hon Justice Michael Kirby AC CMG

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THE DREYFUS AFFAIR

*A centenary reflection:* It may seem strange for an Australian judge to cross half the world to come to Dublin to talk about the Dreyfus affair. Yet as I shall show, it is a tale worth retelling because it has modern resonance. The case has lessons both for Ireland and Australia. Indeed, as I hope to demonstrate, it is remarkably up-to-date in the instruction it gives to contemporary citizens and particularly to lawyers.

It is exactly a century since Alfred Dreyfus, the French soldier who was Jewish, was finally cleared of the offence of high treason. At the time, he was described as the most famous man in the world since the death of Napoleon<sup>1</sup>.

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\* An earlier version of this lecture was delivered in Melbourne, Australia, on 26 March 2006.

Footnote continues

Yet today, in both of our countries, the events involving Dreyfus, the story of the trials he underwent on the charge of providing military secrets to Imperial Germany, is largely forgotten. My purpose is to retrieve memories of what happened. In his *Philosophy of History*, Hegel remarked that people and governments have never learned anything from history. I am not sure that this is true of the Irish people. But I am here to ensure that we rekindle the memories.

In its time, Dreyfus's ordeal became an illustration of how human institutions can go wrong. Lawyers know that human justice can fail. Pride and patriotism can swamp concern for the individual. All too easily, this can happen when that individual is a member of a minority subjected to irrational hatred - as Dreyfus, the Jew, was and as others in the century that followed have often been.

The Dreyfus case was a warning 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. The

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\*\* Justice of the High Court of Australia. The author acknowledges the assistance of Mr Adam Sharpe, legal research officer of the High Court of Australia, with Irish materials.

<sup>1</sup> M Burns, *France and the Dreyfus Affairs* (Bedford/St Martin's, 1999), vii.

warning was not sufficiently recognised a century ago. We should reflect on its lessons today so that we do not repeat its mistakes.

It is in the detail, that the real wrongs of the Dreyfus affair are to be found. The greatest wrong was not the mistaken conviction of Dreyfus for treason. No human effort is wholly immune from error<sup>2</sup>. What was important was how the conviction came about in the first place; how it was reconfirmed in the face of mounting evidence; and how ultimately institutions of government and other powerful forces elevated the insistence on Dreyfus's guilt above the proof of his innocence. Maintaining 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 to honour Dreyfus are desecrated. In France, anti-Semitic murders still happen<sup>3</sup>. In Australia, violence occurs against ethnic and religious minorities that shocks citizens who are convinced that the multicultural ideal will spare the country from the worst of such prejudice. Although sectarian violence has greatly receded in Ireland, it still exacts a price, as was seen in the recent murder in Ballymena.

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<sup>2</sup> E C Hughes, *Men and Their Work* (1958) cited in O Quick, "Outing Medical Error" (2005) 14 *Medical Law Review* 22 at 23.

<sup>3</sup> S Rotella, "Racism a Factor in Murder of Jew Says Magistrate", *Sydney Morning Herald*, 22 February 2006, p 13 (concerning the death in France in on 13 February 2006 of Ilan Halimi).

So come back a hundred years to when the Dreyfus affair was on the lips of most informed people<sup>4</sup>. How did this it happen? Why should we today give any thought to events that occurred so long ago in a world so different?

*Sources of anti-Semitism:* To find the answers to these questions it is necessary to dig deep into an unattractive but common human tendency. A root cause of the Dreyfus affair was anti-Semitism. The fear and hatred of Jews in France arose because of several factors: their minority numbers; their exclusive, counter-majoritarian, habits; their close involvement in money lending and finance; their often unusual clothing; their distinct culinary habits; 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 for release and said to Pilate, of Jesus, "His blood be on us, and on our children"<sup>5</sup>. Those nine words occasioned a terrible hatred.

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<sup>4</sup> See eg *Sydney Morning Herald*, 11 September 1899; *The West Australian*, 12 September 1899 cited in H L Rubinstein, "'A Disgrace to Christendom': Australian Reactions to the Dreyfus Affair" in (1994) 12 *Journal of Australian Jewish Historical Society* 467 at 467-468.

<sup>5</sup> St Matthew's Gospel, Ch 27, v 25. See also C Thornton-Smith, "Reactions of the Australian Catholic Press to the Dreyfus Case"

Footnote continues

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

*Revolutionary and military causes:* It was a mark of the acceptance 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 endured, it waned in nineteenth century France. Gradually, notions of secularism, which reserved religion to a private zone, began to prevail. This was a feature of France in the *Belle Epoch* that reassured Dreyfus, when accused, that he would be protected by the French legal system against any lingering hostility against Jews. After all, decades earlier, Christian symbols had been removed from French courthouses. The French *Declaration on 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, still proud of the Napoleonic conquest of Europe, was a great blow to French honour and pride. The catastrophe was commonly attributed to work of 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 collapse, 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 many of those who elected to live in France suspect in the eyes of fellow citizens. The popular Parisian newspapers pandered to these fears. This was especially so if those who remained were German-speaking, with German-sounding names or foreign appearance. It was particularly so if they were of the Jewish minority.

