

THE ORPHAN CRISIS OF WORLD WAR ONE AND THE ITALIAN JUDICIARY

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Abstract: The formidably complex problem of World War I orphans can be studied from different points of view, ranging from moral, family and social aspects to those of a legal, economic, political or financial nature. In this short essay, only some of these facets are considered. Among the measures taken by the Italian authorities – first by the government as a matter of urgency, and later by the parliament – attention is focused on the role of the judiciary and especially on the *giudice delle tutele*, or guardianship judge. He performed delicate tasks of voluntary jurisdiction and supervised the actions of the *pretori* (local magistrates). He also contributed to various administrative activities, as he was a member of the Provincial Committee in charge of providing assistance to war orphans. He acted as a coordinator on several fronts, and in particular, he had to find the right balance between the actions of the State and those of the family. Indeed, he had to ensure – in keeping with the intention of legislators – that the State did not interfere with and replace families, but simply stepped in to support them when necessary.

Keywords: War orphans; World War I; Judiciary; Guardianship Judge; Natural Paternity

Summary: 1. Introduction. – 2. The first measures taken by government. – 3. A legislative framework. – 4. Conclusion.

1. *Introduction*

The overwhelming number of deaths in World War I presented serious problems and burdens for the countries involved. As in other nations, the Italian government was forced to take emergency measures and establish new institutional bodies in order to cope with the situation. Any government action had to be coordinated with that of the relevant public and private institutions, as well as with the actions of families, though it proved difficult to organize all of these efforts so that they could work in harmony. This article focuses on the role played by the judiciary, and specifically by the *giudice delle tutele*, or guardianship judge: an interesting, newly established figure who was entrusted with some very delicate duties.

2. *The first measures taken by government*

Regardless of the era, one of the many problems that war creates is how to assist the children of those who lost their lives in the conflict, or who have become disabled and as such can no longer work to support their families. This is a particularly complex issue with wide-ranging implications, not only on a political and economic level, but also from a legal, ethical and social point of view. Never before was this problem bigger or more dramatic than during and after the World War I, when the number of deaths and disabled reached staggering levels in all of the countries involved.

A year after entering the war, it was becoming clear in Italy that military operations were not meeting the optimistic expectations of those who had hoped for a quick end to the hostilities. Indeed, the deadly potential of new weapons had been underestimated, and the overwhelming number of deaths was only destined to rise. The State realized that it had to act in order to safeguard the children of those who had sacrificed their lives or had seriously jeopardized their own health and safety in defense of the country.

Given the delicate nature of this issue, the government initially opted to adhere to normal legislative procedure and submit a bill to parliament, rather than take advantage of the extraordinary powers it had been

granted through law n. 671 of 22 May 1915¹ and intervene directly. On 6 June 1916, Prime Minister and Minister of the Interior Antonio Salandra submitted a bill to the Chamber of Deputies that was structured similarly to a law that had been passed for the recent earthquakes in Italy²; it proposed the establishment of an independent national institution which would be tasked with coordinating, guiding and overseeing private initiatives, and which could support them or step in to replace them whenever it deemed fit.

The Chamber of Deputies appointed a commission to scrutinize the bill, which it took several months to do³. As a result, the government was forced to adopt urgent measures as a short-term remedy for the situation, which, far from seeing improvement, was only getting worse. Through lieutenant's decree n. 968 of 6 August 1916 and its corresponding statutes (approved on 27 August⁴), the government thus aimed to provide temporary regulations to address the issue – regulations that would only be finalized with the passage of law n. 1143 on 18 July 1917. It would then take almost another year for the latter law to be implemented⁵, at which point the war was drawing to a close.

Consequently, for almost the entire duration of the war, the regulatory framework addressing this problem was based on the temporary regulations issued in the summer of 1916 and on the general principle that the State was expected to act in full observance of the rights of the family, and that it would intervene – or, if needed, take the place of the family – only when absolutely necessary to defend the interests of orphans. Among other things, article 11 of the decree issued on 6 August addressed this very principle: «Preferably, when receiving the assistance described in the

¹ C. Latini, *Governare l'emergenza. Delega legislativa e pieni poteri in Italia tra Otto e Novecento*, Milano 2005, especially p. 56 et seq.

² In addition to the infamous earthquake that had occurred in Calabria and Sicily on 28 December 1908, causing approximately 100,000 deaths, another earthquake had struck Abruzzo (in the Marsica region) on 13 January 1915, resulting in over 30,000 deaths.

³ The Commission's report was authored by MP Camillo Peano and submitted to the Prime Minister's office on 24 November 1916 (I. Tambaro, *Gli orfani di guerra*, Napoli 1919, p. 12).

⁴ D.L. n. 1251.

⁵ D.L. 30 June 1918, n. 1044.

present decree, the orphan should be left in the care of his family, or in the care of the person who exercises parental authority, or in the care of his legal guardian».

The government's aim was to provide assistance to a wide range of subjects⁶. Thus, war orphans included not only debarred persons, but also legitimate, legitimized or acknowledged natural minors (excluding emancipated minors and married women) whose father had died as a result of the state of war. In the absence of a father, then the same applied to children whose mother's death was ascribable to the war, provided she had exercised authority over the child. As a result, this included not only the children of soldiers who were killed during military operations, but also those children who lost a parent in a way that was somehow connected to the war. What's more, even unacknowledged natural children were included if certain conditions were met⁷.

In approving the decree's statutes, the government expanded the list of orphans still further, so that it came to include the children of incestuous or adulterous relationships if it was determined that the child had been supported by the parent who died because of the war⁸. Furthermore, there

⁶ D.L. 6 August 1916, n. 968, art. 2.

