Introduction: Diversity and the Role of the Judiciary

Introduzione: diversità e ruolo della magistratura

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1. The Judiciary: Responses to Diversity

The relationship between the judiciary and diversity has historically been characterized by ambivalence. While modern legal systems have frequently addressed diversity, they have done so in an instrumental and often superficial manner, treating difference as a problem to be regulated rather than as a constitutive element of legal reasoning (Meccarelli 2016). Diversity, however, should not be understood in a narrow or static sense. Cultural, social, economic, and gender disparities are all part of this complex and dynamic issue. It challenges the fundamental tenets of law, calling for a reexamination of the ideas of justice, equality, and rights themselves rather than just a collection of extraneous elements to be accommodated within preexisting legal frameworks (Neuenschwander Magalhães 2016; Stara 2016).

The tension between law and social differences has deep historical roots. Legal responses to diversity have frequently shifted between two poles: the drive toward assimilation through universalistic abstractions and the reluctant accommodation of particular identities (Cazzetta 2016). However, the rise of identity politics, multiculturalism, and the judicialization of human rights in recent decades have put fresh pressure on courts to address diversity as a constitutive aspect of justice rather than as a side issue.

Today's justice systems are under growing pressure due to the heightened visibility of diverse identities and social configurations. These pressures – fueled by global phenomena such as migration, evolving family structures, and shifting social norms – are not something external to legal systems but integral to their functioning. They challenge conventional ideas of judicial functions and modify the day-to-day operations of courts, reminding us that society continuously transforms law rather than only responding to it (Garapon 2013). This is crucial because, as Febbrajo (2009, p. 122) notes,

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Data invio: 11 novembre 2025. Data accettazione: 25 novembre 2025.
DOI: https://doi.org/10.54103/1972-5760/30763

"the ability of facts to change norms and, correspondingly, the ability of norms to learn from facts."

This evolving legal landscape demands a rethinking of the judiciary: indeed, courts can no longer be regarded as neutral enforcers of a static legal order (De Sousa Santos 2002; Cotterrell 2006; Latour 2009). On the contrary, they must be understood as sites where rights, identities, and power are continuously negotiated. In this sense, courts increasingly function both as institutions of state power and as public services—what Verzelloni (2020) has described as a "justice service" shaped by actors and processes beyond the courtroom, making judges and legal experts active participants who help to shape social reality rather than just interpreting rules.

Law plays a constitutive role in organizing political, economic, and social life. It does so, in part, through its classificatory practices—through the ways it names, frames, and categorizes lived experiences (Griffith 2005; Rosen 2006). Legal classifications possess performative value and are not neutral instruments. They do simplify society, but they are also creations of frameworks that are influenced by history and culture (Decarli 2018). Once institutionalized, legal classifications delineate who is afforded protection, who is subjected to criminalization, and who remains excluded from recognition. For marginalized groups, such classifications can deepen pre-existing forms of exclusion and inequality. Labeling individuals or groups as "vulnerable" is a particularly illustrative example. Such labeling is never a neutral act – especially when vulnerability is attributed automatically based on group identity rather than assessed contextually (Parolari 2012). The concept of diversity in relation to vulnerability is interpreted critically in this dossier. It is crucial to examine vulnerability as a result of systemic inequalities, which means that social structures – rather than personal characteristics – are what create and sustain vulnerability.

Understanding how courts engage with diversity also poses distinct methodological challenges. Judicial institutions remain among the most opaque in democratic societies, protected by formalism, confidentiality, and institutional autonomy. Penetrating this opacity requires empirical and interdisciplinary approaches, such as ethnography, critical discourse analysis, and in-depth interviews (Kapiszewski, Silverstein, Kagan 2013). Such methods are crucial, particularly as courts increasingly confront issues left unresolved or unregulated by legislatures.

2. Focus and Orientation

This dossier sets out to explore the multiple challenges posed by increasing social complexity and to analyze how judicial responses – or the lack thereof – affect the justice system's ability to meet the evolving needs of

SOCIOLOGIA DEL DIRITTO, Vol. 52, Numero 2, 2025
ISSN 0390-0851 – ISSNe 1972-5760

society. It brings together three contributions that examine key areas where the judiciary needs to address diversity, in its broader meanings: family law, international protection, and mental health.

Each article adopts a socio-legal perspective, integrating multiple levels of analysis, namely individual, organizational, and systemic. Methodologically, the contributions highlight the added value of combining theoretical reflection with empirical research. In particular, the empirical studies underscore both the potential of using diverse methodologies, such as interviews with legal professionals, critical discourse analysis of judicial decisions, courtroom observation, and shadowing, to investigate a domain like the judiciary, which is traditionally considered difficult to access.

