

Let's Stamp Out the Gavel

Fortunately, I am a calm man. Were I not, my seeing the currently showing cinema production, *In the Name of the Father*, would raise the blood pressure for more reasons than one. The film tells a story of unforgivable injustice brought about by corrupt police. As an illustration of the dangers of accepting "voluntary" signed confessions, when police have the power to detain without arrest, it is salutary.

The film, for me, was seriously flawed by the allegedly London courtroom scenes showing an English High Court Judge pounding away with a gavel like an excited auctioneer, being asked for a "recess" and for permission to "approach the Bench".

The ABC and the *Sydney Morning Herald* and many other Australian media members frequently show the gavel in illustrations preceding or concerning stories about Australian courts and lawyers.

That (in journals and media other than this one) the purveyors of news can be guilty of such ignorance should not surprise us, given that a large part of our profession manages to do so well from the laws of libel and contempt.

That the media's ignorance can be spread to the general community is a vexing matter. When will the Australian media cease passing off the gavel, incorrectly, as a symbol of justice in this country? For gorsake, the gavel in the courtroom is as exclusively and homegrown American as the "continuance" and the popularly-elected judge.

The *Oxford English Dictionary* confirms that it is a United States word, and suggests the appearance of the gavel in American courtrooms as early as 1860. The origin in American courts seems to have been associated with the origin of the gavel's use in the Congress.

This is just a theory, mind, but what seems to have occurred is that when the mace crossed the Atlantic in a generally western direction, it was not good enough for the Americans as a symbol of authority. In *The Gavel and the Mace or Parliamentary Law in Easy Chapters* by Frank Warren Hackett (Sweet & Maxwell, 1900) the author lists the duties of the Speaker, as including: "To use the symbol of the State, in the shape of a gavel, or hammer, wherewith to rap members to order." He continues: "As a last resort for the purpose Great Britain arms the Speaker of her House of Commons with a mace, built of solid silver, and reputed to be a terrible weapon at close quarters. Our House of Representatives at Washington has adopted a like emblem of parliamentary authority."

The American lawyers took to the gavel with enthusiasm.

The American Bar Association first met in August 1878 at Saratoga Springs, New York. According to Gerald Carson, the author of *A Good Day at Saratoga* (American Bar Association, published 1978): "Despite the overwhelming presence of first class minds well stocked with legal knowledge, or perhaps because of it, some physical symbol of authority was needed to carry on the business of the assembly. For how, after all, can a presiding officer properly discharge his functions without a gavel? But there was no gavel. So the young acting secretary, Rawle, was sent out to a general store, or according to some accounts, a hardware store, where he purchased an ordinary carpenter's mallet for seventeen cents. It performed its first service in the hands of the temporary chairman. Then it passed to ... [the] ... President of the Conference. Then it was

handed on, like the torch in the ancient Greek games ... It was used continuously at every annual meeting from 1878 to 1946 and ... is now on exhibition in a glass case at ABA headquarters... The gavel was, for sixty-eight years ... 'our sole regulator'."

The extraordinary thing is that it is difficult to find an American attorney who has actually seen a gavel being used in court. Detroit trial attorney, Jean Pierre Ruiz, says: "I have practised in Detroit for almost ten years and although I have seen them on the bench, I have never seen a gavel being used."

Washington DC attorney, Lynette Platt, formerly a Canberra barrister and solicitor, has practised in Washington DC for 12 years and has never seen one used. She says of them: "I think they are more likely to be found in the State Courts rather than the Federal Courts and especially in the boon docks, e.g., Kentucky.

"Watergate special prosecutors say they saw gavels being used to announce the opening of Watergate hearings but not otherwise. They may also be a Californian thing. Even there I believe they tend to use a gavel head without a handle and only in the low courts where it is necessary from time to time to call order. When I talk to American lawyers I find that everyone thinks they have seen them used, but when they are questioned they cannot remember an instance and certainly never in the Federal Courts. They seem to be present in all Federal Courts as a symbol, sitting on a gavel stand, but are never used to keep order. The whole time I have been in the United States I have only seen it being used once and that was on daytime television in 'The People's Court'. There is no doubt the judge on that program bangs his gavel a lot."

The American people seem keen on the symbolism of the gavel.

The tragically misguided 1960s philosopher, Abbey Hoffman (having tried, unsuccessfully, to levitate the Pentagon in the 1960s) tried unsuccessfully in the early-1980s to buy the gavel which had been on the bench of the trial judge at his earlier trial.

If the Attorneys-General of the States and of the Commonwealth are really concerned about micro-economic reform in the legal profession, they could begin by exhorting members of the press to illustrate items about the law by means of a symbol which does have meaning in this country. The wig is sometimes used (and nothing wrong with that, you might say). Those hurtful purveyors of lawyer jokes might well suggest the \$100 note. My clerk, Mr Ken Hatcher, has designed several fax covers for my floor. One of them, I am embarrassed to say, shows the gavel. Another shows a male British judge in what appears to be a frock. The third shows the scales of justice. Whilst it might be thought by some that a male judge in a frock has, as symbolism, some attractions, that is clearly not the one we should use. The scales of justice constitute the one symbol which is common to British, American and Australian courts. There is a statue of the scales of justice at the Old Bailey. Those of us whose education about the American legal system came from *Perry Mason* and *LA Law* will know that the scales of justice are commonly referred to in that country. Many Australian solicitors use the scales on their letterhead. Australian juries not uncommonly have the balance of probabilities explained to them by reference to an imaginary set of scales. It's not novel, but at least it's accurate and it's universal.

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