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**The Best Interests of the Child in Judicial Perspective:  
Morocco and Chile as Case-Studies (1990-2020)**

*Susana Sanz-Caballero*

**ABSTRACT**

Is there a common understanding in the judiciary process about what “the child’s best interests” are, regardless of geographic location or legal order? In every nation, when disputes impacting minors arise, judges emerge as the final adjudicators. Judges, as final adjudicators, appear to be in the best possible position to determine a child’s best interests and apply the notion fairly and appropriately. However, the concept of a child’s “best interests” is far from uniform, varying across cultures and individual family dynamics. It is an invaluable exercise to review the national case law of different countries to test whether the concept and its application are as definitive as one might suppose. This article examines the judicial practices of two countries—Morocco and Chile—in applying the “best interests of the child” standards in judicial contexts from 1990 to 2020. The purpose of this analysis is twofold: first, to clarify the concept of the “best interests of the child,” as referenced in General Comment (“GC”) number fourteen of the Committee on the Rights of the Child; and second, to identify the similarities and divergences of the interpretation of the “best interest of the child” standard, as applied in different courts worldwide.

**I. HOW IS THE “BEST INTERESTS OF THE CHILD” DEFINED IN THE UN CONVENTION ON THE RIGHTS OF THE CHILD AND INTERPRETED IN THE GENERAL COMMENTS OF THE COMMITTEE OF THE RIGHTS OF THE CHILD?**

Rarely has a concept been used to serve more diverse purposes than that of the “best interests of the child.” It seems as if every person knows better than all others on how to interpret this notion. However, adults lay the blame on others for what seems to be their inability to assess and determine the concept accurately. Many purport to use the argument of “the best interests of the child” to justify their respective points of view, but

often the children involved are excluded from expressing their own opinions.<sup>1</sup> The best interests of the child is an undefined legal concept. The term is controversial, and its content is complicated.<sup>2</sup> Nevertheless, in the case of a dispute, the court is the final arbitrator. For this reason, presiding judges declare where the child's best interests lie.<sup>3</sup>

The Convention on the Rights of the Child (the “Convention”) devotes Article 3 to “the best interests of the child” as a limit on the action of the adults empowered to make decisions on behalf of children.<sup>4</sup> However, it was not until May 29, 2013, that the Committee of the Rights of the Child of the United Nations (the “CRC”) devoted a complete General Comment (the “GC”) to the rights of the child to have their best interests taken as a primary consideration.<sup>5</sup> In this GC, children are no longer considered objects of protection but subjects with rights.<sup>6</sup> In GC no. 14, the “best interests of the child” is, all at once, a right, a principle of interpretation, and a rule of procedure.<sup>7</sup> As a subjective right, authorities can invoke the “best interest of the child” standard when children are affected in a case. As a principle, when a legal norm can be interpreted differently, the interpretation that best aligns with the child’s expressed interests should be selected. As a rule of procedure, State parties are bound to develop suitable safeguards so that authorities give due regard to the child’s best interests in their decisions; therefore, the best interest standard is a polysemic concept.

<sup>1</sup> Jorge Cardona Llorens, *El interés superior del niño: balance y perspectivas del concepto en el 25º aniversario de la Convención sobre los Derechos del Niño*, 34 REV. ESPAÑOLA DE DESARROLLO Y COOPERACIÓN 21, 24 (2014) (Spain) [hereinafter *Interés superior del niño*]; see also Eveline van Hooijdonk, *Children’s Best Interests: A Discussion of Commonly Encountered Tensions*, in THE BEST INTERESTS OF THE CHILD: A DIALOGUE BETWEEN THEORY AND PRACTICE 40, 42 (Milka Sormunen ed., Council of Eur., 2016) (Eur.); Nigel Cantwell, *The Concept of the Best Interests of the Child: What Does It Add to Children’s Human Rights?*, in THE BEST INTERESTS OF THE CHILD: A DIALOGUE BETWEEN THEORY AND PRACTICE 18, 18 (Milka Sormunen ed., Council of Eur., 2016) (Eur.); Jorge Cardona Llorens, *Presentation of General Comment No. 14: Strengths and Limitations, Points of Consensus and Dissent Emerging In Its Drafting*, in THE BEST INTERESTS OF THE CHILD: A DIALOGUE BETWEEN THEORY AND PRACTICE 11, 12 (Milka Sormunen ed., Council of Eur., 2016) (Eur.) [hereinafter *Presentation of GC*].

<sup>2</sup> *Presentation of GC*, supra note 1, at 12; see also Michael D.A. Freeman, *Upholding The Dignity and Best Interests of Children: International Law and Corporal Punishment of Children*, 73 No. 2 L. & CONTEMP. PROBS., 211, 216 (2010); Jason M. Pobjoy, *The Best Interests of the Child Principle As an Independent Source of International Protection*, 64 No. 2 THE INT’L & COMPAR. L.Q. 327, 328 (2015) (Eng.).

<sup>3</sup> Barbara Bennett Woodhouse, *“Out of Children’s Needs, Children’s Rights”: The Child’s Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 334 (1994); Phillip Alston, *The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT’L J.L. & FAM. 1, 18 (1994); Stephen Parker, *The Best Interests of the Child – Principles and Problems*, 8 INT’L J.L. & FAM. 26, 26 (1994).

<sup>4</sup> Gerison Lansdown, *Best Interests of the Child and the Right to be Heard*, in THE BEST INTERESTS OF THE CHILD: A DIALOGUE BETWEEN THEORY AND PRACTICE 1, 31 (Council of Eur. 2016) (Eur.).

<sup>5</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 14 (2013): *On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration*, May 29, 2013, CRC/C/GC/14, [hereinafter U.N. CRC GC 14].

<sup>6</sup> *Presentation of GC*, supra note 1, at 17.

<sup>7</sup> U.N. CRC GC 14, supra note 5, at ¶ 1.

Additionally, GC no. 14 states that the child's best interests are closely related to other general principles of the Convention, such as the right not to be discriminated against, the right to life, survival and development, and the right to be heard.<sup>8</sup> The right for a child to be heard acquires a special value. If children are not given the chance to express their opinion, it will be more difficult to make the best decision for their future and for their rights. This document provides some elements that should be considered to better assess the child's best interests, such as safety, health, care and protection, identity, vulnerability, preservation of family environment, and education.<sup>9</sup> Also, child-friendly procedural safeguards must be adopted by States to ensure the adequate application of the best interests, including but not limited to the right of children to express their own views, their need for appropriate legal representation, and the use of qualified personnel in cases that affect children. That said, it is important to note, however, that these elements do not always have equal weight and should be balanced in each situation.

As mentioned, the best interests of the child is an undefined legal concept whose interpretation is flexible and heavily fact-dependent. A child's best interests may look dramatically different across children and their circumstances, making it is an evolving concept. What may be a good decision for one child may not be for another. The best interest standard aims to ensure both the effective enjoyment of the rights recognized in the Convention and the child's holistic development.<sup>10</sup> However, a flexible interpretation may lead to arbitrary decision-making. This is why the assessment and determination of the best interests of the child should be based on objective criteria that guarantee the full respect of the Convention.<sup>11</sup> Nevertheless, the child's best interests can contradict other aspects of daily life that are also legitimate, such as the interests of the other people involved, public health, or public policy. In these cases, the best interests of the child shall be prioritized but cannot be the only factor considered during the decision-making process.<sup>12</sup>

The Convention establishes that "...in all legal actions concerning children, whether undertaken by private or public institutions, the best interests of the child shall be a primary consideration."<sup>13</sup> GC no. 14 clarifies, "...the term 'concerning' refers first

<sup>8</sup> Article 2 of the Convention is devoted to the right not to be discriminated against, whereas Article 6 includes the right to life, survival and development and Article 12 considers the right to be heard.

<sup>9</sup> See U.N. CRC GC 14, *supra* note 5, at ¶¶ 53, 55, 58, 71, 75, 77 and 79.

<sup>10</sup> U.N. CRC GC 14, *supra* note 5, at ¶ 4.

<sup>11</sup> U.N. CRC GC 14, *supra* note 5, at ¶¶ 48-84.

<sup>12</sup> U.N. CRC GC 14, *supra* note 5, at ¶¶ 37-39.