2.1 Cultural Diversity

One of the most consequential categories shaped by legal classification is that of cultural diversity, particularly as it pertains to immigrant communities. Legal systems often approach cultural differences through specific markers such as immigration status, country of origin, or religious affiliation, that create boundaries between those who are granted full legal recognition and those relegated to the margins. From deciding access to public services and fundamental rights to influencing the evaluation of trustworthiness in asylum proceedings and the interpretation of culturally particular family customs, these categories have far-reaching effects. Implicit presumptions on integration, loyalty, and threat are commonly embodied by these categories. In this sense, immigrant groups are frequently presented as culturally "other," rather than as recent arrivals, which serves as an excuse for exclusion, mistrust, or increased monitoring.

Contemporary societies – and the global order they are embedded within – are far more complex than what classical liberal legal theory has traditionally assumed (De Sousa Santos 2002). Plurality has become a defining feature of modern social life, and Europe – and Italy – is no exception. While cultural, linguistic, and religious diversity is by no means a new phenomenon in European history, it has significantly expanded in both scope and visibility in recent decades, largely driven by post-World War II migration and the steady rise in refugee movements (Kymlicka 2016). In Italy alone, the presence of more than 5.3 million foreign residents signals the pressing need for legal institutions to engage meaningfully with cultural differences as a structural rather than exceptional reality.

Legal pluralism and cultural heterogeneity, therefore, are not marginal elements but constitutive features of today's interconnected societies. Legal pluralism, understood as the coexistence of multiple legal systems or normative frameworks within the same political or social space, is no longer the

exception – it has become a defining characteristic of contemporary legal life (De Sousa Santos 2002; Griffith 2005; De Lauri 2013). This phenomenon generated a great and fruitful debate in different fields. Foundational legal anthropology works (Pospisil 1971; Moore 1973; Roberts 2000) established the framework for comprehending the interactions and coexistence of various legal orders. Furthermore, while later theorists (Teubner 1991; Tamanaha 2008; De Sousa Santos 2002) examined legal pluralism in the context of globalization, transnational governance, and fragmented state authority, other contributions by scholars like Griffiths (1986) and Merry (1988) offered empirically supported definitions that differentiate between formal and informal normative systems.

Although this introduction does not seek to engage directly with the theoretical dimensions of legal pluralism, it is important to underscore its relevance. As evidenced by changes in judicial practice, legislative reform, and policy interpretation, culture and cultural claims have emerged as major areas of conflict and negotiation in both the political and legal spheres (Van Rossum 2007). Even the institutional frameworks used to envision and administer justice are changing, as noted by Bhamra (2011), as is our understanding of justice in general and the demands that increasingly varied societies place on it. However, pluralism in the law is not always emancipatory. What is frequently hailed as plurality can actually be a form of exclusion, as De Lauri (2012) warns. Although there may be multiple legal frameworks in theory, not everyone has equal access to them. Many marginalized people may find that such plurality has no practical significance, especially those who lack economic, social, or legal capital. Instead of challenging established hierarchies in these situations, legal pluralism runs the risk of strengthening them, giving advantages to those who can successfully negotiate complicated legal issues while effectively denying others access to recognition or redress.

These issues are dealt with transversally in two contributions. *Judging Cultural Diversity in Italian Family Law* by *Claudia Cavallari* investigates how Italian judges interpret sociocultural diversity in family law cases. Using a triangulation of data – interviews and judicial decisions – the article shows a dissonance between the understandings judges articulate in interviews and the more rigid, schematic representations found in the judicial decisions. The analysis shows how their reasoning is shaped by institutional constraints, professional routines, and implicit cultural biases, rather than depicting judges as neutral interpreters of the law. It thus draws attention to the structural factors that hinder context-sensitive adjudication and underscores the need for more inclusive and reflective judicial practices in multicultural societies.

In *Handling Diversity on the Ground in Italian Asylum Appeals*, *Alice Lacchei* examines how the daily work of international protection judges

SOCIOLOGIA DEL DIRITTO, Vol. 52, Numero 2, 2025
ISSN 0390-0851 – ISSNe 1972-5760

with linguistic, socio-cultural, and geographical diversity, linking individual and organizational levels. Drawing on ethnographic research in immigration court sections, the author also reflects on the potential for analyzing judicial sector dynamics, combining qualitative methods like semi-structured interviews and shadowing.