⁷ D.L. 6 August 1916, n. 968, art. 8: there were three cases in which the guardianship judge had the power to register unacknowledged natural children as war orphans: «when it was a matter of common knowledge that the mother or alleged father notoriously lived *more uxorio* at the time of conception; when the natural child has possession of status (*possesso di stato*); when paternity is acknowledged by an explicit declaration written by the father; or indirectly through a civil or criminal judgement». *Possesso di stato* was a de facto situation resulting from a series of circumstances which, as a whole, were able to demonstrate relations of filiation and kinship between a given person and the family to which he or she claimed to belong. This is not the place to go into more detail on the differences in the legal status of children in Italian law at that time. However, it seems opportune to clarify that natural children – that is, children born out of wedlock – could remain illegitimate or could be acknowledged by one or both parents (in any case, children of incestuous or adulterous relationships remained illegitimate). Acknowledged natural children found themselves in an intermediate position between legitimate and illegitimate children. On the other hand, legitimized children were natural children who obtained the same status as legitimate children when their natural parents married each other, or by decree of the King if certain prerequisites were met.

⁸ D.L. 27 August 1916, n. 1251, art. 7. A natural child could receive maintenance only if one of the conditions listed in article 193 of the Italian Civil Code was met: «[...] 1. If

was an explicit provision in the statutes that also made it possible to verify the natural maternity of women who died due to the war in the same way that natural paternity was verified⁹.

The mayor of each municipality was to maintain a list of orphans that included both the children of fallen soldiers¹⁰ and the children of anyone who had died «due to the state of war». A copy of the list was to be sent to the Congregation of Charity (*Congregazione di carità*), the Provincial Committee for Public Welfare (*Comitato provinciale di assistenza pubblica*), and the office of the *pretore* (a local magistrate)¹¹. Furthermore, each municipality was to prepare a file divided into three categories, which would record information on orphans, children of the disabled, and children of soldiers declared missing, respectively¹².

Given that this was a growing problem in all parts of the kingdom, it was decided not to establish a national institution based in Rome (which is what had been done for the earthquake victims¹³). Instead, focus was placed on creating what would essentially be a decentralized system.

The main goal was to ensure protection and assistance for orphans at all costs. Specifically, the government wanted to avoid leaving them with no

paternity or maternity is indirectly confirmed through a civil or criminal judgement; 2. If paternity or maternity derives from an annulled marriage; 3. If paternity or maternity is confirmed by an explicit declaration written by the parents».

⁹ D.L. 27 August 1916, n. 1251, art. 7.

¹⁰ For the children of fallen soldiers, the Ministry of War and Ministry of the Navy were to request the relevant civil registrar to record that a parent had died due to the war on the orphan's birth certificate (D.L. 6 August 1916, n. 968, art. 3).

¹¹ D.L. 6 August 1916, n. 968, art. 4: for each orphan, the list was to include information on «whether [the orphan] was under the mother's parental authority, or under guardianship, whether a pension had been applied for and whether it had been paid, and for what amount».

¹² Circular n. 26700-6, issued by the Ministry of the Interior on 18 November 1916 and sent to the prefects (*Collezione celerifera*, XCV, 1916, pp. 1326-1327). On the problem of missing persons, and on the need for a reform of absence in the technical sense and the introduction of the presumption of death in Italian civil law (a need that became urgent due to World War I), see A. Monti, *Repenser l'absence. La doctrine italienne après la première guerre mondiale*, in *L'absence. Du cas de l'absent à la théorie de l'absence*, J. Hoareau and G. Métairie (ed.), Limoges 2011, p. 366 et seq.

¹³ *Supra*, nt. 2.

means of subsistence, or in a state of abandonment and thus at risk of being exploited. For this reason, the assistance provided to war orphans was to be overseen by a newly created body operating within each prefecture: the Provincial Committee (*Comitato provinciale*). It was a relatively simple body chaired by the prefect and made up of just five members: a newly created magistrate called the *giudice delle tutele* (guardianship judge); the provincial doctor; and three members appointed by the Provincial Commission for Public Welfare and Charity (*Commissione provinciale di assistenza e beneficenza pubblica*)¹⁴. In addition to these five, there was also a secretary, who had the important task (among others) of keeping an up-to-date list of all of the province's orphans by coordinating the information sent to him from the individual municipalities¹⁵.

Tasked with a great number of burdensome duties, the Provincial Committee was given wide-ranging powers. It established the necessary procedure for determining a war orphan in cases where such status was in doubt (any disputes would be settled by the Ministry of the Interior: a decision which could not be appealed)¹⁶. It could delegate supervision of orphans to public or private institutions (recognized as such by decree of the King or prefect), which were in a better position to monitor the situation more extensively, and which could nominate inspectors to be approved by the Committee itself¹⁷. Such institutions might include the

¹⁴ D.L. 6 August 1916, n. 968, art. 5. The Provincial Commission for Public Welfare and Charity was regulated by law n. 390 of 18 July 1904.

¹⁵ D.L. 27 August 1916, n. 1251, art. 6.

¹⁶ D.L. 27 August 1916, n. 1251, art. 1.