<sup>13</sup> U.N. Convention on the Rights of the Child, Art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

of all, to measures and decisions directly affecting a child, children as a group, or children in general, and secondly, to other measures that have an effect on an individual child, children as a group, or children in general, even if they are not the direct targets of the measure.”<sup>14</sup> The term’s scope goes beyond actions that directly influence children but also covers those that have an impact on them in indirect ways. However, cases where children are directly concerned should be distinguished from those where children are indirectly affected. Where children are indirectly concerned, the decision-maker should prioritize reaching the “best” solution for the general issue to be decided even if the best solution is not the best for one specific child, whereas, in the case of decisions that directly affect a child, the decision-maker should prioritize finding a solution that has the best outcome for the child.<sup>15</sup>

Certainly, GC no. 14 is not the only Committee GC to interpret the child’s best interests, but it is the only one entirely focused on it. One of the CRC’s iterations of the best interests of the child standard addresses the topic of education. GC no. 1, implemented on April 17, 2001, emphasizes the need for a child-centric education that considers the development of a child’s personality and abilities and recognizes each child’s unique strengths, interests, and learning needs.<sup>16</sup> On the topic of public health, GC no. 3 from January 17, 2003, addressed the HIV/AIDS crisis and its relationship with the best interests of the child. This Comment placed the child at the center of national pandemic responses and urged strategies adapted to children’s rights and needs.<sup>17</sup> Similarly, when hospitalization or placement of an adolescent in a psychiatric institution is required, GC no. 4 from May 19, 2003, clearly establishes that the placement of a child for their health and development must be carried out in accordance with the child’s best interests.<sup>18</sup>

In another vein, GC no. 5 of November 27, 2003, considers the best interests as a principle that should be systematically applied in legislative, administrative, and judicial decision-making, especially in scenarios where children are only indirectly concerned.<sup>19</sup>

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<sup>14</sup> U.N. CRC GC 14, *supra* note 5, at ¶ 19.

<sup>15</sup> John Eekelaar, *The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children*, 23 INT’L J. CHILD’S. RTS. 3, 3 (2015).

<sup>16</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 1 (2001): *On the Aims of Education*, April 17, 2001, ¶ 9.

<sup>17</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 3 (2003): *On HIV/AIDS and the Rights of the Child*, January 17, 2003, ¶ 10.

<sup>18</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 4 (2003): *Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, May 19, 2003, ¶ 29.

<sup>19</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 5 (2003): *General Measures of Implementation of the Convention on the Rights of the Child*, November 27, 2003.

In GC no. 6 of September 1, 2005, the best interest standard is described as a principle that must be respected during all stages of the displacement cycle. Determining what is in children's best interests requires a clear, friendly, and comprehensive assessment of their identity, including their "nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs."<sup>20</sup> GC no. 7 from September 10, 2006, discusses implementing children's rights beginning in early childhood; here, the best interests are considered for individual children and groups of children. Individually, it requires active measures to promote a child's survival, growth, and well-being. Collectively, the principle includes actions directly affecting children, such as those related to health services, care systems, or schools, and actions that indirectly impact children, such as those related to the environment, housing, or transport.<sup>21</sup>

Physical punishment is inherently contradictory to the best interests of a child and can never be justified. The CRC includes the obligation to protect children from all forms of violence in GC no. 8, March 2, 2007.<sup>22</sup> The CRC states that the child's best interests should be the parents' utmost concern; however, prosecuting parents does not, in most cases, take the best interests of their children into account<sup>23</sup>. In circumstances involving prosecution and other formal intervention, including removal of either the child or a perpetrator from the home, the CRC suggests proceeding only when the intervention is both necessary to protect the child from a significant harm and in the child's best interests.<sup>24</sup> Regarding children with disabilities, placement in institutions should only be used as a measure of last resort.<sup>25</sup> Similarly, GC no. 10, April 25, 2007, on juvenile justice, attempts to balance the best interests of individual children in conflict with the law and society's short and long-term interests.<sup>26</sup>

In GC no. 11 on indigenous children of February 12, 2009, the CRC re-examines the idea that the child's best interests should be conceived as both a collective and an

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<sup>20</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, September 1, 2005, ¶ 20.

<sup>21</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 7 (2006): *Implementing Child Rights in Early Childhood*, September 20, 2006, ¶ 13.

<sup>22</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 8 (2007): *The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, March 2, 2007, ¶ 26.

<sup>23</sup> *Id.* at ¶ 41.

<sup>24</sup> *Id.* at ¶ 41.

<sup>25</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 9 (2006): *The Rights of Children with Disabilities*, February 27, 2007, ¶ 47.

<sup>26</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 10 (2007): *Children's Rights in Juvenile Justice*, April 25, 2007.

individual right. In the case of indigenous children, the best interests cannot be neglected or violated in preference for the best interests of the group.<sup>27</sup> However, the collective cultural rights of the child are also part of the child's best interests.<sup>28</sup> Furthermore, the best interests of the child should be of paramount consideration in any alternative care placement of indigenous children.<sup>29</sup> There is also a very close relationship between the best interests of the child and the right of the child to be heard. In GC no. 12 on the child's right to be heard, of July 20, 2009, the best interests are described as a procedural right.<sup>30</sup> The right of the child to freedom from all forms of violence is self-evident; accordingly, GC no. 13, April 18, 2011, regarding the right of the child to freedom from all forms of violence, devotes an entire paragraph to the child's best interests.<sup>31</sup> Arguments based on the child's interests cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's dignity and right to physical integrity.<sup>32</sup>

The best interests of the child is a principle that must be observed in all health-related decisions. Individual children's best interests should be based on their physical, emotional, social, and educational needs, as well as their age, gender, relationship with parents and caregivers, familial and social background, and based on the child's own expressed views according to Article 12 of the Convention. This is established in GC no. 15, of April 17, 2013, on the child's right to the enjoyment of the highest attainable standard of health.<sup>33</sup> GC no. 16 of April 17, 2013 on State obligations regarding the impact of the business sector on children's rights states that this principle is also directly applicable to enterprises that function as private or public social welfare bodies by facilitating any form of direct services for children.<sup>34</sup> The CRC has also elaborated on the relation between the best interests and the child's right to recreation. GC no. 17 of April 17, 2013, emphasizes that the rights of children to rest, play, engage in recreational

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<sup>27</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 11 (2009): *Indigenous Children and their Rights under the Convention*, February 12, 2009, ¶ 30.

<sup>28</sup> *Id.* at ¶ 32.

<sup>29</sup> *Id.* at ¶ 48.

<sup>30</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 12 (2009): *The Right of the Child to be Heard*, July 20, 2009.

<sup>31</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 13 (2011): *The Right of the Child to Freedom from all Forms of Violence*, April 18, 2011, ¶ 61.

<sup>32</sup> *Id.*

<sup>33</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 15 (2013): *On the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health*, April 17, 2013.

<sup>34</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 16 (2013): *On State Obligations Regarding the Impact of the Business Sector on Children's Rights*, April 17, 2013.

activities, partake in cultural life and the arts, and enjoy leisure is, in and of itself, in the child's best interest.<sup>35</sup>

Concerning budgeting, GC no. 19 of July 10, 2016, underlines that the best interests should also be a primary consideration throughout every phase of the financial process and in all fiscal decisions that affect children.<sup>36</sup>

According to GC no. 21 of June 21, 2017, which addresses children living on the streets, the obligations attached to the best interests of the child are fundamental, as part of a child rights approach, to secure the holistic physical, psychological, and moral integrity of children living in the street, and to promote their human dignity.<sup>37</sup> These children have been identified as particularly vulnerable; accordingly, the best interests of a child in a particularly vulnerable situation are not the same as those of children in more secure situations.<sup>38</sup>

Other UN GCs regarding the human rights of children in the context of international migration highlight that the best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child, placement or care of a child, or the detention or expulsion of a parent associated with their migration status. Assessing the child's best interests is an individualized action that should be undertaken in light of the specific circumstances, including age, gender, maturity, whether the child belongs to a minority group, and the social and cultural context in which the child finds themselves.<sup>39</sup> Also, the detention of any child because of their own or their parents' migration status constitutes a child's rights violation. When children are accompanied by a family member, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. When the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the

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<sup>35</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 17 (2013): *On the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts*, April 17, 2013.

<sup>36</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 19 (2016): *On Public Budgeting for the Realization of Children's Rights*, July 20, 2016, ¶ 45.

<sup>37</sup> Comm. on the Rts. of the Child, General Comment no. 21 (2017) on children in street situations, ¶ 28, U.N. Doc. CRC/C/GC/21 (Jun. 21, 2017).