*Discovery of the bordereau:* Into this mixture of fear, paranoia and suspicion intruded a remarkable event<sup>6</sup>. A document was discovered, apparently by a French concierge working in the Germany embassy in Paris. It was handed to French security which then worked in a section of the General Staff of the Army. Torn into six pieces, this memorandum (or *bordereau*) was a communication in

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<sup>6</sup> M P Johnson, *The Dreyfus Affair: Honour and Politics in the Belle Epoque* (1999).

French, apparently addressed to a German contact, about military secrets, including details about a new classified French field gun. The document 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, he lived an unusually quiet family life. His misfortune was that the leaders of the French General Staff were openly anti-Semitic. They were determined, without delay, to rid the Army of the author of the incriminating document.

The *bordereau* was discovered in September 1894. By late October 1894, the conservative and right-wing Christian newspaper, *La Libre Parole*, was fed the news that the suspect in the spying was a Jewish officer. On a pretext, Dreyfus had been asked by a superior 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.

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

As is now known, contrary to the basic rules of procedural fairness and also the French law governing courts martial, an officer of the War Ministry provided a secret dossier to the members of the court martial whilst they were deliberating. The dossier contained a letter from an Italian military attaché inculpatng Dreyfus. Neither Dreyfus nor his lawyer was given access to this secret evidence. Nor did they know of its provision to the tribunal. The course adopted was later justified in the name of national security<sup>7</sup>. Vehemently professing his innocence, Dreyfus was unanimously

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<sup>7</sup> H T Tamplin (ed) "The Dreyfus Case" (1898) 15 *The Cape Law Journal* 23.

convicted of treason. He was condemned to military degradation and perpetual deportation.

In an electric 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 downcast. 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". 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. Yet he was far from humbled. Repeatedly he declared "*Innocent! Innocent! Vive la France!*". It was an unsettling response and it led several who witnessed it to quit the assembly in a state of disquiet.

However, the vast majority of witnesses were relieved by the quick resolution of the disgraceful episode. Dreyfus's protestations at the *École Militaire* 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 the treacherous spy so swiftly 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 of the centre, jumped on the bandwagon of excoriation. Dreyfus was sentenced to exile to Devil's Island off the coast of French Guyana, as soon as his petition for leave to appeal was rejected. On that island, he spent his time in solitary confinement in a malarious environment. But his spirit was not broken; nor that of his wife and brother.

A saga of iniquity began that represents the essence of the Dreyfus affair. The Army had wanted no publicity and a quick conclusion to the matter. No motive had been shown why a wealthy captain, with a promising career and quiet domestic life, would have acted as claimed. The motive hinted at 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 to the institutions of the state. Yet the questioners would not let up.

*A second letter is discovered:* The case against Dreyfus began to collapse in March 1896 when a further letter was intercepted in the German embassy. This could not have been written by Dreyfus. He was safely locked away on Devil's Island. Because a new

government had taken office in Paris, the Dreyfus file was reopened. Against his earlier belief, a military official, Georges Picquart, became convinced 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 and he recognised the writing. The facsimile had been published to confirm Dreyfus's guilt and to still the doubts. Instead, it shifted a spotlight to 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 had been 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 story proved unconvincing. A leak from military headquarters to a sympathetic newspaper contained a mention, for the first time, of the existence of the incriminating secret file that had been provided to the court martial in 1894. This unintended slip propelled the Dreyfus family to petition the Chamber of Deputies for a review of the proceedings. The Army transferred Picquart to a dangerous post in Tunisia, presumably in the hope that he would die or disappear there. Picquart did not oblige. Another conservative newspaper, unsympathetic to Dreyfus, *Le Matin*, boastingly published the

*bordereau* as evidence of Dreyfus's guilt and de Castro saw it. However, an even bigger mistake was made. It involved the interference by military operatives in the evidence that had been used to convict Dreyfus.

Forged messages were inserted in the evidence 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 identification of Dreyfus's name appeared on paper that had obviously been skilfully inserted into the original that had contained no such identification. It was like a modern case of reconstruction by photocopying. It showed the extent to which elements in the Army would go to keep the Dreyfus case closed.

*Émile Zola's accusation:* 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". Yet a group of civil libertarians and intellectuals had taken up the Dreyfus cause<sup>8</sup>. Their intervention was to prove decisive.

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<sup>8</sup> W E Dwight, "An Episode in the Affaire Dreyfus", 8 *Yale Law Journal* 272 at 272 (1898).