2.2 Mental Health

As previously mentioned, the law relies fundamentally on categories (Decarli 2018) – but once these classifications are defined and sanctioned by legal authority, they can carry powerful and far-reaching consequences. They do more than organize legal thinking; they help determine who is recognized as a full legal subject and who is positioned outside the boundaries of legitimacy. In this sense, legal categorization plays a crucial role in shaping processes of inclusion and exclusion, often reinforcing the marginalization of already vulnerable or stigmatized groups. One of the clearest examples is the treatment of mental health. The legal system has historically played a role in characterizing people with mental illness as subjects to be regulated, managed, or confined rather than as active citizens with rights. The relationship between psychiatry and the legal system – both in Italy and internationally – has been deeply rooted in the institutional management of deviance and social difference (Basaglia 1982; Canosa 1979; De Bernardi, De Peri, Panzeri 1980; De Bernardi 1982).

The asylum has long been understood not simply as a place of care, but as a powerful institutional device aimed at identifying and isolating those deemed "unproductive" or "dangerous." Far from being a neutral space, it has been critically examined as a site of subjugation (Foucault 1974), a totalizing institution that strips individuals of agency (Goffman 1961), and a space focused more on containment than on healing (Esposito 2019). Historically, it has disproportionately targeted marginalized and subaltern groups (Basaglia 1968), functioning as a tool for managing the "surplus" populations created by industrialization and the rise of the modern nation-state (Canosa 1979; Fontana 2003).

In Italy, the turning point in the field of mental health was triggered by the oppositional movement in Gorizia (Basaglia 1968), which led to Law 833/1978 and the establishment of the National Health System (SSN). Up until that moment, psychiatric internment in Italy – governed by Law 36 of 1904 and its later amendments in 1909 – was used not primarily for therapeutic purposes, but as a tool of public order. People were often institutionalized less for clinical reasons than for being perceived as threats to social stability, reflecting a logic of containment rather than care (Girolimetto 2025).

It was necessary to wait for the Prime Ministerial Decree of April 1, 2008, and the so-called "empty the prisons" decree (Decree Law of December 22, 2011, no. 211, amended by Law 9/2012) to reach the "definitive" closure of the judicial psychiatric hospitals (OPG).

The introduction of the REMS (Residences for the Execution of Security Measures) replaced the OPG, permanently closed in 2015, and marks what has been called a "gentle revolution" in the field, shifting the focus from a custodial to a more therapeutic paradigm (Corleone 2018).

Placement in these new facilities is meant to be both exceptional and temporary. According to the Ministry of Justice, it can only be applied "in cases where there is clear evidence that it is the only measure capable of ensuring appropriate treatment while also addressing the social dangerousness of the mentally ill or partially mentally ill individual" (Ministero della Giustizia 2018). This signals a shift away from indefinite institutionalization toward a model that emphasizes proportionality and individualized care.

Unlike the traditional model of institutional confinement, REMS were therefore conceived with a clear socio-healthcare mission, aiming not simply to detain but to offer rehabilitation and support, representing a significant change in how assistance is understood (Girolimetto 2025).

Against this backdrop, when dealing with mental health and the judiciary it is considered here the Involuntary Psychiatric Treatment (TSO). The TSO is marked by an inherent, almost ontological ambiguity. It functions simultaneously as a measure of care and a mechanism of control. On one hand, it is intended to provide urgent medical assistance to individuals experiencing severe mental health crises; on the other, it involves a suspension of personal autonomy and the imposition of external authority (Di Luciano, Miravalle 2023).

Unlike therapeutic sanctions in criminal law – such as penalties or security measures – the TSO does not rely on a verifiable or legally established event, such as the commission of a crime (Ronco 2018).

In the realm of criminal justice, therapeutic interventions are considered only in the presence of an offense. Similarly, the security measure of psychiatric hospitalization, now carried out in REMS, is reserved for individuals with psychiatric conditions who have committed a crime and have been declared not criminally responsible due to their mental state at the time of the offense (Miravalle 2015).

While in the criminal justice system, the goals of control are explicit and openly acknowledged, in the case of TSO, control operates as a more latent and implicit function. This distinction points to a classic theme in the sociology of law: the differentiation between penal control and social control. Whereas penal measures are justified through legal procedures in response to a defined offense, TSO embodies a subtler form of regulation, one that relies on medical authority but still serves to manage deviance and main-

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ISSN 0390-0851 – ISSNe 1972-5760

tain social order, often without the same level of transparency or procedural oversight (Di Luciano, Miravalle 2023).

In *Law and Incapacitation: Empirical Insights into Mental Health Compulsory Treatments*, *Carolina Di Luciano and Michele Miravalle* analyze over 1,000 judicial files concerning TSO. Their study exposes the routinization of legal safeguards, revealing how courts often become administrative checkpoints rather than sites of substantive review. Foucault's insight into the intersection of psychiatry and law as a site of biopolitical control becomes particularly salient here. The judiciary, intended as a guardian of rights, risks legitimizing practices that reduce legal subjectivity to clinical management.

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