<sup>38</sup> *Id.* at ¶44.

<sup>39</sup> Comm. On the Prot. of the Rts. Of All Migrant Workers and Members of Their Fam. And Comm. on the Rts. Of the Child, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of Migrant Workers and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, ¶ 27, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017).



child's parents and requires the authorities to choose non-custodial solutions for the entire family.<sup>40</sup>

In short, the meaning of the child's best interests is not unambiguous.<sup>41</sup> The best interests of the child is, all at once, a substantive right, an interpretative legal principle, and a rule of procedure. It applies to children both as individuals and as part of a group. GC no. 14 provides the key guidance on this issue, stating that a child's interests have high priority and are not considered minor factors. The purpose of assessing and determining the child's best interests is to ensure the effective enjoyment of the rights recognized in the Convention and the child's holistic development. However, once assessed and determined, the best interests of the child might conflict with other interests or rights, such as those of other children, a child's parents, or the general public. Thus, potential conflicts ought to be resolved on a case-by-case basis by carefully balancing the interests of all parties involved and finding a suitable compromise.<sup>42</sup>

## II. THE ASSESSMENT AND DETERMINATION OF THE BEST INTERESTS OF THE CHILD BY COURTS

National courts attend to, review, and adjudicate the controversies brought to their attention. In so doing, judges have a unique opportunity to frame, interpret, and build legal concepts and theories. However, because courts are a product of the society within which they work, their jurisprudence often mirrors the values of that society.

Local courts are in privileged and unique positions to interpret laws and adapt them to a given society's realities, including cases where children are involved. Therefore, it is crucial to study how the courts in a given society apply their social norms that concern children or otherwise have implications for children. By adjudicating individual cases where children's rights are at stake, the courts express the role and importance they give to the child in society and provide clues on what that society principally values, including the types of laws enforced.

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<sup>40</sup> Comm. On the Prot. of the Rts. Of All Migrant Workers and Members of Their Fam. And Comm. on the Rts. Of the Child, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of Migrant Workers and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, ¶12, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017).

<sup>41</sup> Miguel Cillero Bruñol, *El Interés Superior del Niño en el Marco de la Convención Internacional Sobre los Derechos del Niño*, INSTITUTO INTERAMERICANO DE NIÑOS, NIÑAS Y ADOLESCENTES 1, 8 (2001) (Uru.).

<sup>42</sup> G.N. Barrie, *The Best Interests of the Child: Lessons from the First Decade of the New Millennium*, 1 J. S. AFR. L. 126, 126 (2011) (S. Afr.).

In cases of conflict between contradictory interests, judges' rulings are decisive for children, and they can establish guidelines for determining and assessing children's interests.<sup>43</sup> This is why it is especially important to consider the extent to which judges are familiar with the concept of the best interests of the child and whether their decisions are assessed and determined with adequate information in all cases affecting children. Additionally, despite the relatively recent adoption of GC no. 14, it is essential to examine whether national courts are familiar with the standards presented therein.

It is critical to scrutinize the case law delivered by different local courts from different cultures and geographic locations. Such examination will indicate how national judiciaries vary in understanding, interpreting, and applying the child's best interests among their constituencies. It will also help to understand the relevance that judges give to the child's best interests when resolving the controversies brought before them. Hence, for the purpose of a comparative study, the chronicle of cases and subsequent analysis targets two different continents by citing case law issued by local courts of Chile and Morocco. These two countries and their judicial branches show significant differences in historical, cultural, religious, and societal terms. A comparison between how Moroccan and Chilean judges understand and apply the best interests of the child in the proceedings that are brought to their attention can demonstrate to what extent this concept is universally accepted and to what extent it has been internalized worldwide. Considering the recency of the issue of interpreting this standard, this study will cover a sample of judicial cases resolved from 1990 to 2020.

#### *A. The Best Interests of the Child According to Chilean Jurisprudence*

Recent Chilean case law in relation to the best interests of the child can be classified into two different periods: from 1990 (the year of ratification of the Convention) to 2004 (the year Chile established family courts) and from 2004 onwards.

During the first period, despite several reforms that updated Chilean family law and the legal enforceability of the Convention, national laws suffered from vagueness and a lack of definition of the best interests of the child.<sup>44</sup> The courts tried to overcome this

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<sup>43</sup> *Id.*; see also Patricia Hansen & Frank Ainsworth, *The 'Best Interests of the Child' Thesis: Some Thoughts from Australia*, 18 INT'L J. SOC. WELFARE 431, 431 (2009) (Austl.).

<sup>44</sup> Helen Pacheco Cornejo, *El interés superior el niño en la jurisprudencia chilena. Casos del denominado conflicto indígena mapuche*, in EL INTERÉS SUPERIOR DEL NIÑO EN LA JURISPRUDENCIA INTERNACIONAL, COMPARADA Y ESPAÑOLA 113, 114 (Susana Sanz-Caballero ed., 2017).

deficiency with their own judicial argumentation to varying degrees of success.<sup>45</sup> For instance, in case no. 9485-2003, decided by the Juvenile Court of Villarrica, the best interests of the child were established to be neither a right nor a directly enforceable norm. Instead, it was presented as a principle that guides, drives, determines, lays the foundation for, and limits the actions of society regarding children.<sup>46</sup> The case concerned the guardianship of three sisters. The guardianship of the three girls had been awarded to the mother, as adjudicated by Chilean law, which automatically grants custody to the mother unless “justifiable reasons” recommend otherwise. The girls’ father challenged this decision on the grounds that the sexual orientation of the girls’ mother, his ex-wife, was contrary to the interest of his daughters.<sup>47</sup> The Court supported his arguments and decided that, in the context of a heterosexual and traditional society such as that of Chile, the father offered more favorable arguments on behalf of the girls’ best interests. The Court considered that the sexual orientation of the mother prevented her from exercising responsible maternity.<sup>48</sup> The case was brought to the Court of Appeals of Temuco, which restored custody to the mother.<sup>49</sup> The Supreme Court, in its judgment of May 31, 2004, quashed the ruling and decided that guardianship of the girls had to be given to the father because their mother’s sexual orientation was irreversibly harming the girls’ interests.<sup>50</sup> The high court thought that the mother, by informing her daughters about her sexual orientation and bringing her new partner into the girls’ home, had placed her own personal interest before her daughters.<sup>51</sup>

This judgment was the reason for Chile's subsequent condemnation at the Interamerican Court of Human Rights in the Atala Riffo and Daughters case of February 24, 2012.<sup>52</sup> It was also the first case the Court adjudicated that involved LGBTQ+ rights.<sup>53</sup>

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<sup>45</sup> *Id.* at 116.

<sup>46</sup> Juzgados de Menores Villarrica [J. Men.] [Juvenile Court of Villarrica], 29 octubre 2003, “Riffo, Karen Atala c. Allendes López, Ricardo Jaime” Rol de la causa: 9485-2003., (Chile).

<sup>47</sup> *Id.* at legal reasoning no. 5.

<sup>48</sup> *Id.* at legal reasoning no. 17.

<sup>49</sup> Corte de Apelaciones Temuco [C. Apel.] [court of appeals], 30 marzo 2004, “Riffo, Karen Atala c. Allendes López, Ricardo Jaime” Rol de la causa: 2158-2003., add page number/paragraph when receive source) (Chile).

<sup>50</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 31 mayo 2004, “Riffo, Karen Atala c. Allendes López, Ricardo Jaime” Rol de la causa: 1193-2003., (Chile).

<sup>51</sup> Fernando Muñoz León, “*El Núcleo Fundamental de la Sociedad*”: Los Argumentos contra la Crianza Homoparental en los Casos Atala y Peralta, 19 Rev. Ius et Praxis [R.I.P.] 7, 22 (2013) (Chile).

<sup>52</sup> Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 254, at 4 (Feb. 24, 2012).

<sup>53</sup> Jessica Stern, *Creating Legacy Today: The First LGBT Ruling by the Inter-Creating Legacy Today: The First LGBT Ruling by the InterAmerican Court of Human Rights American Court of Human Rights*, 15 CUNY L. REV. 247, 247 (2012).