¹⁷ D.L. 27 August 1916, n. 1251, art. 11, where the inspectors' main tasks are neatly summed up in the second paragraph. Among other things, they were responsible for ensuring compliance with the social legislation that Italy – albeit later and less comprehensively than other countries – had enacted towards the end of the previous century: «While avoiding any inappropriate interference with the free exercise of parental authority or the functions of guardians, the primary aim of inspectors' investigations shall be to ascertain whether it is necessary to come to families' aid in order to support orphans, and whether there is compliance with the laws in force regarding compulsory education, female and child labor, the ban on beggary, the ban on employing children in wandering trades, and the like; whether it is necessary to put orphan girls in an institution of some sort». See also the circular issued on 9 October 1916 by the Ministry of the

Congregations of Charity, trade associations, institutions for abandoned children, schools, rural colonies, charitable institutions, and so on. In small municipalities where provincial authority was hard to enforce, the Provincial Committee could create commissions as it saw fit, which would be chaired by the *pretore* or justice of the peace and made up of members from various backgrounds. Commission members were in charge of oversight, and if necessary, they could temporarily act as guardians¹⁸.

Similarly, public and private welfare organizations that had been tasked with safeguarding orphans by the Provincial Committee could function as guardians when the circumstances called for it¹⁹; or the Provincial Committee itself could directly take on the role in accordance with the Italian Civil Code, which provided for such measures in the event that a child was being kept in a shelter and had no relatives who were able to accept such a delicate responsibility²⁰.

Nonetheless, any resort to joint guardianship was to be seen as an emergency measure – a view that was clarified by Minister Orlando²¹. Indeed, he strongly recommended that joint guardianship last as short as possible, and that the family council or guardianship council be convened as soon as possible²².

Interior, Direzione generale dell'amministrazione civile, Divisione III, in «Bollettino ufficiale del Ministero di Grazia e Giustizia e dei Culti», XXXVII, 1916, p. 887.

¹⁸ D.L. 6 August 1916, n. 968, art. 6: these commissions were to be chaired by the *pretore* or justice of the peace and made up of the president of the Congregation of Charity, the local health official, an elementary school teacher, and the parish priest or other priest, or a minister of another faith if the orphans were not Catholic.

¹⁹ D.L. 6 August 1916, n. 968, art. 6.

²⁰ D.L. 27 August 1916, n. 1251, art. 10 and art. 262 of the Italian Civil Code.

²¹ For more on Vittorio Emanuele Orlando, start with the two encyclopedia entries edited by Giulio Cianferotti: the one in *Dizionario Biografico degli Italiani*, vol. LXXIX, Roma 2013, pp. 547-556, and the one in *Dizionario Biografico dei Giuristi Italiani (XII-XX secolo)* edited by I. Birocchi, E. Cortese, A. Mattone, M. N. Miletta, vol. II, Bologna 2013, pp. 1465-1469.

²² Circular issued on 9 October 1916, [nt. 17], p.887. However, the Oversight Committee responsible for the orphans of the earthquake in Calabria and Sicily – chaired by MP Chimirri – had already experimented with forms of joint guardianship to replace a guardian or family council, and had had success doing so (Tambaro, *Gli orfani*, [nt. 3], pp. 91-92).

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The Provincial Committee had sweeping discretionary powers: in fact, it could delegate oversight to institutions, evaluate the efficiency and appropriateness of their work, and remove them from their role if they were not up to the task, all without appeal, as such decisions were final²³.

However, it was possible to file an appeal through official channels with the Ministry of the Interior against measures taken by the Provincial Committee if such measures fell within the powers delineated in article 13 of the decree of 27 August. These were the same powers that had been established to protect against child abandonment in the 1904 law, passed under Giolitti, whereby the Provincial Commissions for Public Welfare and Charity had been created²⁴.

Lastly, the Provincial Committee's authority also extended to financial matters: namely, it was responsible for managing and allocating funds made available to the various institutions for all orphans (not just war orphans)²⁵; when the aforementioned institutions requested temporary government subsidies to assist war orphans, the Provincial Committee was required to provide a legal opinion justifying such a request²⁶; and the Provincial Committee had to receive monthly updates from the competent office in the Italian Court of Auditors (*Corte dei conti*) on war pensions paid out to orphans or widows with children²⁷.

Thus, the Provincial Committee was the central body around which the entire system revolved. It was chaired by the prefect and under the

²³ D.L. 27 August 1916, n. 1251, art. 8 last paragraph and art. 9.

²⁴ Article 13 of the decree of 27 August referred to article 5 letter (e), article 6 letters (f) and (g), and article 18 of law n. 390 of 18 July 1904. Specifically, this regarded the following cases: decisions on appeals against the granting of regular welfare payments and payments of any type made by public charities which violated laws, regulations or statutes; situations in which the judicial authorities were informed of facts that might imply the loss of parental authority, guardianship or the role of guardian; reports of agreements that might infringe the law on child labor, or infringe other regulations meant to safeguard children; measures taken in order to close private charities.

²⁵ D.L. 27 August 1916, n. 1251, art. 14

²⁶ D.L. 27 August 1916, n. 1251, art. 15: as specified by Vittorio Emanuele Orlando, a legal opinion was required in order to provide the Ministry with information that could help it fairly allocate funds to the provinces (Circular issued by the Ministry of the Interior on 9 October 1916 [nt. 17], p. 887).

²⁷ D.L. 27 August 1916, n. 1251, art. 3.

authority of the Ministry of the Interior, from which it received its instructions. Furthermore, it had to submit a quarterly report to the same Ministry in which it summarized its work as well as the work of the institutions in charge of overseeing orphan care²⁸.

