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FOREWORD

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I was present when Justice Marcus Einfeld delivered this address. The setting seemed a trifle unreal for the subjects dealt with. The ballroom in the Queen Victoria Building, Sydney has been restored to its imperial magnificence. The colours of brown, beige and gold were lit by the flickering candles of the menorah. In the audience were many distinguished Australians - including politicians of different persuasions. Bestriding us all, at the podium, was the Human Rights Week orator. Marcus Einfeld has great gifts of oratory: a commanding presence, a splendid delivery, the cadences of a person versed in literature and poetry and a fervent message about derogations from human rights at home and abroad.

I am sure the author would concede that his fervour and passion were born of his own upbringing and nurtured in the proud fact of his Jewishness. Jews, as specially targeted victims of monstrous cruelty, have every reason to be in the vanguard of the defence and advancement of human rights throughout the world. All of us learn from our own experience. Those who suffer derogation of human rights must derive energy and commitment from that suffering. They must become evangelists for the cause of human rights. They must protest against derogations, not only to people like themselves, but to any group who are targeted and afflicted. It is to Marcus Einfeld's credit that his own experience, and that of his community, have propelled him into a deep concern for other victims of human rights abuses. Many of them are here as silent witnesses to his oration. It begins in the still familiar world of those oppressed by the Third Reich (and to the categories which he mentions, I would add those

persecuted by the Nazis for their sexuality). But it soon fans out to embrace more recent victims. The well-known recipients of the oppression of Saddam Hussein. The less well-known oppressed by Kuwait. Those suffering misery in the states of the former Soviet Union. The millions of Ethiopians dying of starvation. The people of East Timor asserting their cherished right to self-determination. The refugees from oppression in Burma. The victims of reviving racism and extremism in Europe. On and on the list goes. And just as it seemed that human rights was a foreign problem of people in far-away lands, the orator swings the focus of his attention back to Australia. The statistics which he presents of Aboriginal people in custody are truly shocking. But they are but the outward manifestation of a deeper Australian social and cultural malaise. He discerns the growing selfishness of our political debates; the unparalleled attacks on the courts of Australia; and the pusillanimous response which often marks our official reactions to human rights abuses in Asia.

The most telling part of the oration, as I heard it and have now re-read it, lies in its treatment of refugees in Australia. Justice Einfeld is Austcare's Ambassador for Refugees. His is not a theoretical concern only. He carries in his life the collective memory of the rejection of the Jewish refugees who sought to escape Hitler's tyranny and the death-camps being built for them in the 1930s. Every visitor to Amsterdam should visit the Anne Frank Huis. There, still within the chimes of the bells of the Westerkerk which Anna heard in her war-time captivity, you can see the details of the desperate attempts of the refugees to escape - to the United States, to Canada, to Australia, indeed anywhere. We took a mere trickle then. We seem determined to repeat our historic error today.

Two days after Justice Einfeld's oration, the High Court of

Australia delivered its judgment in *Chu Kheng Lim and Ors v The Minister for Immigration, Local Government and Ethnic Affairs and Anor* (unreported, 8 December 1992). The Court upheld the power of the Federal Government to detain in custody an alien, refugee or otherwise for the purpose of expulsion or deportation. It upheld provisions in the Migration Act 1958 which supported that Executive power. But, by majority, it struck down as unconstitutional section 54R of that Act which had provided:

"A court is not to order the release from custody of a designated person."

Such persons were defined as non-citizens who, in effect, had arrived on a boat in Australia without a visa. The majority Justices decided that this provision was invalid. "Ours is a Constitution", said Justices Brennan, Deane and Dawson, "which deals with the demarcation of powers, leaves to the courts of law the question of whether there has been any excess of power and requires them to pronounce as void any act which is [beyond power]". Their Honours went on:

"A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove [invalid] acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid."

An important blow was thereby struck not only for the continuance of the supervision of the acts of the Federal officials by the courts of Australia - but for the rule of law itself.

The principles of international human rights law are increasingly influencing the decisions of the courts of our country. We have only to remember the *Mabo* case and the *Electoral*

Advertising case in 1992 to appreciate this.

It is in this context that Australia has need of judges like Marcus Einfeld to illuminate the way ahead and to appeal to our moral judgment, sense of human dignity and adherence to the fundamental rules of human rights.

This oration is therefore a timely piece. In the warm glow of the imperial building in which it was delivered it was dramatic to hear. Even from the cold pages of its transcript, the proper fervour and passion of the orator appeals to our hearts and minds. And where human rights are concerned, we should not be ashamed of the instruction of our hearts.

SYDNEY
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