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 opinions that had declared 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 ...!*". French authors of great distinction, such as Marcel Proust and Anatole France, joined the campaign. But anti-Semitic hoodlums took to the streets to defend France against "Masons, Protestants and Jews".

By February 1898, the French League for Human and Civic 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 official resolve to affirm Dreyfus's conviction and to keep his file closed and out of public scrutiny. This resolve was at first vindicated by the outcome of Zola's public letter. Instead of the reopening the Dreyfus case, it resulted in a long prosecution of Zola for criminal libel. He was convicted and, after an appeal, retried and reconvicted. He fled to Switzerland and then to England where he awaited the outcome of the campaign. He was denounced personally and, not content with this, his critics also traduced his father.

Yet by August 1898 more senior Army officers were beginning to share some of the doubts about the forged materials inserted into the Army files. They secured the dismissal of Esterhazy from the Army. When this occurred it was not for treason, but for "habitual misconduct". Yet even in the face of plain forgeries, the Army at its highest level continued to cover up. Indeed, an inquiry was initiated against Picquart, on account of his work for a reopening of the Dreyfus case from within the Army. Picquart was arrested and imprisoned. Still more violent anti-Semitic demonstrations broke out in Paris. Mobs in the streets asserted the guilt of Dreyfus and condemned the lack of patriotism of those who questioned that guilt. Evidence was not the concern of these people. Fear of German spies and of Jewish aliens was what drove them on. By December 1898, in response to the activities of 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.

*Second trial and its outcome:* All of this notwithstanding, by 1899, despite the cover-up, it had become impossible to keep the lid on the errors of the original Dreyfus trial. In June 1899 a Court of Appeal overturned the court martial verdict of 1894. Dreyfus was

brought 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. The second trial opened a week later. Yet to the astonishment of foreign observers, Dreyfus was not acquitted. For the second time, this time by a majority verdict, 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<sup>9</sup>.

The outcry against the second verdict was instantaneous and overwhelming. 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 establish, his innocence. The French President agreed to this stipulation. The pardon issued. The Minister of War declared: "The incident is over"<sup>10</sup>. 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

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

<sup>10</sup> J D Bredin, *The Affair: The Case of Alfred Dreyfus* (1986); A David, *Famous Political Trials* (Lerner, 1980) at 45.

disappear into obscurity and old age. But the turmoil was not so easily put to rest.

*Vindication and innocence:* Several 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 on charges of treason. 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 acquittal and total rehabilitation of Dreyfus. Exactly a century ago it proclaimed Dreyfus's 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!*"<sup>11</sup>. Picquart was there to witness the scene.

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<sup>11</sup> A L Goodhart, "Three Famous Legal Hoaxes" (1968) 6 *Alberta Law Review* 1 at 9.

*The Vichy aftermath:* A hundred years ago many observers declared that the ultimate outcome of the Dreyfus affair was a delayed vindication of French institutions and a reaffirmation of the civic equality of all citizens in the face of stigma and discrimination. Yet the case left a deep sense of disquiet among both supporters and opponents of Alfred 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 and high office-holders would stoop. His opponents continued to hate those who had supported Dreyfus. They considered that their damaging campaign had undermined French institutions and questioned the honour of the French Army and the nobility of the nation: values that should be maintained at all costs - even, if necessary, at the sacrifice of a person like Dreyfus. Some of the anti-Dreyfusards 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 outer perimeter wall in one corner of the *École Militaire* in Paris, where the beginning and the end of the Dreyfus drama was played out, is a memorial. It records a group of French Jews who were ordered to assemble there, and were deported to the Nazi death camps with almost total loss of life and real loss of national

honour. Anti-Semitism did not die out in France with the rehabilitation of Alfred Dreyfus. It lay in wait for further victims.

So what are the lessons for today that we should derive in Ireland and Australia, as we reflect on the story of Alfred Dreyfus in France a century ago? I do not presume to recount all of the lessons for Ireland. It would be inappropriate for me to do so. Yet there surely are lessons. Many would be the same as those that we can see in Australia where so many descendants from this nation have made their lives.

#### TEN LESSONS FOR TODAY

*Vigilance against miscarriages:* The first lesson is that, whoever we are, but especially if we are judges and lawyers, we must be vigilant against miscarriages of justice<sup>12</sup>. 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. The fact that a trial has gone through all the correct procedures, and ostensibly conformed to legal forms, 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.

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<sup>12</sup> See AAS Zuckerman, "A Strategy for Reducing the Incidence of Miscarriage of Justice" 44 *Northern Ireland Legal Quarterly* (1993) 3.