Given that urgent measures were needed, the government did not present radical changes to the Italian Civil Code's regulation of guardianship, despite the fact that it had long been the subject of criticism and calls for reform²⁹. Nonetheless, there were two changes worthy of note, as recognized by Minister of Justice Ettore Sacchi in a circular distributed to the presidents and chief prosecutors of the Courts of Appeal. Of these two, one was really nothing more than the reinstatement of a provision that had previously been introduced in response to the earthquakes that struck Calabria/Sicily and Marsica³⁰: namely, the

²⁸ D.L. 27 August 1916, n. 1251, art. 16.

²⁹ In particular, the shortcomings and flaws of the system outlined in the Italian Civil Code had been the subject of much debate during the Fifth National Legal Congress in Palermo in 1903. Indeed, on that occasion it was acknowledged that reforms were needed, and a lawyer by the name of Piccolo had proposed guidelines which were approved, but given the complexity of the issue and time constraints, the discussion was postponed to a future congress (*V Congresso Nazionale giuridico forense – Atti*, Palermo 1904, vol. I, *Adunanza del 25 aprile 1903*, Discussion on the topic *Delle riforme da apportarsi allo istituto della tutela*, pp. 73-80).

³⁰ R.D. 21 March 1909, n. 162, art. 2. Regarding this provision, Vittorio Polacco disapproved of giving women the opportunity to become guardians – in other words, to exercise a *munus publicum* with respect to people outside of the immediate family – without their spouse's consent; on the other hand, he believed that it was anachronistic to require a husband's authorization for what concerned the financial interests of married women (V. Polacco, *Di alcune deviazioni dal diritto comune conseguite al terremoto calabro-siculo*, Padova 1909, pp. 11-12). On Vittorio Polacco, see the masterful work of Paolo Grossi in various studies, and in particular his long essay entitled '*Il coraggio della moderazione*' (*specularità dell'itinerario riflessivo di Vittorio Polacco*), in «Quaderni fiorentini per la storia del pensiero giuridico moderno», 18 (1989), pp. 197-251, in *Scritti in onore di Angelo Falzea*, Milano, Giuffrè, 1991, and in Id., *Assolutismo giuridico e diritto privato*, Milano, Giuffrè, 1998, pp. 69-126; see also G. Cazzetta, *Codice civile e identità giuridica nazionale. Percorsi e appunti per una storia delle codificazioni moderne*, Torino 2012, *passim* and especially pp. 66-67, as well as M. Sabbioneti, '*Polacco, Moisè Raffael Vittorio*', in *Dizionario Biografico dei Giuristi Italiani (XII-XX secolo)* edited by I. Bircocchi, E. Cortese, A. Mattone, M. N. Miletti, vol. II, Bologna 2013, pp. 1609-1611.

restriction of the family council or guardianship council to only two members, and the admission of women in such councils even if they did not have their husband's authorization³¹.

Therefore, the only true change was the institution of the *giudice delle tutele*, or guardianship judge. This role drew inspiration from Germanic models and showed just how important a role the judiciary played in such a complex and delicate issue. Indeed, from the very beginning of the aforementioned circular, Minister Sacchi placed particular emphasis on «the new, extremely delicate functions [given] to magistrates»; furthermore, in their respective roles, he regarded guardianship judges and *pretori* as guarantors of a function that was now both administrative and above all social in nature, and no longer simply a part of voluntary jurisdiction. As such, these judges had to take on a burden and a moral responsibility that went beyond their natural competence, and they were obligated to fulfill a «patriotic duty in the name of solidarity with the children of those who had shed blood for the national cause»³².

The *pretori* already had certain jurisdiction over orphans in accordance with the Italian Civil Code³³, which included above all the authority to summon and preside over the family council³⁴. Now they would also preside over the Oversight Commissions in small municipalities³⁵, and they would be in charge of duly checking civil registration records, meaning that they would have to periodically verify that all information related to orphans had been properly registered and/or updated, and report any omissions³⁶. A report was to be prepared every four months, which was to contain the results of these checks³⁷.

The guardianship judge was to oversee the work of the *pretori*, and in general ensure compliance with all provisions of the Italian Civil Code and lieutenant's decrees relating to guardianship. He was to be appointed on a

³¹ D.L. 6 August 1916, n. 968, art. 9.

³² Circular n. 1936 issued on 14 November 1916, in «Bollettino ufficiale del Ministero di Grazia e Giustizia e dei Culti», XXXVII, 1916, p. 886.

³³ See title IX, chapter II, Della tutela, articles 241 et seq., *passim*.

³⁴ Article 251 of the Italian Civil Code.

³⁵ D.L. 6 August 1916, n. 968, art. 6.

³⁶ D.L. 27 August 1916, n. 1251, art. 2.

³⁷ Circular n. 1936 issued on 14 November 1916 [nt. 32], p. 886.

yearly basis by the president of the local court³⁸, who in turn was to be periodically informed of the guardianship judge's progress³⁹. The court devolved authority to the judge to approve resolutions passed by the family council in order to authorize acts of extraordinary administration regarding the estates of war orphans⁴⁰, as well as authority over any challenges to the family council's resolutions⁴¹.

This judge's most delicate task, however, was to rule on the inclusion of unacknowledged or unacknowledgeable natural children among war orphans, which he could do upon verifying that certain conditions were met (the verification process was strictly confidential and could not have further legal consequences)⁴². Such a task was defined as «almost administrative» in nature by Riccardo Luzzato, while others considered it policing in the broad sense of the term⁴³ – either way, it was a task that spoke to feelings of pity and human solidarity. While it was true that it did not legally establish a relationship of natural filiation, there were nonetheless some jurists who were alarmed by these regulations, for they saw a dangerous *vulnus* to the protection of the legitimate family as foreseen by the Italian Civil Code⁴⁴.