The Interamerican Court argued that the Supreme Court had wrongly interpreted the child's best interests for two reasons. First, where listening to the child's opinion is an important element of the best interests of the child standard, no regard had been given to the girls' preference to stay with their mother. Second, the Supreme Court had confused the child's best interests with the protection of public morality. Consequently, it had not been proven in this specific case that the girls' mother's cohabitation with her partner had a negative effect on the girls' best interests. Hence, national courts had used abstract, stereotyped, and discriminating arguments to justify their decision.<sup>54</sup>

After this ruling, the jurisprudence of Chilean courts became less subjective. This is demonstrated in the ruling of the Court of Appeal of Santiago on September 1, 2004.<sup>55</sup> In this judgment, it is claimed that the contours of the child's best interests are to be determined individually, on a case-by-case basis.<sup>56</sup> The facts of this case are as follows: five months after the death of a mother, the deceased's sister and the child's father reached a written agreement, according to which the child's guardianship would be granted to the deceased's sister (i.e., the child's maternal aunt). Public authorities challenged this agreement and took the case to court. However, the court was of the opinion that the most adequate way to protect the best interests of the child was to accept the terms of this private agreement. On one hand, the father was not able to look after the child. On the other hand, the child had been living with his aunt since he was five months old and all his needs had been covered appropriately. The Court of Appeals considered the best interests apply to every aspect of the child's life, assuring their development and autonomy.

Since 2005, Chilean jurisprudence has been more focused on adhering to the best interests of the child standard; this is probably due to the establishment by Law 19.968/2004 of Family Courts within the judiciary structure.<sup>57</sup> These specialized courts have shown more sensitivity and a more empathetic interpretation of the best interests of the child, including how to assess and determine it. However, the process of interpreting

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<sup>54</sup> *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 254, ¶146 (Feb. 24, 2012).*

<sup>55</sup> *Corte de Apelaciones Santiago [C. Apel.] [court of appeals], 1 septiembre 2004, Rol de la causa: 4105-2004., trabajo menores, p.1, (Chile).*

<sup>56</sup> *Id.* At ¶5.

<sup>57</sup> *Emilio José Bécar Labraña, El principio de interés superior del niño: origen, significado y principales manifestaciones en el derecho internacional y en el derecho interno, 42 ACTUALIDAD JURIDICA U. DEL DESARROLLO, 528, 556 (2020).*

what the best interests of the child means in a given scenario, as well as how it should be assessed, is still slow-moving.<sup>58</sup>

In the case Daniel Muñoz Méndez with Federico Ernst Webb of November 2, 2006, the Supreme Court of Chile stated that the international doctrine has provided parameters to assess the best interests of the child standard, insisting that it be determined on a case-by-case basis.<sup>59</sup> Among other elements, attention must be given to the child's opinion, and the courts must consider the needs to strike a balance between children's rights and duties, find an equilibrium between the rights of children and the rights of others, and to consider children as developing human beings with unique rights. This case concerned a biological father who, at the time of birth, denied paternity; however, he later asked the court to grant him his rights as father, thus invalidating the rights of the child's legal father (the mother's current partner), with whom the child had an emotional and legal bond.<sup>60</sup> The Court of First Instance of Santiago accepted the biological father's claim, but the Supreme Court later annulled this judgment arguing 'the best interests of the child' as the basis of its reasoning.<sup>61</sup> The Supreme Court stated that the referring court had confused the principle of the best interests of the child with the right of the child to have his biological identity override their emotional and legal attachment.<sup>62</sup> In this specific case, if the plaintiff had won the case, the child would have experienced a dramatic change in his life because his surname would have changed and he would no longer be his legal father's son. This would have had a serious impact on the child's personal and social life, affecting the image he had of himself as well as the image others held of him. The Supreme Court understood that, more than a right, the best interests of the child is a hermeneutic principle, that is, an interpretative tool, according to which the solution to the conflict should always guarantee the effective protection of the rights of the child.<sup>63</sup>

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<sup>58</sup> Gloria Baeza Concha, *El Interés Superior del Niño: Derecho de Rango Constitucional, Su Recepción en la Legislación Nacional y Aplicación en la Jurisprudencia*, 28 REV. CHILENA DE DERECHO 355, 361 (2001).

<sup>59</sup> Judgement of the Fourth chamber of the Supreme Court, case 6553-2005, correlativo 28203-2006, 2 November 2006.

<sup>60</sup> Ibidem, eight legal reasoning of the judgment supra: "...no obstante haberse el menor desarrollado en un ambiente adecuado, con cariño y lazos familiares...".

<sup>61</sup> Thirteen Civil Court of First Instance of Santiago, case N° 2620-04, Daniel Muñoz Méndez versus Federico Guillermo Ernst Webb and Lorena del Pilar López Miranda.

<sup>62</sup> First legal reasoning of the judgment supra: "Sin embargo, alega, los sentenciadores no han entendido la ratio legis del principio del interés superior del niño, confundiendo el derecho de la identidad con este principio rector".

<sup>63</sup> Sixth legal reasoning of the judgement supra: "Aquí cobra toda su importancia el concepto del interés superior del niño como principio hermenéutico. A través de él, la solución al conflicto debe conducir a una efectiva garantía de los derechos del hijo".

During the period after the establishment of family courts, the Court of Appeal of Santiago still delivered a perplexing judgment in the case of María Carolina Figueroa Elizalde versus José Antonio Moure Bolados, of November 2, 2005.<sup>64</sup> This case concerned the guardianship of five siblings in a case in which there was evidence of neglect on the part of the mother.<sup>65</sup> The children aged 9, 11, and 12 wanted to stay with their father, whereas the children aged 5 and 7 wanted to stay both with their mother and with their elder siblings. The depositions of the elder children were consistent, while the bonds of the smaller children were clearly stronger with their mother.<sup>66</sup> After having heard the children twice in a period of nine months, using the argument of the best interests of the child, a Solomonic resolution was issued that meant the definitive separation of the siblings.<sup>67</sup> Moreover, in its ruling, the Court did not make it clear whether there was a security risk for the children in the case they remained with the mother. The Court only mentioned that there had been neglect and recriminations on her part.<sup>68</sup> Here, the Court dealt correctly with the concept of the best interests of the children on a theoretical level but failed to apply it properly in practice. Not only did the Court separate the siblings, but it also failed to explain adequately why remaining in the custody of the mother would not implicate a safety risk to the children aged 7 and 7. Surprisingly, the judgment elaborated more on why staying with the father was beneficial to the elder children rather than on why staying with the mother was not harmful for the youngest. The best interests of the child was interpreted as the acceptance of the decision of the elder children not to stay with their mother. However, little attention was given to the harm to the best interests that separating children certainly produces. The Court blamed the legislation in force for this rough and partial solution.<sup>69</sup>

Another interesting judgment deals with the relation between the best interests of the child and the right to education, as it relates to a student who was expelled from school

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<sup>64</sup> Judgment of the Court of Appeal of Santiago de Chile, María Carolina Figueroa Elizalde versus José Antonio Moure Bolados of 2 November 2005, no. 3294-2005.

<sup>65</sup> *Ibidem* paragraph 4.

<sup>66</sup> *Ibidem* paragraph 3.

<sup>67</sup> *Ibidem*, paragraph 3: “El análisis de los antecedentes reunidos en el proceso y, en particular, la voluntad de los tres hijos mayores que, atendida su edad, se debe considerar especialmente, unido a que los hijos menores han alcanzado un vínculo más estrecho con la madre, lleva a concluir a la juez a quo que, aunque idealmente los hermanos debieran estar juntos, el interés de los menores aconseja mantener la situación actual, esto es, que los tres mayores permanezcan con el padre y los dos menores con su madre, porque es la más beneficiosa para ellos, en términos que les otorga la estabilidad necesaria y es la que genera un perjuicio menor frente a todas las demás alternativas”.

<sup>68</sup> *Ibidem* paragraph 4.

<sup>69</sup> *Ibidem* paragraph 7.

due to low grades. It is the case Luis Sebastián Montero Castro, in representation of Gloria Andrea Laurie Sáez and Mauricio Felipe Andrés Sanzana Laurie. The case was judged by the Court of Appeals of Temuco on February 18, 2011.<sup>70</sup> The Court condemned the school for caring more about academic success than about the value of educating the student. According to the Court, the only valid interpretation of the best interests of the child was the protection of all 'the rights of the child' before any other consideration or any other calculation of collective benefits,<sup>71</sup> such as that of maintaining a high school record in terms of students' grades. The best interests needs to be a primary consideration for all institutions, including education entities. The best interests also has a hermeneutic function: it is an interpretative tool and it helps to account for legal deficiencies or voids. The best interests of the child standard also relates to the integral satisfaction of the child's rights and the special attention which needs to be given to the child's opinion. This is why the best interest of the child is also related to the principle of autonomy. The wishes and feelings of the child occupy a central role in the decision-making process.