Many 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 an accused has confessed, great wrongs can follow<sup>13</sup>. This is why the High Court of Australia, in a series of decisions in the 1980s and 1990s, ultimately insisted on verification of confessions to officials. This insistence led Parliaments throughout the country to provide for sound and video recording of them<sup>14</sup>. Vulnerable and inexperienced witnesses can sometimes undermine their own cases<sup>15</sup>. In such instances, it is not enough for a court to admit to lingering "anxiety"<sup>16</sup>. Yet this was what the High Court did at the beginning and end of its reasons dismissing an appeal of Rupert Max Stuart, an Aboriginal accused of, and sentenced to death for, the murder of a young girl based on an

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<sup>13</sup> *The Queen v McKinney and Judge* (1991) 171 CLR 468. Also relevant was the decision upholding the right to legal representation of the indigent in serious criminal trials: *Dietrich v The Queen* (1992) 177 CLR 292; cf I Dennis, "Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions" [1993] *Public Law* 291 at 291-301.

<sup>14</sup> 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).

<sup>15</sup> See eg *Tuckiar v The King* (1934) 52 CLR 335.

<sup>16</sup> *Stuart v The Queen* (1959) 101 CLR 1.

uncorroborated and flawed confession<sup>17</sup>. In the end, it was a media campaign, the agitation of civil libertarians and the disquiet of some politicians and a Catholic priest, Father Dixon, that saved Max Stuart's life. It was not the Australian courts of justice.

There have been other recent instances of suggested miscarriages of justice in Australia where the courts have been divided. The Lindy Chamberlain case is an instance<sup>18</sup>. That case involved the trial and conviction of a young mother whose baby disappeared near Ayers' Rock in the centre of Australia. A wild dog (dingo) was first blamed for the death of the baby. The mother and her husband were members of a small minority religion. There was much media antagonism towards the mother. The mother was found guilty by a jury and convicted of murder of her baby. Once again, the eventual outcome of the saga was secured outside the courts. It followed a Royal Commission of Inquiry. Many more recent examples show an increased vigilance of Australian courts against the risks of miscarriage. This is usually a central issue in most criminal appeals<sup>19</sup>.

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<sup>17</sup> *Ibid*, at 3, 10 per Dixon CJ, McTiernan, Fullagar, Taylor and Windeyer JJ; cf M D Kirby, "The Stuart Case - Black and White Lessons for the Australian Judiciary" (2002) 23 *Adelaide Law Review* 195.

<sup>18</sup> *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521.

<sup>19</sup> *Weiss v The Queen* (2006) 80 ALJR 444 where the relevant cases concerning criminal appeals are collected.

In the recent case, *Mallard v The Queen*<sup>20</sup>, the importance of the fair conduct by the prosecution to just outcomes in all criminal trials in Australia was given fresh emphasis by the High Court of Australia. In our criminal justice system, the prosecutor 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 fair criminal procedure<sup>21</sup>. Courts themselves are not exempt from it. The *Mallard* case had come to the High Court in 1997 and Mr Mallard had been refused leave to appeal<sup>22</sup>. I was a party to that refusal. It was only when further evidence was gathered and analysed by supporters, who believed in Mr Mallard's innocence, that the matter was returned to the courts on a petition of mercy. Only then was the evidence reopened, re-explored and found wanting. Even then, the petition was rejected in the intermediate court. But it was unanimously upheld in the High Court of Australia. Mr Mallard's decade in prison for murder was ended. Sadly there have been similar cases of miscarriage of justice in Ireland and Britain<sup>23</sup>. Many

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<sup>20</sup> *Mallard v The Queen* (2006) 80 ALJR 160.

<sup>21</sup> *Mallard v The Queen* (2006) 80 ALJR 1 at 8 [68]ff.

<sup>22</sup> Noted *Mallard v The Queen* (1997) 191 CLR 646.

<sup>23</sup> Lord Steyn, "Human Rights: The Legacy of Mrs Roosevelt" [2002] *Public Law* 473 at 473-474.

wrongful Irish convictions have taken more than a decade to be uncovered and corrected<sup>24</sup>.

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 retain an open mind. They must never join a popular bandwagon. And society must maintain a questioning attitude towards officialdom. The persistent supporters of Dreyfus elevated a "duty to question" over the "duty to obey"<sup>25</sup>. Some patriots and institutional conservatives at the time deeply resented this<sup>26</sup>. However, in the end, the questioners were proved right.

*Alert to stigmatised minorities:* The second lesson of the Dreyfus case is that we should always be alert to the dangers of prejudice towards stigmatised minorities, especially people who are hated and feared because they are different.

There is no doubt that Dreyfus suffered - and was kept on Devil's Island long after his conviction could be seen by fair-minded

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<sup>24</sup> *Miscarriages of Justice: A Review of Justice in Error* (1999), describing Irish cases in England (pp 46-49); Northern Ireland (pp 298-300) and the Irish Republic (pp 304-308).

<sup>25</sup> Burns, above n 1, viii.