³⁸ D.L. 6 August 1916, n. 968, art. 7.

³⁹ Circular n. 1936 issued on 14 November 1916 [nt. 32], p. 886.

⁴⁰ Article 301 of the Italian Civil Code.

⁴¹ This regarded both resolutions that were not subject to judicial approval (article 815 of the Italian Code of Civil Procedure) as well as those that were not unanimously adopted (article 260 of the Italian Civil Code).

⁴² *Supra*, nt. 7.

⁴³ Tambaro, *Gli orfani di guerra* [nt. 3], pp. 75-76, wherein the opinions of Orlando, Mancini and Pisanelli are cited in the comments on the Italian Code of Civil Procedure.

⁴⁴ In Senate debates, Lodovico Mortara pointed out that providing assistance to children of incestuous or adulterous relationships, or to children born into cohabitation *more uxorio*, could lead to «extremely harmful consequences from a moral and social point of view, while encouraging concubinage and favoring the formation of illegitimate families» (A. Groppali, *Gli orfani di guerra*, Milano 1917, p. 13). See also the observations of G.P. Chironi, *Sul disegno di legge sugli orfani di guerra*, in «Rivista di diritto pubblico», 1917, pt. I, pp. 312-313. For a contrasting opinion, see R. Luzzatto, *Diritto familiare di guerra*, in «Nuova antologia di lettere, scienze ed arti», s. 6, 188 (1917), p. 84, nt. 1, and G. Faggella, *La legislazione bellica in relazione al diritto pubblico preesistente ed alle riforme future*, in «Rivista di diritto pubblico», 1918, pt. 1, pp. 368-369. On the crisis that afflicted civil law and its sources – which had already begun to simmer in the late 1800s, but which

As part of the judicial system, the guardianship judge was subject to the hierarchical authority of the president of the court of first instance, as well as that of the presidents of the Courts of Appeal in the case of appeals; in turn, the presidents had to submit annual reports to the Ministry of Justice on the progress of war orphan assistance. On the other hand, the guardianship judge was also a member of the Provincial Committee, and as such he had to perform administrative duties; from this perspective, he was necessarily subject to administrative authority, namely that of the prefect, as well as that of the Minister of the Interior (above the prefect).

This dual position was not viewed negatively by the Minister of Justice, as he did not find any violation of the principle of the separation of powers in such an arrangement. On the contrary, he highlighted how this was a real opportunity to have a figure who could coordinate «the actions of the judicial authorities with those of the administrative bodies responsible for public welfare and charity»⁴⁵. Generally speaking, he believed that the main virtue of these government regulations was this very aspect, namely that they had better reorganized how all involved parties worked together. This meant better cooperation between the judicial authorities and the surviving parent, or if there was no surviving parent, the family council, and then better coordination of the result of this joint effort with administrative proceedings. Lastly, it also meant that the various functions of the State could better collaborate with charitable institutions.

The guardianship judge was the central figure in the interaction of these forces – as such, he had to be reliable. It was no coincidence, then, that the minister placed particular emphasis on the ideal qualities that such a judge was to possess. He recommended that the presidents of the courts appoint qualified senior magistrates (and not simple *pretori*), and that if necessary, they were to be relieved of other duties⁴⁶.

emerged in overwhelming fashion with the flood of urgent measures enacted in order to cope with wartime needs – see P. Grossi, *Scienza giuridica italiana. Un profilo storico*, Milano 2000, p. 130 ss.; Id., *Introduzione al Novecento giuridico*, Bari 2012, *passim*; G. Cazzetta, *Codice civile e identità giuridica*, [nt. 31], p. 156 et seq..

⁴⁵ Circular n. 1936 issued on 14 November 1916 [nt. 32], p. 886.

⁴⁶ *Ibidem*.

3. *A legislative framework*

The law passed by Parliament on 18 July 1917 and the implementation of its statutes on 30 June 1918 helped complete what the government had started in 1916.

First of all, it definitively resolved what had been a hotly contested issue in parliament⁴⁷, namely whether assistance to war orphans was to be provided directly by the State or by an independent national institution created specifically for that purpose. The former solution prevailed, which was in line with the government's previous choice: the entire system dedicated to this noble cause would remain under the authority of the Ministry of the Interior⁴⁸.

Nonetheless, because the Ministry was already overloaded with tasks as it was, the government decided to create a National Committee that could work alongside it in order to lighten its load somewhat, and to help it carry out this complex function more satisfactorily. This Committee would function as a deliberative body for what concerned the administration of the orphan fund (though all decisions were still subject to Ministry approval)⁴⁹, as well as an advisory body to support the Ministry in its coordination and steering of the Provincial Committees⁵⁰. The 16 members of the National Committee came from a variety of different backgrounds: from politics, the judiciary and public administration, to the high ranks of the military and national institutions for the protection of orphans⁵¹.

⁴⁷ A summary of the arguments presented in the Chamber of Deputies, the Senate and their respective legislative committees can be found in Tambaro, *Gli orfani di guerra* [nt. 3], *passim*.

⁴⁸ L. 18 July 1917, n. 1143, art. 1: «The State is responsible for providing protection and assistance to the orphans of the current war».

⁴⁹ L. 18 July 1917, n. 1143, art. 8.

⁵⁰ L. 18 July 1917, n. 1143, art. 6.