The June 6, 2016 case of Víctor Alejandro Mateluna Silva no. 32128-2015 of the Supreme Court is a civil procedure case on the rights of a father's access to their child in the midst of a divorce.<sup>72</sup> To characterize this ruling first the Court does not only consider "the best interests of the child" as a hermeneutic principle but also as a right of the child and a norm of procedure. Second, the Court explicitly cites GC no. 14. It is quite unusual for the Chilean judiciary to cite international documents and even more so to cite GC 14. The ruling goes further by saying that the respect of the best interests of the child is a State duty. Despite recognizing the undefined character of the best interests of the child, the Court acknowledged that it is the obligation of judges to configure and confirm it.<sup>73</sup>

The ruling of the INDH versus Zona Araucanía de control de orden público de carabineros de Chile before the Appeals Court of Temuco of June 2017 in the proceeding

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<sup>70</sup> Judgment of the Court of Appeals of Temuco, Luis Sebastián Montero Castro, in representation of Gloria Andrea Laurie Sáez and Mauricio Felipe Andrés Sanzana Laurie, no. 59-2011 of 18 February 2011.

<sup>71</sup> Ibidem, third legal reasoning: "... la única interpretación posible del interés superior del niño es identificar este interés con sus derechos reconocidos en la Convención, esto implica que la protección de los Derechos del Niño prima sobre cualquier consideración cultural que pueda afectarlos, así como sobre cualquier otro cálculo de beneficio colectivo".

<sup>72</sup> Judgment of the Supreme Court, Víctor Alejandro Mateluna Silva versus Lualeska Yandira Arellano Millapan no. 32128-2015 of 6 June 2016: "El principio de corresponsabilidad parental va íntimamente ligado al principio de interés superior del niño, y comprende el efectuar una distribución equitativa de los períodos en que el niño se relacionará con cada uno de sus padres... siempre considerando su interés superior como el objetivo fundamental, en lo cual los padres deben cooperar y deponer sus propios beneficios".

<sup>73</sup> Ibidem, legal reasoning no. 16.

of *amparo* 74-2017, is important to consider.<sup>74</sup> This is a case on police violence against a Mapuche family suspected of hiding weapons in the home.<sup>75</sup> In the course of the police search, extreme violence was used in front of three siblings aged 5, 8 and 14. The eldest was wounded by gunfire and did not receive immediate medical attention. Instead, he was conducted to the police station to testify.<sup>76</sup> In view of the gravity of the facts, the Court devoted its legal reasoning to determine whether the interests of the child had been granted during the search of the family premises.<sup>77</sup> The Court elaborates on the standard of protection granted to the best interests of the child in the International Law of Human Rights. It refers in particular to the Interamerican Court’s advisory opinion no. 17-2002 in which “the best interests of the child” is defined as a regulating principle, a reference point, a limit upon State action, and the origin of the obligation to adopt measures to prevent the weakening of children judicial guarantees. The Court continues by saying that looking to the best interests of the child establishes a superior standard of protection, meaning a higher and more intense level of protection in situations where children are involved, and especially in violent scenarios.<sup>78</sup> In its ruling, the Court refers to GC no. 13 of the CRC regarding the right of the child to be free from all forms of violence.<sup>79</sup> The Court ascertains that police officials were responsible for violence against children, and that the way the police conducted the home search was disproportional and unreasonable to the extreme and, therefore, illegal.<sup>80</sup> In its verdict, the Court reminded the parties that Chile is a party to the Convention and that the duty of parties is to ensure the maximum degree of development of children in an atmosphere of peace and security.<sup>81</sup> Despite this progress, the ruling does not mention the CRC’s General Comment that is fully devoted to the best interests of the child—namely, GC no. 14. Instead, it cites GC no. 13, which

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<sup>74</sup> Judgment of the Court of Appeals of Temuco, Instituto nacional de derechos humanos versus Zona Araucanía de control de orden público de carabineros de Chile of 27 June 2017, proceeding of *amparo* 74-2017.

<sup>75</sup> Mapuche is the most numerous group of Indians in South America. Most inhabit the Central Valley of Chile.

<sup>76</sup> Judgment in the *amparo* proceeding 74-2017, paragraph II.2.

<sup>77</sup> *Ibidem*, legal reasoning II.3.

<sup>78</sup> “El Interés Superior del Niño, establece un estándar superior en cuanto a una exigencia de mayor protección de los derechos de niños, niñas y adolescentes. Y esta exigencia de mayor protección en función del Interés Superior del Niño se vuelve más intensa en situaciones de violencia –como ocurre claramente en el caso de marras- contra niños y niñas” (legal reasoning II.3).

<sup>79</sup> *Ibidem*, legal reasoning II.3.

<sup>80</sup> *Ibidem*, legal reasoning II.6.

<sup>81</sup> *Ibidem*, conclusion no. 7: “Que, a la luz de la Convención de los derechos del Niño y de la Infancia de cual Chile es parte, es deber de los Estados procurar el máximo desarrollo de los niños en un clima de paz y seguridad, teniendo en vista la materialización del principio fundamental del interés superior del niño...”



devotes an entire section to the study of the best interests of the child in the specific context of children victims of violence.

Summarizing the previous cases, Chilean courts have progressively incorporated the assessment and determination of the best interests of the child into their jurisprudence, especially since Chile's ratification of the Convention. The creation of the family courts means another step forward in this process of sensitization. That said, it needs to be noted that the jurisprudence on these sensitive issues is varied. Some judges have demonstrated a high degree of knowledge and sensitivity to the interests of children, whereas others have not. In some cases, there is a clear difference of quality between how 'best interests' is defined at a theoretical level and how it is finally assessed. At the conceptual level, judges generally show a high degree of interest in this principle, and they cite international documents, including both hard law (binding norms) and soft law (non-mandatory declarations) and legal doctrine, to define it. However, at a practical level, other legitimate interests are protected periodically.

This case law must be reconciled with the Concluding Observations adopted by the CRC on Chile on 2022.<sup>82</sup> The CRC acknowledged Chile's progress on the matter; however, the CRC emphasized that there were several areas where the State should consider urgent action. This included the issues of freedom of association and the right to peacefully assemble; the right for children to be free from violence; the right for children to be in a family environment; specific rights pertaining to children who are asylum-seekers, refugees, and migrants; specific cultural rights of indigenous children; and juvenile justice as a broad category.<sup>83</sup> In line with the purpose of this study, attention would only be paid to those concerns and recommendations of the Committee which have to do with the judiciary.

Concerning the best interests of the child as a general principle of the Convention, the CRC recommends that Chile ensure that a child's best interests are consistently applied in the implementation of programmes and in legislative, administrative, and judicial proceedings, including cases of separation of children from their families, high-conflict divorces, children in prison with incarcerated mothers, and children in care and in the child justice system.<sup>84</sup> In the same vein, Chile is encouraged to ensure that all

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<sup>82</sup> Comm. on the Rts. of the Child, Concluding observations on the combined sixth and seventh periodic reports of Chile, ¶ 1, U.N. Doc. [CRC/C/CHL/CO/6-7 \(Jun. 22, 2022\)](#).

<sup>83</sup> *Concluding Observations on the combined sixth and seventh periodic reports of Chile*, *supra* note 80, ¶ 5.