<sup>26</sup> B Dickson, "The Prevention of Terrorism Acts" in Clive Walker and Keir Sarmer (eds), *Justice in Error* (1993) 178.

observers as suspect. He was a Jew in a society with widespread and powerful if usually 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 Australia as the Jews: the homosexual minority. Gays are still hated, feared and discriminated against, often, I am ashamed to say, at the behest of the same religious people who hated the Jews in France a century ago. Convicted prisoners, the mentally disabled and the unconventional are also easy targets. The rule of law and equality before the law forbid courts giving effect to such prejudices.

The lesson of the Dreyfus affair is that judges, prosecutors and advocates must be on their guard to ensure that prejudices do not affect official decision-making. From the start, the objective evidence against Dreyfus was extremely weak. There was no motive, no reliable confession, simply contested handwriting evidence and a spirited protestation of innocence. What filled the evidentiary deficit in the France of 1894 was anti-Semitism. In Ireland, as in Australia, we must make sure that we never make up an evidentiary deficit in a case with attitudes of fear or dislike against members of a minority. 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 prejudice. The commitment to equality before the law is tested

by the way we treat vulnerable minorities. Members of the majority do not generally have to face this problem<sup>27</sup>.

*Beware of military tribunals:* Dreyfus was twice convicted by a military tribunal. The first conviction was reached on flimsy and unreliable evidence. The second conviction 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 to prove the accusation.

Loyalty, love of nation and belief in its institutions can be admirable virtues. In the modern world, patriotism has its place, at least in sporting contests. But there is a danger of tribunals deciding questions of liberty that operate outside the independent courts<sup>28</sup>. This is why the independence of the courts, and the tenure of the judges, are so important for our freedoms<sup>29</sup>.

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<sup>27</sup> *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116 at 124 per Latham CJ.

<sup>28</sup> B Dickson, "Law versus terrorism: Can law win?" [2005] *European Human Rights Law Review* 11.

<sup>29</sup> C Campbell, "'Wars on Terror' and Vicarious Hegemons: The UK, International Law and the Northern Ireland Conflict" (2005) *International and Comparative Law Quarterly* 321; C Walker, "The Commodity of Justice in States of Emergency" (1999) 50 *Northern Ireland Legal Quarterly* 164.

An examination of outcomes in the Australian Refugee Review Tribunal, after its members were not regularly reappointed as they had previously been as a matter of course, shows a fall-off in decisions favourable to applicants for refugee status and a rise in decisions in favour of the Minister contesting the claim<sup>30</sup>. This is what can happen where decision-makers do not enjoy guaranteed tenure. It is true that such guarantees sometimes entail disadvantages. Occasionally, they can cloak individual inadequacies. However, 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 to the conception of the members 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 today to read the American comments on the Dreyfus trials in the 1890s and their asserted superiority of American civil courts<sup>31</sup>, contrasting those comments

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<sup>30</sup> Mary Crock, "Reviewing the Merits of Refugee Decisions: An Evaluation of the Refugee Review Tribunal" in Conference Proceedings, *Retreating from the Refugee Convention* (1997), Northern Territory University, Darwin.

<sup>31</sup> S D Thompson, "The Revision of the Dreyfus Case" (1899) 11 *Green Bag* 9 at 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".

with the contemporary defence of United States military commissions at Guantánamo Bay.

In Australia, courts martial are an exception to the general principle of civilian courts for contested federal accusations<sup>32</sup>. In this, Australian law normally reflects a longstanding tradition of the common law restricting courts martial, essentially, to military accusations arising out of conduct on the battlefield<sup>33</sup>. However, a recent decision of the High Court of Australia has had the effect of expanding this exceptional military jurisdiction. It was my opinion, in that case, and still is, that we should not expand the jurisdiction and powers of military tribunals<sup>34</sup>. Doing so is contrary to our constitutional history and, in my view, at least to the Australian constitutional text<sup>35</sup>.

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<sup>32</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 and *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

<sup>33</sup> Discussed in *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 341 [103] citing *Re Tracey* (1989) 166 CLR 518 at 558 and *Burdett v Abbot* (1812) 4 Taunt 401 at 449-450 [128 ER 384 at 403].

<sup>34</sup> *Re Aird* (2004) 220 CLR 308.

<sup>35</sup> cf C Walker, "Army Special Powers on Parade" (1989) 40 *Northern Ireland Legal Quarterly* 1 at 31-33; J D Jackson, "The Northern Ireland (Emergency Provisions) Act 1987" (1988) 39 *Northern Ireland Legal Quarterly* 1 at 31-33.