⁵¹ In addition to two senators and two deputies, there was a judge from the Supreme Court of Cassation in Rome, an assistant public prosecutor from the aforementioned court and a member of the Council of State; the chairman of the High Council on Welfare and Charity; the general director of civil administration in the Ministry of the Interior; two general officers, one from the army and the other from the navy; one accountant from the Treasury; and one delegate from each of the national institutions for the protection of orphans (article 7 of law n. 1143, 18 July 1917). Specifically, the latter institutions were the following: the National Institution for orphans of farmers who died at war; National

Within the National Committee there was an Executive Committee made up of seven members, which examined all the issues to be submitted to the National Committee for discussion and subsequently drew up resolution proposals⁵².

Just as the National Committee featured a wide variety of members from different walks of life, so too did the Provincial Committees enrich themselves with new members from diverse backgrounds. In order to strengthen the role of the judiciary, the guardianship judge would now be flanked by the kingdom's public prosecutor (*procuratore del re*) from the same court; additionally, the head of the provincial education authority (*provveditore agli studi*) would become a member, as well as two representatives from the Provincial Council, two high-ranking officers, and a delegate from the province's public institutions in charge of protecting and assisting abandoned children⁵³. The prefect would continue to chair the Committee as the *longa manus* of the government, even though some voiced concerns that the Committee's work could potentially be influenced by political changes and electoral campaigns⁵⁴.

The government was faced with a truly dramatic situation after four years of hard combat and tragic losses, which led it to expand the category of war orphans even further. Thus, the statutes now explicitly provided for anyone who lost the person who was fully or largely responsible for supporting them⁵⁵; such orphans would also include «the children of those who have become unfit to work due to an injury or illness suffered during wartime military service or ascribable to war-related events, provided that

Institute for Seafarers; the National Institute for the civil and religious assistance of war orphans; and the General Union of Italian Teachers (article 13 of law n. 1143, 18 July 1917).

⁵² D.L. 30 June 1918, n. 1044, articles 19-22.

⁵³ L. 18 July 1917, n. 1143, art. 9.

⁵⁴ Tambaro, *Gli orfani di guerra* [nt. 3], p. 203 and 207, wherein particular reference is made to Don Sturzo's concerns.

⁵⁵ D.L. 30 June 1918, n. 1044, articles 2-3; article 1 also specified that anyone who perished up to a year after the armistice due to an illness contracted or made worse during military service (no matter where they served), or even during civil service that was somehow connected to the war, would be presumed to have died due to the state of war.

such children had been conceived before the event leading to the disability of the parent, and that they have been acknowledged by said parent»⁵⁶.

Evidently the creation of the guardianship judge had achieved good results, because the position was given even further prestige: it would no longer be appointed by the president of the court, but rather by the more powerful president of the Court of Appeal. Furthermore, the choice was to be made «preferably from among higher ranking judges who have proven their skill and aptitude for the functions assigned to them»⁵⁷. The judge's powers were broadened to include both those of the president of the court and those that fell under the court's authority in accordance with Title VIII (on parental authority) and Title IX (on the age of minority, guardianship and emancipation) in the first book of the Italian Civil Code. In addition, his powers now included those that fell under articles 113-116 of law n. 6144 on public security (30 June 1889), namely as regarded the measures to be taken to address minors under the age of eighteen who were indolent, vagrant, «disreputable», or reduced to beggary or prostitution⁵⁸.

Though the holder of these powers may have changed, the codification thereof was not touched – this despite the fact that, as previously mentioned, calls for reform had long been launched. Specifically, there were calls to limit or abolish the family council, as it left much to be desired in terms of how it functioned, and it tended to hinder procedures. However, this institution was preserved under the same conditions set forth in the 1916 decrees, and it was still the guardianship judge's responsibility to convene the family council and oversee its formation and operation⁵⁹.

The judge maintained full discretionary power to establish natural paternity or maternity, and in doing so he continued to operate «without formalities», meaning without due process⁶⁰. He ordered inquiries as he

⁵⁶ L. 18 July 1917, n. 1143, art. 42.

⁵⁷ D.L. 30 June 1918, n. 1044, art. 52.

⁵⁸ L. 18 July 1917, n. 1143, art. 17.

⁵⁹ D.L. 30 June 1918, n. 1044, articles 68-69.

⁶⁰ *Ivi*, art. 54.

saw fit⁶¹, but contrary to the past, his decisions could now be appealed in the Court of Appeal⁶².

The magistrate was also tasked with an equally delicate function, namely that of overseeing the «moral or material interests» of orphans. If there was any case in which parental authority or the role of guardian had been abused, then the Provincial Committee, public prosecutor or orphan's next of kin could petition the guardianship judge, who would have to take measures to appoint a new guardian; in less serious cases of mistakes or negligence, the judge could place the orphan under the guardianship of the Provincial Committee, or under that of national institutions, or under that of any organizations administered by national institutions⁶³. In more urgent cases, the judge himself could take on the role of guardian, in order to then transfer guardianship to the Provincial Committee or to another institutional body⁶⁴.

As a general rule he had to personally see to all acts and measures falling under his authority, although he could also collaborate with other judicial authorities, such as the public prosecutor and *pretori*, as well as administrative authorities and the police for what concerned inquiries, inspections, information, proposals and opinions⁶⁵.

Furthermore, the guardianship judge was responsible for taking disciplinary measures or temporarily sending orphans to a reformatory or other institution in the event that an orphan demonstrated reprehensible conduct. Before taking such measures, the magistrate was required to carefully evaluate the physical and mental state of the minor, as well the family circumstances and living conditions⁶⁶.