<sup>84</sup> *Id.* ¶ 14.

relevant professionals, including judges, systematically receive appropriate training on the right of the child to be heard and have his or her opinion taken into account in accordance with the child's age and maturity.<sup>85</sup> Concerning the right to freedom of association, the CRC manifested itself as deeply concerned for the level and frequency of institutional violence against children, and the limited and very slow progress in judicial cases. It also expressed its deep concern for the excessive and disproportionate use of violence by the Chilean customs guards ("carabineros") during the 2019 social uprising with more than 1,000 children affected included in schools and indigenous communities.<sup>86</sup> In the aftermath of this uprising, the CRC urged Chile to ensure that human rights violations that occurred during protests are independently and thoroughly investigated and that perpetrators are brought to justice.<sup>87</sup>

Concerning indigenous children, the CRC underlines the historical abandonment and neglect that these children suffer. This circumstance places them among the poorest in Chilean society. It also leads to an institutional violence carried out by the State against them. The CRC expressly mentions its concern about the large number of judicial actions for serious crimes against Mapuche children.<sup>88</sup> Consequently, the CRC indicated that it is seriously concerned about the length of time that is taking to adopt bills related to child justice, the precarious living conditions of children placed in detention centers, and the lack of specialized child justice procedures, including specialized judges for children, among others.<sup>89</sup> In this regard, the Chilean judicial system shows weak points. Chile should urgently develop procedures to provide guidance to all those with the authority to determine the best interests of the child, including the Courts in every area, and to give those interests due weight as a primary consideration. Thus, despite showing an increasing awareness of the relevance of the best interests of the child and an improved application of this principle in recent jurisprudence cases, Chilean authorities still demonstrate shortcomings in the way they implement, interpret, and determine this concept.

### *B. The Best Interests of the Child According to Moroccan Jurisprudence*

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<sup>85</sup> *Id.* ¶ 14.

<sup>86</sup> *Id.* ¶ 16.

<sup>87</sup> *Id.* ¶ 17.

<sup>88</sup> *Id.* ¶ 36.

<sup>89</sup> *Id.* ¶ 40.

There are inherent difficulties in analyzing how Moroccan judges apply the principle of the best interests of the child in their case law. One of them is the obstruction of access to judicial files. Another impediment stems from the fact that when it comes to the protection of children's rights, Morocco takes into account both the international treaties of human rights to which Morocco is a party, among them the Convention, but also Islamic Law, or Sharia. Indeed, some authors refer to the existence of a dual and ambivalent legal model, that is, a complex legal system of cohabitation between norms of very different origins which also affect the private sphere.<sup>90</sup> Other authors elaborate on the question of the value given to universal principles in local law.<sup>91</sup> Moreover, if the Islamic Law in its Maliki version<sup>92</sup> contradicts the international covenants on human rights, surveys indicate that local judges usually solve the dilemma by giving priority to the application of the Islamic Law.<sup>93</sup>

The Moroccan Family Code of 2004 places the protection of the best interests of the child as one of its guiding principles.<sup>94</sup> However, the study of both the Code and the jurisprudence based upon it often shows undue concern on questions such as whether there was conception before marriage, whether the child was born out of wedlock, whether the woman's behavior was impeccable (according to Islamic law),<sup>95</sup> or concerns about obscenity/honesty of the mother, rather than making a determination based on a precise and thoughtful analysis regarding whether the interest of the child was adequately determined and preserved in a given case.<sup>96</sup> A dramatic example of this can be found in paternity cases. In such cases, a child born out of the wedlock is recognized as belonging to the mother ("*mater semper certa est*"), but not the father. As a result, children born out of wedlock are denied any rights concerning their father, as they are considered

<sup>90</sup> Fatiha Sahli & Asma Ezzahzi, *El interés superior del niño en la jurisprudencia marroquí*, in EL INTERÉS SUPERIOR DEL NIÑO EN LA JURISPRUDENCIA INTERNACIONAL, COMPARADA Y ESPAÑOLA 171, 173 (Susana Sanz-Caballero ed., 2017) [hereinafter *Marroquí*]

<sup>91</sup> See David Melloni, *La Constitution Marocaine de 2011: une mutation des ordres politique et juridique marocains*, CAIRN (2013) (Morocco).

<sup>92</sup> Maliki is one of the Sunni schools of Islamic jurisprudence. Quran and hadiths are its primary sources of Law but it also accepts the consensus of the people of the city of Medina as a valid source of Law.

<sup>93</sup> *Marroquí*, *supra* note 88, at 176.

<sup>94</sup> See Morocco Family Code (Moudawana) art. 177 and art. 244 *translated in* THE MORROCO FAMILY CODE (MOUDAWANA) OF FEB. 5, 2004 (Global Rights trans., Human Rights Education Associates eds., 2005). See also Hajar Maider, *Here Is What You Don't About Child's Guardianship & Custody In Morocco*, AFRICAN LEGAL NEWS (Jan. 15, 2023), [https://africa-laws.org/Here%20Is%20What%20You%20Don't%20About%20Child%E2%80%99s%20Guardianship%20&%20Custody%20In%20Morocco.php#google\\_vignette](https://africa-laws.org/Here%20Is%20What%20You%20Don't%20About%20Child%E2%80%99s%20Guardianship%20&%20Custody%20In%20Morocco.php#google_vignette).

<sup>95</sup> *Morocco: Marriage and divorce – legal and cultural aspects*, LANDINFO, 1, 13 (2018) (Norway)

<sup>96</sup> Eva Schlumpf, *The Legal Status of Children Born out of Wedlock in Morocco*, 4 ELEC. J. OF ISLAMIC & MIDDLE E. L. 1, 23 (2016) [hereinafter *Wedlock in Morocco*].

illegitimate and undesirable children. The will to safeguard principles of the Muslim faith drives the legislative power to despise so-called illegitimate children.<sup>97</sup> This absolute exclusion of the father's responsibility affects the child's identity, legal recourses, surnames, economic support, and other socioeconomic implications. The Court of First Instance of Agadir confirmed this interpretation in its decision no. 78 of April 14, 2009.<sup>98</sup> A man admitted having regular sexual relations with the mother of a child; however, the Court rejected any paternal obligations the man may otherwise have had to the newborn due to both the absence of cohabitation and legal union. In cases of this type, the Supreme Court accepts the father's biological connection to a child that has been born before the "minimum deadline after marriage" (six months) only if the father recognizes paternity.<sup>99</sup> This shows a disregard of the interests of the child born out of wedlock by giving priority to moral concerns implicit in Islamic Law. This view was later confirmed by the Cassation Court of Morocco in September 29, 2020,<sup>100</sup> which held that children born out of the wedlock are not related to their biological father, even in the presence of a biological DNA test certifying paternity.<sup>101</sup>

With respect to guardianship after divorce, the Family Code gives priority to the mother instead of the father. In case of the mother's death, custody will be granted to the father. However, at times, judges disregard the Family Code in order to guarantee the best interests of the child. This is shown in a case in which, after the mother's death, guardianship was granted to the grandmother, despite the father's claims of paternity. This decision took into consideration the fact that the grandmother had taken care of the child since her daughter had passed away. Therefore, this decision preserved the best interests and the stability of the child. However, the Court of Appeal in its ruling no. 19 of January 29, 2014, returned the child to the father's custody, giving priority to the wording of Islamic Law and thus ignoring whether their decision was in line with the child's best interests.<sup>102</sup>

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<sup>97</sup> Mariam Monjid, *L'Islam et la modernité dans le droit de la famille au Maghreb, Étude comparative : Maroc, Algérie, Tunisie*, 145 (L'Harmattan, 2013) [hereinafter *Étude comparative*].

<sup>98</sup> Court of First Instance of Agadir, decision no. 78 of 14 April 2009.

<sup>99</sup> Supreme Court, case no. 439 of 28 September 2005.

<sup>100</sup> Judgment of the Cassation Court – Chamber on the Personal and Succession Status, no. 1/275, dossier n° 365/2/1/2018 of 29 September 2020.

<sup>101</sup> Abdelahi El Hourri, *Reconnaissance d'enfants illégitimes : la Cour de Cassation dit non*, MEDIAS24 (Apr. 20, 2020), <https://medias24.com/2021/04/16/reconnaissance-denfants-illegitimes-la-cour-de-cassation-dit-non/>; Zaynab El Bernoussi, *DNA Testing and Paternity Lawsuits in Morocco: The Tangier's Court Case*. 21 Y.B. ISLAMIC AND MIDDLE E. L.ONLINE at 28, 29 (2020).

<sup>102</sup> Judgment of the Court of Appeal of Marrakech, Case No. 19 (January 29, 2014).

Despite the general rule that guardianship is generally granted to the mother, the previous Family Code penalized a mother's second marriage with the loss of the right of custody. Although Moroccan legislation now does not abide by this general rule since the reforms of 2007, there are still judicial cases, even at the highest level, where the courts still punish women entering second marriages by revoking custodial rights of their child.<sup>103</sup> Attention should be given in this respect to the judgment of the Court of First Instance of Sidi Bennour of March 17, 2005, in which a remarried mother retained custody on the grounds of the best interests of that child.<sup>104</sup> The Court made an exceptional decision and granted custody to the mother because the transfer of the child to his father would affect the minor's psychological stability as well as his right to education.<sup>105</sup>

According to Moroccan law, if a divorced mother moves to a different city, she retains custody of her children only if she relocates to another Moroccan location; but, the legal representative of the child would have to agree to the mother moving abroad.<sup>106</sup> Leaving aside the obvious discrimination against women that these measures imply, the wording of the Code may further neglect the best interests as a primary consideration.

