

BOOK REVIEW

PERFORMING JUDICIAL AUTHORITY IN THE LOWER COURTS

BY SHARYN ROACH ANLEU AND KATHY MACK
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Duncan Kennedy wrote an iconic essay in 1982 entitled ‘Legal Education as Training for Hierarchy’¹, which drew attention to the way legal education is obsessed with hierarchy. The hierarchy of courts is the most pervasive, with a disproportionate amount of attention accorded the decisions and jurisprudence of appellate courts. This is despite the fact that the magistrates courts represent the face of justice for most people. Indeed, they are responsible for the finalisation of 97 per cent of all criminal matters in Australia.

Performing Judicial Authority in the Lower Courts is a path-breaking book, for it seeks to rectify the imbalance by focusing exclusively on the lower courts. In their thoroughgoing empirical study, Roach Anleu and Mack draw on large-scale national research that they have initiated and carried out on Australian courts from the beginning of the 21st century. The comprehensive body of research includes surveys, court observations and interviews.

While underpinned by the relevant socio-legal theoretical literature, the study is not written at a high level of abstraction, but focuses on the perceptions and experiences of individual magistrates. In addition to addressing conventional issues relating to skills and values, the reader is given an insight into the quotidian reality of the

¹ Duncan Kennedy, ‘Legal Education as Training for Hierarchy’ in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1982) 54.

working lives of magistrates, including the limited scope they have for shaping the conditions under which they work. Autonomy, the paradigmatic mark of the professional in relation to the work performed, is singularly absent. Thus, while flexible work is a 21st century workplace issue everywhere, particularly for women, the large volume of cases to be resolved on a daily basis rules out this option for magistrates. Indeed, lawyers in private practice who hope to escape the tyranny of the long hours culture by accepting appointment as a magistrate may be disappointed to find that the work is highly pressured with multiple disparate matters to be dealt with every day, which can make the job exceedingly stressful. Incidentally, we are not told anything about the qualifications, background or appointment of magistrates, other than the number of years they have served on the Bench.

Despite the constraints of time management, the focus on *performing* judicial authority captures the way individual magistrates are nevertheless able to exercise a modicum of agency by adopting a more personal approach than judges in higher courts. The demeanour of magistrates is more significant because of the relative absence of the formal symbols of authority, such as wigs and gowns. Roach Anleu and Mack show how authority in the magistrates courts may be performed in different ways without detracting from judicial authority.

The question of whether women judges make a difference has been on the agenda for some time as the legal profession has become feminised, although the focus tends to be on decision-making rather than demeanour. As most decisions in magistrates courts are delivered *ex tempore*, the focus of gender difference shifts to the demeanour of the judicial officer. The demeanour of the judge is conventionally one of impartiality and detachment, a norm that most magistrates favour, with some deliberately distancing themselves from defendants by the use of tactics such as the passive voice. Perhaps unsurprisingly, however, the authors found that empathy and compassion were valued more highly by women than by male magistrates and judges. The women would also look at and speak directly to defendants — whether represented or not — more often

than male magistrates. This was apparent in the more personal interactions favoured by the women when dealing with unrepresented defendants or those being sentenced. Roach Anleu and Mack note that there is relatively little racial or ethnic diversity within the magistracy, which precluded findings in this regard.

Based on their meticulous empirical study, the authors argue for a broader understanding of judicial legitimacy that takes account of the way justice is performed in magistrates courts. This does not discount the core legal values of impartiality, high ethical standards and fairness, for therapeutic jurisprudence in action carries with it an enriched understanding of justice.

The book is very well written, clearly organised and remarkably free of jargon and legalise. Hence, it would be readily accessible not only to students, lawyers, researchers and judicial officers themselves, but also to general readers. While there is a wealth of detail, the text is enlivened by quotes from the interviews. For those of a more scholarly bent, a detailed description of the methodology is included in an appendix.

From time to time, passing reference is made to substantive matters dealt with by the magistrates courts, such as driving offences. However, as the range of offences dealt with in the lower courts is extensive and varied, I would have liked to have heard a little more about the dilemmas that their resolution posed for magistrates. For example, was there a gender difference in the conviction and sentencing of the perpetrators of violence, domestic violence in particular? But perhaps such issues will be the subject of another study. In the meantime, this book contains ample food for thought and I commend it to you.

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