The extent of the guardianship judge's power was explicitly stated in article 70 of the statute: «The guardianship judge's orders have executive

⁶¹ In addition to the inquiries conducted by the guardianship judge in order to ascertain natural paternity or maternity, the National Committee for war orphans was also now required to draw up a questionnaire for the judges to forward to municipal authorities and public security authorities, or to the Royal Carabinieri (D.L. 30 June 1918, n. 1044, art. 60).

⁶² L. 18 July 1917, n. 1143, art. 17.

⁶³ *Ivi*, articles 18-19.

⁶⁴ D.L. 30 June 1918, n. 1044, art. 64.

⁶⁵ *Ivi*, articles 56-58.

⁶⁶ *Ivi*, art. 61.

force over any authority, institution or private organization. The judge himself shall see to their implementation, and a copy or certificate of his orders shall be sent to the offices responsible for their execution». This was a considerable amount of authority, which could have conflicted with the equally considerable powers of the prefect or the Provincial Committee. If such a conflict came to pass and could not be resolved «through voluntary relinquishment», then any of the concerned parties could take the issue to the Court of Appeal⁶⁷.

The importance of the role played by the guardianship judge was reaffirmed by the fact that, contrary to matters of voluntary jurisdiction⁶⁸, the public prosecutor was not normally required to intervene or make decisions when it came to war orphans. Even if the law specifically required the public prosecutor to intervene, the guardianship judge could bypass this requirement «if a delay might endanger» the orphan in any way, provided that he subsequently inform the public prosecutor of the action taken. The public prosecutor then had the power to review or appeal such action⁶⁹.

On the other hand, the kingdom's public prosecutors were required to intervene when people acting as guardians or holding parental authority were convicted of serious crimes. A copy of the sentence was to be sent to the Provincial Committee, so that it could then take appropriate measures to safeguard the children or wards⁷⁰.

The *pretori* remained an important part of the system, and in addition to the duties that they had been assigned through the previous decrees, they could now also intervene on their own initiative; in the event that it was necessary to remove an orphan from his or her family's home, the *pretore* could take the appropriate measures, after which he was required to report to the guardianship judge⁷¹. Moreover, they were required to

⁶⁷ D.L. 30 June 1918, n. 1044, art. 71: however, if a conflict arose between the prefect and the Provincial Committee, then the National Committee would be tasked with settling it.

⁶⁸ L. 28 November 1875, n. 2781, art. 2; art. 346, n. 5 of the Italian Code of Civil Procedure; l. 6 December 1865, n. 2626, art. 139.

⁶⁹ D.L. 30 June 1918, n. 1044, art. 53.

⁷⁰ L. 18 July 1917, n. 1143, art. 28.

⁷¹ D.L. 30 June 1918, n. 1044, art. 59.

record any information on family councils or guardianship councils in a special register, and to then send a summary of these records to the guardianship judge. They were also required to send the guardianship judge an annual statistical report on the service they carried out in their jurisdiction⁷².

As can be observed, the 1917 law and its associated statutes reaffirmed and reinforced what the government had already recognized previously, namely that the judiciary was to have a fundamental role in managing a serious problem which had only increased in magnitude as the war unfolded, and which would have consequences for years to come.

The guardianship judge's role was given the utmost importance, as a considerable number of duties fell under his authority, including some very delicate tasks. Indeed, he acted as a link between the different parties that had to work together.

The idea of entrusting a single magistrate with the duties and powers of the public authorities in issues pertaining to minors had already been proposed by a Royal Commission established on 7 November 1909, the objective of which was to study measures to combat juvenile delinquency. The Commission had been appointed by Minister Orlando, and one of its tasks was to collect all laws and regulations regarding minors (in both the civil and criminal spheres) and unify them into one text.

In 1912, the Commission presented the *Progetto del codice dei minorenni* (Project for a juvenile code) together with a report authored by the chairman of the Commission, Senator Oronzo Quarta. It was proposed that each court of first instance institute a *magistrato distrettuale*, or district magistrate, who «in the broadest and fullest sense» would be entrusted with «the oversight, guardianship and social protection of minors», in addition to special jurisdictional functions⁷³. He was to be appointed by the King upon the suggestion of the minister of justice, and he was to be chosen from judges or assistant attorneys general who, «if possible», were to be learned «in biological, pedagogical and social

⁷² D.L. 30 June 1918, n. 1044, articles 73-74.

⁷³ *Progetto del codice dei minorenni*, Roma, Stamperia Reale, 1912, articles 1 and 6.

sciences»⁷⁴; or from lawyers who had practiced law for at least eight years; or from holders of a law degree «who, through teaching, publications, or positions held in societies or institutions providing assistance, charity or other such [aid]», were deemed fit to take on such a delicate role⁷⁵. The appointment was to last five years, the magistrate could be reappointed⁷⁶, and he would be relieved from any other duty while serving in this position⁷⁷.

The purpose of such a role was to unify the direction, coordination and prompt action of all activities related to the education and protection of minors on the one hand, and any disciplinary or punitive measures on the other. It was also hoped that in this way, any rivalries or conflicts (which unfortunately were quite common) between private and public institutions providing charity or assistance could be avoided⁷⁸.