Anyone in doubt about the defects that can intrude into military tribunals in fraught circumstances should consider the Dreyfus case, and especially Dreyfus's second trial at Rennes. These provide a reason for deep concern, mentioned by many observers, about the proposed United States military commissions for trying prisoners kept for four years in the military base at Guantánamo Bay<sup>36</sup>. The subordination of military power to civilian power is one of the key elements in a successful modern democracy. We must keep it unimpaired<sup>37</sup>.

*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 and helped to turn up the real culprit.

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<sup>36</sup> cf *Hamdi v Rumsfeld* (2004) 159 LEd 2d 578; 124 SCt; I Barker, "Human Rights in an Age of Counter-Terrorism" (2005) 26 *Australian Bar Review* 1 at 10.

<sup>37</sup> cf PA Thomas, "September 11th and Good Governance" (2002) 53 *Northern Ireland Legal Quarterly* 366 at 366-374; 380-390.

A feature of our legal system is a revulsion against secret trials<sup>38</sup>. Even where there is confidential information, courts must ordinarily be allowed to adopt expedients to keep the trial, and the evidence, as open as possible whilst treating sensitively material recognised as sensitive<sup>39</sup>. 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<sup>40</sup>.

The fact that national security was repeatedly asserted as the reason for the secrecy of the Dreyfus trial demonstrates the need for appropriate caution and scepticism about the justification for such claims. Had it not been for the gradual emergence of the truth, the Army and many other powerful interests in France, would have closed the Dreyfus case. Most people 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 small band

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<sup>38</sup> See eg *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 50-58; *John Fairfax and Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465; *In the Matter of an Application by the Chief Commissioner of Victoria Police* (2005) 79 ALJR 881 at 900 [114]; cf *Scott v Scott* [1913] AC 417 at 437-438.

<sup>39</sup> R Costigan, and PA Thomas, "Anonymous Witnesses" (2000) 51 *Northern Ireland Legal Quarterly* 326 at 335-357.

<sup>40</sup> M O'Neill, "EC Law and the regulation of British Anti-Terrorism Legislation: Does Gallager open the door to further EC challenges?" (1998) 1 *Contemporary Issues in Irish Law and Politics* 110 at 11-113.

of supporters, and the gradual emergence of the truth, that saved this innocent man from such a fate. That was not the outcome of the closed and secret trial which officialdom supported and defended. How many innocent people languish for lack of supporters and skilled advocates?

*Protection for people of conscience:* The Dreyfus case also demonstrates the importance of protecting people of conscience. Protests might have been expected from Dreyfus's wife and brother: declaring his innocence and working for his vindication. Families are usually like this. They often cling to a belief in 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 and Ireland, there are people, some in the law, who do not much like intellectuals, criminologists and do-gooders. They are attacked as "egg-heads". In Australia, they often fall as the first victims to the tall poppy syndrome that has existed since the earliest convict days. Further, there are people who condemn civil libertarians and reject the legitimacy of their role. On some occasions, it is true, civil libertarians buck the system. They challenge authority with its important tasks to perform. Yet, it was the Dreyfus case that led to the establishment of the French League

for Human and Civic Rights. Writers, philosophers, journalists and lawyers joined the League. It gave focus to the gathering disquiet about the Dreyfus conviction. It mobilised the belief that a serious wrong should be righted.

In Australia, Justice Lionel Murphy, a leading judge of my court of Irish derivation once explained that the world had been greatly improved by protestors objecting to injustice as they saw it. Sometimes they have brought the world around to their persuasion. Justice Murphy famously declared that Mr Percy Neal, an Aboriginal activist, was "entitled to be an agitator"<sup>41</sup>. We must never forget that entitlement. We must defend it and uphold it<sup>42</sup>.

Eventually, some of the most important converts to the Dreyfus cause were officers of the French Army. Commandant Georges Picquart became convinced that Dreyfus had been framed. Picquart paid for this belief, and the publication of his reasons, by being arrested, court martialled and imprisoned. Yet fortunately, he lived to see the vindication of his suspicions. He was present when Dreyfus was welcomed back to the *École Militaire* in 1906. But when he acted as he did, in defence of his conscience and his

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<sup>41</sup> *Neal v The Queen* (1982) 149 CLR 305 at 316-317 per Murphy J.

<sup>42</sup> cf A Bunyan, "The War on Democracy and Freedom? - An Assessment of the War on Terrorism on Criminal Justice Civil Liberties" (2002) 12 *Irish Criminal Law Journal* 25.

notions of the requirements of justice, Picquart could not have known the outcome. Some whistle-blowers are obsessive, misguided, intolerant people who will never accept even overwhelming evidence. But, as Picquart illustrates, some are important agents for truth. Where it is significant, and a person is suffering loss of liberty and of reputation, society must find ways to 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 expressed 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 long time.

*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 France, a great democratic republic 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<sup>43</sup>. It would help prove what the forger "knew", in any case, was the truth. But the forgery was discovered. When its perfidy was revealed, the Army officer involved committed suicide. Immediately, he was praised for his actions. They were called patriotic and well-meaning. A national collection was invited for the support of his widow<sup>44</sup>.