In another vein, a criminal penalty against the mother on grounds of fornication, abortion, incitation to obscenity, or unethical behavior automatically deprives her of guardianship, as established by the Supreme Court.<sup>107</sup> In the context of Moroccan jurisprudence, considerations on what is best for the child are cast aside when the moral honesty of the mother is at stake.

To summarize, the sample of cases is quite representative of Morocco's judiciary doctrine due to the role religion plays in Moroccan society and therefore implicates judicial decision-making. Prejudices and principles such as the supremacy of the male in society and the consideration of sex outside marriage as a criminal offense prevent advancements of both the legislation and the judicial system.<sup>108</sup> From this jurisprudence, it is clear that the application of the best interests of the child by the Moroccan courts is

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<sup>103</sup> Judgment of the Supreme Court, Case No. 556/2/1/2004 (January 12, 2005).

<sup>104</sup> Judgment of the Court of First Instance of Sidi Bennour, Case No. 468 (March 17, 2005)

<sup>105</sup> *Id.*; *Marroquí*, *supra* note 88, at 176.

<sup>106</sup> *Marroquí*, *supra* note 88 at 183; According to the Family Code of Morocco, the legal representative is in the first place the father, and only after, the mother, but it could be a tutor decided by the parents or a tutor decided by the judge. It could also be an institution in case of lack of family ties.

<sup>107</sup> Judgment of the Supreme Court, Case No. 414 (September 14, 2005) R21.5.; *Wedlock in Morocco*, *supra* note 94, at 23; *Étude comparative*, *supra* note 95, at 145.

<sup>108</sup> *Wedlock in Morocco*, *supra* note 94; *Étude comparative*, *supra* note 95 (discussing the difficult relations that exists in Islam between law, religion and morality – especially regarding sex).

not sufficiently adequate. Sometimes the best interests of the child are blatantly neglected. Religious considerations have extreme weight in the decisions made by courts, and judges seem more comfortable applying Islamic Law rather than international human rights principles. The best interests of the child are cited by courts, but the interpretation given to this concept demonstrates a lack of understanding of international standards. It can be said that in some judicial decisions, the norms are more neutral and human rights-friendly than in others.

The interest to overcome the various shortcomings in its system of child protection is ascertained by the CRC in its “Concluding Observations” on Morocco.<sup>109</sup> In this document the CRC recommends that Morocco strengthen its efforts to bring all its legislation, especially its Family Code, into conformity with the Convention and to promptly repeal all provisions that discriminate against girls and women and negatively impact children, such as those related to inheritance. The CRC encourages the State to consider the development of a Children’s Code covering all areas of the Convention and to ensure that the necessary human, financial and technical resources are effectively allocated for the implementation of child-related legislation. The CRC also shows concern for various shortcomings of the National Action Plan for Children. Morocco is also encouraged to promptly establish a specific monitoring mechanism to receive, investigate, and address complaints in a child-sensitive manner.<sup>110</sup> Adopting such law would be in accordance with the mandate of the National Human Rights Council.

Specifically related to the child’s best interests, the CRC recommends that Morocco strengthen its efforts to ensure that this right is appropriately integrated and consistently applied in all legislative, administrative, and judicial proceedings, as well as in all policies and programs that have an impact on children. In this regard, Morocco is encouraged to develop procedures and criteria to provide guidance to all relevant authorities in determining the best interests of the child in every area, and in giving them due weight as a primary consideration.<sup>111</sup> The CRC urges the State party to reform the law in order for all mothers to have the right to bestow their family names to their children as well as to ensure that all children born in its territory, regardless of the status of their parents, are immediately registered and provided with official birth certificates<sup>112</sup>. The

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<sup>109</sup> Comm. on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Morocco*, CRC/C/MAR/CO/3-4 (October 14, 2014).

<sup>110</sup> *Id.* at ¶ 19.

<sup>111</sup> *Id.*

<sup>112</sup> *Ibidem* ¶ 30.

CRC requests Morocco to enable women and children to initiate action in order to establish paternity on the basis of DNA testing<sup>113</sup>. Also, Morocco should unequivocally prohibit corporal punishment in all circumstances and actively oppose early marriages of children.<sup>114</sup> Likewise, national authorities should develop a comprehensive legal framework to prevent, prohibit and sanction all forms of neglect, abuse including domestic violence<sup>115</sup> and revise the Interim Status Code Act to ensure that all provisions that discriminate against women and girls and negatively impact their children are repealed, such as those which authorize polygamy<sup>116</sup>. The CRC urges to eliminate any form of discrimination against children born from a marriage between a Muslim woman and a non-Muslim man<sup>117</sup>; protect the rights of pregnant teenagers, adolescent mothers and their children and actively oppose and eliminate the stigma attached to out-of-wedlock pregnancy.<sup>118</sup> In the same vein, Morocco is bound to prevent the automatic placement of children born out of wedlock and children in poverty into *Kafalah* (an institution similar to childcare or foster homes, attributed only to Muslim families), by providing single mothers and/or parents with the necessary support to care for their children<sup>119</sup>. Finally, Morocco is requested to address the economic differences affecting rural regions and urban suburbs and leading children to unequal enjoyment of their rights and poverty.<sup>120</sup>

Specifically pertaining to the judiciary, the CRC is concerned that the right of the child to have his or her best interests taken as a primary consideration has not yet been incorporated to the legislation concerning children and therefore it is neither applied in all administrative and judicial proceedings, nor in policies and programmes relating to children.<sup>121</sup> The CRC is also concerned that, although the minimum marriage age for both girls and boys was fixed at 18 years by the 2004 Family Code, early marriage is on the rise and thousands of girls, some of them as young as 13 years, are married every year as a result of the extensive use of derogations from the law by family judges. The CRC is also seriously concerned with the widespread practice of forced marriage and about girls

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<sup>113</sup> *Ibidem* ¶ 33.

<sup>114</sup> *Ibidem* ¶ 37, a).

<sup>115</sup> *Ibidem* ¶ 39, b).

<sup>116</sup> *Ibidem* ¶ 45.

<sup>117</sup> *Ibidem* ¶ 45.

<sup>118</sup> *Ibidem* ¶ 47.

<sup>119</sup> *Ibidem* ¶ 51, b).

<sup>120</sup> *Id.* at ¶¶ 31-59.

<sup>121</sup> *Id.* at ¶ 26.

committing suicide as a result of such marriages<sup>122</sup>. In this context, the CRC is concerned that Morocco is considering lowering the minimum age of marriage to 16 years, meaning that child marriage can be authorized by a judge in spite of the child's legal representative's refusal to allow the marriage.<sup>123</sup> Additionally, despite some improvements, the CRC continues to be concerned that Morocco's juvenile justice system remains mostly punitive, as children are subjected to long periods of pretrial detention; the presence of legal counsel at all stages of the preliminary investigation, including in the case of flagrant offences, has still not been recognized; and detention is, in most of the cases, the first option.<sup>124</sup>

The CRC also urges Morocco to bring its juvenile justice system fully into line with the Convention. In particular, the CRC urges the State party to: (a) Ensure that detention is used as a measure of last resort and for the shortest possible period of time, and that this measure is reviewed on a regular basis with a view to withdrawing it<sup>125</sup>; (b) Ensure that children in conflict with the law are provided qualified independent legal aid at an early stage throughout the legal proceedings, including in the case of flagrant offences<sup>126</sup>; (c) Promote wherever possible alternatives to detention, such as diversion, probation, mediation, counselling, or community service,<sup>127</sup>; (d) Ensure capacity-building and specialization of all the justice personnel, including judges, prison officers and lawyers, on the Convention<sup>128</sup>; (e) Develop appropriate social reintegration programmes for children in conflict with the law<sup>129</sup>; and (f) Make use of the technical assistance developed by the Inter-agency Panel on Juvenile Justice, including the United Nations Office on Drugs and Crime.<sup>130</sup>

These recommendations show that the many shortcomings in the area of effective child protection in Morocco frequently stem from this dual Islamic and International Law referent which coexist in Moroccan society with obvious complications. Prejudices against women, children born out of wedlock and certain demonstrations of morality lead

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<sup>122</sup> *Ibidem* ¶ 43.