These were largely the same reasons behind the creation of the guardianship judge, who the Minister of Justice Sacchi defined «practically the main organ of this new legislation»⁷⁹. As has been shown, he was the custodian of an extremely important range of functions, the most delicate of which concerned that of determining whether unacknowledged or unacknowledgeable minors could be included in the list of war orphans. Indeed, although these inquiries were confidential, they nonetheless contrasted with the basic principles of the Italian Civil Code regarding the protection of the legitimate family; furthermore, they ran the risk of indirectly leading to unpleasant moral and social consequences for the

⁷⁴ Ivi, art. 3, wherein the following was added in the second paragraph: «As the law on the judicial system provides for the training of auditors, the minister of justice shall take measures to ensure that those auditors who reveal themselves to be particularly studious in the above-mentioned sciences, be assigned to the most important offices under the district magistrates, where, should they demonstrate a special aptitude for the functions they have been assigned, they will be able to act as substitutes and collaborators, even after they have been promoted to the role of *giudici aggiunti*; they shall also be given preferential consideration when appointing district magistrates».

⁷⁵ Ivi, art. 5.

⁷⁶ Ivi, art. 4.

⁷⁷ Ivi, art. 8.

⁷⁸ Ivi, *Relazione introduttiva*, pp. 11-12.

⁷⁹ Circular n. 1968 of 1 September 1918, in «Bollettino ufficiale del Ministero di Grazia e Giustizia e dei Culti», XXXIX, 1918, p. 474.

parties concerned. For this reason, the Minister of Justice himself strongly recommended that magistrates use their discretionary power with extreme caution and prudence⁸⁰.

Even if the orphan was legitimately placed in a family context, the guardianship judge was still required to exercise an uncommon amount of restraint: indeed, just as in 1916, the new regulations did not intend to undermine the role of the surviving parent or guardian, and thus the judge had to carefully evaluate the extent to which the State became involved. Once again, the Minister of Justice felt it necessary to intervene, urging the magistrates to avoid conflict and to act in harmony with families⁸¹.

The guardianship judge would later be entrusted with another important task following decree n. 1357 of 31 July 1919, which responded to a wish expressed by the National Committee. In what would be an exception to the relevant regulation in the Italian Civil Code, this measure would extend the institution of adoption to include war orphans under the age of 18. The guardianship judge would be responsible for assessing whether the adoption was favorable to the orphan, and whether the adopter's main purpose was to benefit from the adoptee's pension or estate⁸². In that regard, Minister of the Interior Nitti observed that on the one hand, adoption «can be one of the most providential forms of assistance» as well as «that which best corresponds» with the principle at the foundation of the law of 18 July 1917, namely that family-provided assistance was preferable; on the other hand, however, adoption «could inflict great harm on an adopted orphan, if carried out with devious aims of exploitation»⁸³.

4. Conclusion

Though this article may have only briefly touched upon the system put in place by the government and parliament, it nonetheless provides an idea of its massiveness and complexity. Indeed, those in power truly felt it was

⁸⁰ *Ibidem*.

⁸¹ *Ibidem*.

⁸² R.D. 31 July 1919, n. 1357, articles 2-3.

⁸³ Circular n. 26700-VII-C, issued by the Minister of the Interior on 30 August 1919, in «Bollettino ufficiale del Ministero di Grazia e Giustizia e dei Culti», XL, 1919, pp. 666-667.

their duty to act in the name of national solidarity, yet there were a multitude of thorny issues to resolve before they could do so. The goal was to have the State control the entire system, but it was difficult for the State to satisfy all of the needs that emerged from a situation which continued to worsen in wartime, and which had consequences that would last for many years to come.

The war had taken a terrible toll on the Italian population, resulting in a void that had to be filled. Thus, it was important to nurture the growth, education and instruction of children and youth, who would soon become the backbone of society.

Magistrates were called to do their part alongside administrative bodies, public and private charities, and families: one can only wonder just how efficient such a complex and disparate group could have been. In any case, the present article has sought to focus on the judicial aspects of the matter, which can be summed up in a brief yet significant observation made by minister Lodovico Mortara⁸⁴ in a circular issued on 25 January 1920.

In examining the reports that were sent to his ministry, the Minister of Justice saw that there were several shortcomings in the work of the *pretori*, who were probably overburdened with responsibilities and thus unable to adequately perform their tasks. He exhorted them to overcome their deficiencies in a timely fashion, above all for what concerned the census and registration of orphans, which still seemed incomplete. On the other hand, he expressed satisfaction with the work being done by the guardianship judges, who deserved special praise for having realized since the very beginning that «the correct functioning of these new institutions, created in the interest of war orphans, greatly depended upon their vigilant action»⁸⁵.

Mortara softened his rebuke of the *pretori* towards the end of the circular, where, in the form of an elegant *captatio benevolentiae*, he made

⁸⁴ For more on Mortara, start with the two encyclopedia entries edited by Nicola Picardi: the one in *Dizionario Biografico degli Italiani*, vol. LXXVII, Roma 2012, pp. 232-236, and the one in *Dizionario Biografico dei Giuristi Italiani*, cit., vol.II, pp. 1383-1386.

⁸⁵ Circular n. 2017 of 25 January 1920, in «Bollettino ufficiale del Ministero di Grazia e Giustizia e dei Culti», XLI, 1920, pp. 76-77.

a special appeal to the commitment of all magistrates. Specifically, he expressed his conviction that they «will be able to make themselves deserving of the Country's praise, and prove how, as public officials, the judiciary is second to none in helping pay tribute, with unconditional selflessness and in the name of gratitude and solidarity, to the children of those who gave their lives for this great country»⁸⁶.

⁸⁶ Circular n. 1968 [nt. 79] of 1 September 1918, p. 475; Sacchi, too, had declared in 1916 that he was sure that in carrying out these «new, very delicate functions», the judges would show themselves to be, «as always» and «without a doubt, worthy of the trust placed in them» (Circular n. 1936 [nt. 32] of 14 November 1916, pp. 885-886).