There are people who are so blinded by their concept of duty and patriotism, or misled by their participation in espionage, that they forget society's commitment to truth and justice. A civil society, respecting liberty, must always be 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 House Un-American Activities Committee in the United States show what grave wrongs can be done in the name of patriotism and national security<sup>45</sup>.

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<sup>43</sup> cf D Curtin, "Digital governance in the European Union anno 2002 - Freedom of information trumped by 'internal security'?" (2002) 12 *Irish Law Journal* 17.

<sup>44</sup> P Quillard, "The Henry Monument" cited in Burns, above n 1, 130.

<sup>45</sup> cf N Neligan, "Criminalising International Terrorism: The Criminal Justice (Terrorist Offences) Bill 2002" (2004) 9 *The Bar Review* 152; C Walker and Y Akdeniz, "Anti-terrorism laws and data retention: War is over?" (2003) 54 *Northern Ireland Legal Quarterly* 159 at 172-175.

Every society has a right and duty to protect its citizens against genuine affronts to security. Yet, in the long run, the best guarantee against attacks on society is often a steady adherence to the institutions and ways of a temperate democracy. This steady adherence was demonstrated in Australia in 1951 by the decision of the High Court in the *Communist Party* case<sup>46</sup>. That decision invalidated a law designed to outlaw Australian communists. That case stands in marked contrast to the decision of the Supreme Court of the United States, at the same time, upholding the constitutional validity of a similar law to deprive communists in that country of their rights to assembly and to free speech, although these values are expressly guaranteed in the American Constitution<sup>47</sup>.

*Maintenance of secularism:* Another lesson of the Dreyfus case is the importance of keeping religious beliefs separate from the institutions of the State and processes of the law. 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

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<sup>46</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

<sup>47</sup> *Dennis v The United States* 341 US 494 (1951), Vinson CJ for the Court; Black and Douglas JJ dissenting.

Alfred Dreyfus's appeal, a law was enacted by the French legislature establishing clearly the separation of Church and State in France<sup>48</sup>.

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 present in various Church-supported newspapers and other publications in France<sup>49</sup>. 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 in reaction to the Dreyfus trials.

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<sup>48</sup> See C Thornton-Smith, above n 5, at 76ff for the concerns in the Australian Catholic community about the secular movement in France as it affected the Church.

<sup>49</sup> C Thornton-Smith, above n 5, 76ff.

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 help 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 adherents to the Christian religion or for the universal principles of that faith. It was a lesson of the need to keep the religious dimension private and for the State to protect, and defend *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 enforcement of religious beliefs is again intruding into law and governance in many countries<sup>50</sup>. 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. From contemporary experience, we know 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. Or Muslims. Or Christians in some countries. In a modern, democratic and pluralistic

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<sup>50</sup> See eg R A Fenton, "Catholic Doctrine Versus Women's Rights: The New Italian Law on Assisted Reproduction" (2005) 14 *Medical Law Review* 73 at 75 concerning recent polarisation in the Italian Parliament over a law on assisted reproduction. There are many examples in many countries on many issues.

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<sup>51</sup>.

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. In Australia, to a large extent, we have grown out of such sectarian attitudes. Such attitudes, between Catholics and Protestants and against Jews, were still present in my youth. The wrongs of the Dreyfus case demonstrated the perils of anti-Semitism. There are other like attitudes to members of other religions, ethnic and similar minorities.

Witnessing the ordeal of Alfred Dreyfus, 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 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

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<sup>51</sup> See *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 742 at [55]-[145].

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 and dissenting adherents<sup>52</sup>.

*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 such as *La Libre Parole* and *La Croix*. These journals played their part in suppressing the early attempts to right the wrong of the Dreyfus convictions. They affirmed his guilt largely because of his Jewishness and because the institutions of the state were being accused.

On the other hand, the publication in *L'Aurore* of the famous letter by Émile Zola, "*J'accuse!*" was a turning point in the campaign

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<sup>52</sup> See eg the provision on this subject in the UNESCO *Universal Declaration on Cultural Diversity* of 2 November 2001 and the *Universal Declaration on Bioethics and Human Rights* of 19 October 2005 (art 12); cf R Inglehart and P Norris, "The True Clash of Civilisations", *Foreign Policy*, March/April 2003, 63.

for justice for Dreyfus. Liberal newspapers took up his cause. So did journalists from overseas<sup>53</sup>. The case became one of the earliest global illustrations of infotainment. Part of the media attention arose out of the genuine concern of a few journalists and editors, affronted by the apparent cover-up and injustice. Other journalists just liked a good story. Not a few, in Australia, England, and perhaps Ireland at the time, 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". Dreyfus' trial had not occurred in the civil courts where his conviction would much earlier have been quashed<sup>54</sup>. Even Lord Russell felt obliged, somewhat condescendingly, 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.