<sup>123</sup> *Id.* at ¶ 42.

<sup>124</sup> *Id.* at ¶ 74.

<sup>125</sup> *Ibidem* ¶ 75, a).

<sup>126</sup> *Ibidem* ¶ 75, b).

<sup>127</sup> *Ibidem* ¶ 75, c).

<sup>128</sup> *Ibidem* ¶ 75, d).

<sup>129</sup> *Ibidem* ¶ 75, e).

<sup>130</sup> *Id.* at ¶ 75, f).



to discriminatory situations, practices, and laws against women and children, all of which have a clear reflection in the action of the Moroccan judiciary.

### III. COMPARATIVE STUDY OF THE WAY THE CHILEAN AND MOROCCAN JUDICIARY SYSTEMS INTERPRET THE BEST INTERESTS OF THE CHILD

There are some arguments that appear in the jurisprudence on “the best interests of the child” of both national jurisdictions selected. However, there are also particularities that are specific to each jurisdiction.

With regards to the national jurisdictions, it can be concluded that the use of the best interests principle is more developed in Chile than it is in Morocco. However, even in Chile, the child’s best interests seem to be more effectively managed by the judiciary system at the theoretical level, while abstractly defining the concept as such, rather than at the practical level, while implementing and applying the best interests to a specific child in specific situations.

The common ground is the increasing concern shown by judges regarding the child’s well-being, and the progressive awareness of their status as right-holders and vulnerable human beings who, consequently, deserve more protection. Both jurisdictions are aware of the compulsory nature of the international treaties of human rights to which their States are parties, including the Convention.

Accordingly, the Moroccan judicial system is significantly different from the Chilean system due to the weight it gives to Islamic Law, which often leads to decision-making that has a negative impact on the children involved. Morocco’s prejudices against women and against certain types of families also have negative effects towards children and their best interests,<sup>131</sup> especially related to early marriages,<sup>132</sup> rules on paternity,<sup>133</sup> discriminatory status of children born out of wedlock,<sup>134</sup> discrimination of non-Muslim children and of children born to a non-Moroccan/Muslim parent,<sup>135</sup> acceptance of

<sup>131</sup> Chaima Lahsini, *Morocco Rejects Multiple UN Recommendations on Women’s Rights as ‘Unconstitutional,’* MOROCCO WORLD NEWS, (September 21, 2017)

<https://www.morocoworldnews.com/2017/09/229025/morocco-rejects-multiple-un-recommendations-on-womens-rights-as-unconstitutional>.

<sup>132</sup> UNICEF Middle East and North African Office, *Morocco Country Brief on Child Marriage in the Middle East and North Africa*, 6 (2017)

<sup>133</sup> Sani Ibrahim Salihu, *Denying Paternity of a Child under Islamic Law through Li’an: The Limit of the Rule*, 6 UNIMAID J. OF PRIV. & PROP. L. 11, 12 (2021).

<sup>134</sup> Lauren Kopchik, *In Morocco, Illegitimate Children Struggle for Rights*, THOMSON REUTERS FOUNDATION, (April 2, 2015) <https://news.trust.org/item/20150402163534-qousp/>

<sup>135</sup> Fatima Sadiqi, *Report on Morocco*, WOMEN’S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: PROGRESS AMID RESISTANCE 5 (Sanja Kelly & Julia Breslin eds., Freedom House, 2010)

polygamy for men,<sup>136</sup> ban on homosexuality<sup>137</sup>, illegality of sexual relations outside marriage<sup>138</sup>, and the concept of rape.<sup>139</sup> It should not, then, come as a surprise that Moroccan judges make imbalanced decisions when determining and assessing the child's best interests. These judges tend to apply the law they are most familiar with, which is religious law, rather than international human rights standards, which are more foreign to them. When referring to the best interests of the child in their judgments, judges frequently apply a specific conception of morals, namely the traditional societal view of how things should be done, how society should be ordered, and how women, men and children should behave. When the best interests of the child are cited by Moroccan courts, their interpretation of this concept often shows a lack of acceptance of international standards.

Equally important, the Chilean judiciary system is progressively incorporating the assessment and determination of the best interests of the child into their jurisprudence. Judges use arguments that more frequently incorporate the best interests of the child. However, the level of knowledge and sensitivity of Chilean judges towards the best interests of the child arguments, in particular, and towards the protection of children, in general, is varied and diverse. Even within Chile the level of knowledge differs from court to court, and from city to city, also depending on the judicial order that issues the ruling, whether in civil or criminal court. In Chile, some judges have shown a high degree of knowledge and awareness of the best interests principle, whereas others have not. In some cases, there is a gap between the theoretical argumentation presented by the court of what the best interests of the child are, and in other cases, there is a lack of practical application of the principle to a specific case. Chilean judges generally show interest in defining what the best interests means in theoretical terms, but at times they fail to assess it properly and instead protect other legitimate interests with the mistaken idea that they are faithfully targeting the best interests of the child.

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<sup>136</sup> Muannif Ridwan, Ahmad Syukri Saleh, & Abdul Ghaffar, *Islamic Law in Morocco: Study on The Government System and The Development of Islamic Law*, 1 ARRUS J. OF SOC. SCI. & HUMAN., 13, 21 (2021).

<sup>137</sup> Ahmed Ntungwabona, *Moroccan Minister of Justice Expresses Concerns Over "Growing Influence of Homosexuals"*, MOROCCO WORLD NEWS, (August 1, 2023) <https://www.morocoworldnews.com/2023/08/356815/moroccan-minister-of-justice-expresses-concerns-over-lquo-growing-influence-of-homosexuals>.

<sup>138</sup> Aziz Allilou, *I would Rather Resign Than Decriminalize Sexual Relations out of Marriage: Minister*, MOROCCO WORLD NEWS, (July 1, 2015) [https://www.morocoworldnews.com/2015/07/162257/i-would-rather-resign-than-decriminalize-sexual-relations-out-of-marriage-minister#google\\_vignette](https://www.morocoworldnews.com/2015/07/162257/i-would-rather-resign-than-decriminalize-sexual-relations-out-of-marriage-minister#google_vignette).

<sup>139</sup> AMNESTY INTERNATIONAL, *Bias in Penal Code Puts Women and Girls in Danger in Morocco*, (March 1, 2012).

## CONCLUSION

There is an increasing sensitivity to children's rights which is logically translated into judicial decision-making. Courts worldwide are becoming more aware of the need to consider the best interests of the child in their decisions. However, they do not always show the same level of knowledge and commitment towards the Convention<sup>140</sup>, and few of them seem to not be aware of the existence of, nor are eager to apply, GC no. 14 of the CRC.<sup>141</sup> On one hand, there is an overall positive evolution in the manner and the frequency with which the best interests of the child are considered, determined, and weighed in relation to other legitimate interests. On the other hand, in general terms, the Chilean and Moroccan courts tend to use arguments that underline the special relevance this concept has in cases affecting children, though ultimately there is not a fully uniform and common interpretation of the child's best interests in their States' case law. Best interests of the child are increasingly used and argued but not all judges understand and apply the same arguments under this heading. The concept is often mentioned in judicial cases, but not all tribunals consider it as a substantive right of the child. Some courts neglect it, considering it to be a subsidiary interpretative tool, while others mention the best interests of the child, but fail to determine and assess it in the cases brought to their attention. Few courts refer to GC no. 14, and indeed, most of them ignore it. Overlooking this GC is not only a question of some countries being better informed than others regarding the existence and content of this international tool. Major differences of sensitivity and willingness to apply GC no. 14 are also found among local courts of the countries studied.

Judges need to be trained to better understand how the best interests of the child are served. Wherever and whenever a decision is made in a case concerning a child, the decision needs to consider the same objective elements that any other decision made by a court in any other part of the world would, but this is not always the case.

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<sup>140</sup> Child Rights International Network (CRIN), *CRC in Court: The Case Law of the Convention on the Rights of the Child*, Child Rights International Network, ed, 2012, pp 5 and 28.

<sup>141</sup> U.N. Committee on the Rights of the Child (CRC), General Comment No. 10 (2007): *Children's Rights in Juvenile Justice*, April 25, 2007.