

Martin Kriewaldt Memorial Address

Civil Rights – Some Random Views—The Hon Mr Justice R Meagher

Over 100 members of the profession and interested members of the public attended the Supreme Court to listen to His Honour Justice Meagher of the NSW Court of Appeal deliver the biennial Martin Kriewaldt Memorial Address on Thursday 29 August.

Prior to the Address, John Withnall warned the audience up with some reminiscences of the man in whose honour the event is held, Mr Justice Kriewaldt.

Immediate Past President of the Law Society, Neville Henwood, introduced Mr Justice Meagher, outlining some of his achievements in the legal area, including a term as President of the NSW Bar Association and authorship of a number of legal volumes.

His Honour had chosen as the topic for his address *Civil Rights - Some Random Views* and began his speech by paying tribute to Kriewaldt J and the continued influence of his judgments more than twenty years after his death, remarking that this was a measure of the greatness of the man.

His speech addressed the question of what constituted "civil rights", arguing that this term, often augmented by "a flattering adjective" such as "fundamental" or "inviolable" was something of a moveable feast in that lists made of civil rights changed, adding new "rights" and dropping of old ones.

His Honour raised the question of whether civil rights are legally meaningful, suggesting that "in a very real sense, a right is no more than an entitlement to do something which neither Parliament nor the common law has forbidden".

He pointed to two often cited rights – namely the right to strike and the right to life and suggested that the first "right" in fact constituted a breach of the contract to work and that the second went against the common law view that human life commences at birth, supported by the fact that at common law abortion was not murder, albeit a misdemeanour. Those in the pro-abortion camp, in asserting that it was a "civil right" to control their own bodies were equally at odds with the remnants of the law that declared suicide a criminal offence.

Justice Meagher, however, expressed the opinion that within constitutional

law, it was possible to find legal significance in civil rights. He argued that if a right is enshrined in the constitution and cannot be changed by Parliament, then it could be seen as an inviolable right.

He continued on to suggest two serious difficulties with constitutionally enshrined rights. The first was to be seen in the example of India, whose constitution "bristles with constitutionally entrenched rights, and in 1971 the average waiting time for a case involving civil rights to be heard was 20 years". The second he saw in the difficulty of defining such rights with any precision, citing examples from the decisions made on interpretation of the First Amendment in the Constitution of the United States.

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His Honour averred that it was very difficult to defend these constitutional cases and his reasons for this were many.

As well as defying all known rules for detecting implications in a document, he suggested that "every newly discovered right is *pro tanto* a derogation from the sovereignty of Parliament, which is not only the recognised source of legal power but is expressly recognised as such in the Constitution itself".

His Honour went on to suggest that the new doctrines were undemocratic in that the High Court of Australia ran the risk of reading into the constitution civil rights which were not mentioned, nor even implied because the current judges of that court regarded them as indispensable democratic rights.

He drew attention to the decision *Australian*

Capital Television v Commonwealth which prevented Parliament from forbidding political electioneering in the last few days before an election. His argument suggested that this decision was based on an implied notion of free speech which required dissemination of political information, but gave little credence to the idea that last minute political advertising could distort and misinform. It was Meagher J's view that this question was more properly decided by an elected Parliament than an unelected judiciary.

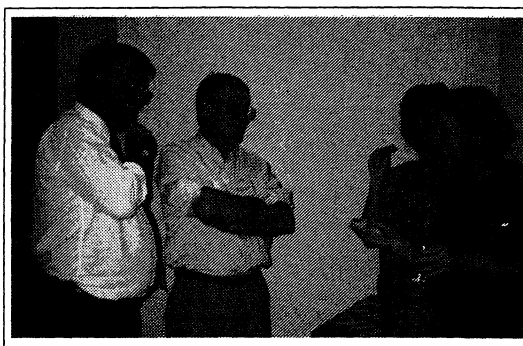
He went on to suggest that it seemed odd that these "newly discovered implied rights" had gone undetected for the time of existence of the Constitution and pointed to what he saw as their irrational basis. Expanding on this, Meagher J maintained that the framers of the Constitution had before them the example of the American Bill of Rights, but had opted not to follow that path, choosing instead government by an elected Parliament.

His Honour concluded with the notion that the process of discovering the new rights was not only unpredictable in its future directions but also idiosyncratic. He expressed along with his fear that we may soon have more entrenched civil rights than countries who have an express Bill of Rights, his hope that these "fragile and novel toys ... will prove to be just as ephemeral".

After thanking His Honour for his thoughts, Mr Henwood also expressed thanks to the Law Society of the N T Public Purposes Trust for funding for the Address, Justice Angel and his staff and

staff of the Law Society for organising the event.

Light refreshments were then served in the foyer of the Supreme Court.



David Farquhar, Peter Tiffin, Barbara Tiffin and Sue Oliver enjoy refreshments at the Martin Kriewaldt Memorial Address