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<sup>53</sup> See eg *The Times of London*, 23 December 1894 extracted in Burns, above n 1, 46-48.

<sup>54</sup> Lord Russell of Killowen to Queen Victoria, 16 January 1899 extracted from R B O'Brien, *The Life of Lord Russell of Killowen* (1901) in Burns, above n 1, 152.

They were soon to re-emerge with terrible consequences for Europe and the world.

*Need for institutional changes:* The need for institutional changes and improvements are illustrated by what happened to Alfred Dreyfus<sup>55</sup>. His case sounded a warning about anti-Semitism. Inadequately attended, this was to produce unparalleled suffering fifty years later, including in France.

Thinking on the Dreyfus case today, in Ireland and Australia, we can conclude that improvements in society's institutions are needed, including sometimes in the attitudes of officials who constitute those institutions<sup>56</sup>. Minimising the role of military tribunals; resisting secret trials; examining closely claims of national security; protecting stigmatised minorities: upholding secularism. All of these are necessities shown in stark relief by what happened to Alfred Dreyfus.

The awful happenings of the first half of the twentieth century, including the Dreyfus affair, led ultimately to the

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<sup>55</sup> C Walker, "Terrorism and criminal justice: Past, present and future" [2004] *Criminal Law Review* 311; B Dickson, "The Prevention of Terrorism Act" in C Walker and Keir Starmer (eds), *Justice in Error* (1993) 178.

<sup>56</sup> cf C Campbell, "The Criminal Justice (Terrorism and Conspiracy) Act 1998" [1999] *Criminal Law Review* 941.

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 domestic law - such as the law on refugees, the law against racial discrimination, against sex discrimination and discrimination 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.

Ireland was the first common law country after the United States to accept the concept of enforceable constitutional rights, subject to the technique of constitutional review. Later, following this Irish example, Britain, Canada and New Zealand, in their different ways, have now done so, as has India, South Africa and the countries of the new Commonwealth of Nations. Such charters are no absolute guarantee against wrongdoing, cover-up and official mistakes. But they do afford an 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.

*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. They would blame everything and everyone except the elements that they adored - in the government, the Army and the Church, which had assailed Dreyfus and played on anti-Semitic sentiments to keep him imprisoned.

By 1985, the French government, at its highest level, determined on a corrective. The socialist President, François Mitterand, commissioned a statue to honour Alfred Dreyfus. It was presented to the Army for placement in the *École Militaire*. The Army declined to accept it<sup>57</sup>. In 1988 it was placed in a corner of Tuileries Gardens in Paris. Soon after, it was daubed with painted swastikas. Anti-Semitic profanities were also marked on Dreyfus's tomb at the Montparnasse cemetery in Paris.

During 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"<sup>58</sup>. That

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<sup>57</sup> Burns, above n 1, 189.

<sup>58</sup> P Gaujac, "A Theory of Innocence" quoted from *Le Monde*, 10 February 1994 extracted in Burns, above n 1, 189-190.

observation showed that some people will never admit error. For them, Dreyfus's guilt was still an open question - an equal hypothesis or an arguable theory.

In 1998, President Jacques Chirac took a bold and healing step. 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"<sup>59</sup>.

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<sup>60</sup>.

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<sup>59</sup> J. Chirac, Letter of the President of the Republic on the Centenary of "*J'accuse*", January 1998, in Burns, above n 1, 199 at 192.

<sup>60</sup> *Ibid*, 193.

Blind patriotism and unquestioning belief in the nation, whatever its wrongs, is not the ethos of a modern, democratic civic society.

Neither in the Republic of Ireland nor in the Commonwealth of Australia have we condemned a fellow citizen for treason to an equivalent of Devil's Island or Guantánamo Bay<sup>61</sup>. Indeed, accusations of treason are rare in the modern history of either country since attaining full independence. 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 all learn to recognise these mistakes. Like President Chirac, where wrongs are shown, we must acknowledge them, express regret for them, learn from them and teach the next generation. That is the way to sustain the human journey towards greater human enlightenment.

The Dreyfus affair speaks powerfully to Jewish people everywhere, including in Ireland and Australia. This is especially so because of the genocide that quickly followed. But it also speaks clearly of wrongs done in Australia to Aboriginals, to Asian

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<sup>61</sup> Although see *Victorian Council for Civil Liberties Inc v Minister for Immigration & Multicultural Affairs* (2001) 100 FCR 491; special leave refused in (2001) 205 CLR 694.

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. No doubt, in Ireland, it speaks clearly to people who have been wrongly branded under anti-terrorism laws; or wrongfully convicted of crimes in the general courts. We must not think that such 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!"*

