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The Best Interests of the Child and the Constitutional Court

MEDA COUZENS

ABSTRACT: The Constitutional Court has developed a comprehensive child-friendly jurisprudence on the best interests of the child provision in s 28(2) of the Constitution. There are, however, concerns that the concept of the best interests of the child is being over-used by the Court to the detriment of other relevant children's rights. The Court has not explicitly defined the content of s 28(2) in the name of preserving its flexibility. This article canvases the jurisprudence on the best interests of the child, and then it presents and analyses the use of s 28(2) by the Court in *J v National Director of Public Prosecutions & Another* (*Childline South Africa & Others as amici curiae*) and *Raduvha v Minister of Safety and Security* (*Centre for Child Law as amicus curiae*). These cases show that despite the declared reluctance of the Court to give formal clarity to the content and the scope of s 28(2) of the Constitution, it may be starting to systematise its approach to the application of this section. In these cases, the Court spells out the legal content of the provision and uses it as a subsidiary tool in the absence of another legal provision relevant for the issue raised. These cases contribute to the clarification of the best interests jurisprudence. The further development of this good practice would be facilitated by the courts acknowledging the diversity of legal sources and functions of the best interests of the child concept. An awareness of the complex nature of the best interests concept enables its principled legal development, without endangering the flexibility of its application on which the success of the concept rests.

KEYWORDS: arrest, children's rights, constitutional review, juvenile justice.

AUTHOR: Honorary Research Fellow and Member of the Navi Pillay Research Group, School of Law, University of KwaZulu-Natal, Durban. Email: couzensm@ukzn.ac.za

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I INTRODUCTION

The Court has a rich children's rights jurisprudence. A significant contribution is its comprehensive jurisprudence on the best interests of the child, for which the Court has been internationally praised.[1] The constitutionalisation of the best interests of the child in s 28(2) of the Constitution of the Republic of South Africa, 1996 ('Constitution') has facilitated this development. However, the Court's jurisprudence on the best interests provision is far from clear. It contains cases in which s 28(2) is applied either as a right, a principle, or a standard, without an explanation for the choice between the roles assigned to it. Arguably, this is not conducive to legal certainty as, presumably, different application techniques and outcomes accompany each of the mentioned roles. Further, the Court has been innovative in declaring that s 28(2) of the Constitution contains an independent right that applies discretely from the more specific rights of the child in s 28(1) of the Constitution. However, the Court has offered no explanation, and has explicitly refrained from assigning a fixed content to the right it identified in s 28(2). It reasoned that this would be contrary to the flexibility needed for this section to fulfil its purpose.[2] This is problematic. A right has an ascertainable content that should be spelled out by courts which ought not shirk their duty to define that content. Failing to give content to a right runs the risk of negating the potential benefits which arise from its recognition as a right – its predictability, uniformity in application and certainty. In the case of s 28(2), this reluctance results in a failure to capitalise on the changed nature of the best interests of the child, and to put to rest criticisms in relation to its vagueness and indeterminacy.

This article argues that the Court needs to overcome its reluctance to define the content of s 28(2), viz, 'A child's best interests are of paramount importance in every matter concerning the child'. In spite of its reluctance, the Court has taken some unacknowledged steps in that direction, but its reasoning has not been sufficiently explicit and systematic. The article argues that the task of doing so will be easier if the Court acknowledges the complex functions that the best interests of the child requirement has come to fulfil and the changes in the nature of the concept that have arisen from its inclusion in human rights instruments such as the Constitution and the UN Convention on the Rights of the Child, 1989 ('the CRC'). Two recent cases – *J v National Director of Public Prosecutions & Another* (*Childline South Africa & Others as amici curiae*)[3] and *Raduvha v Minister of Safety and Security* (*Centre for Child Law as amicus curiae*)[4] – develop the Court's jurisprudence, and suggest directions in which the Court could take its case law so as to introduce some clarity in the judicial application of s 28(2) of the Constitution.

This contribution is structured as follows: part II contains a discussion about the changed nature of the concept of the best interests of the child in the era of human rights, including an

[1] The Committee on the Rights of the Child ('the CRC Committee') noted 'the excellent jurisprudence of the judiciary on the application of this right in concrete situations.' Committee on the Rights of the Child *Concluding Observations on the Second Periodic Report of South Africa* CRC/C/ZAF/CO/2, (27 October 2016) at para 25, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fZAF%2fCO%2f2&Lang=en.

[2] *Minister for Welfare and Population Development v Fitzpatrick & Others* [2000] ZACC 6, 2000 (3) SA 422 (CC) ('*Fitzpatrick*'); *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development & Others* [2009] ZACC 8, 2009 (4) SA 222 (CC)('*DPP*').

[3] [2014] ZACC 13, 2014 (2) SACR 1 (CC)('*J v NDPP*').

[4] [2016] ZACC 24, 2016 (2) SACR 540 (CC)('*Raduvha*').

introduction to the multifaceted nature of this concept. Part III provides a brief summary of the Court's jurisprudence on the best interests, followed in part IV by a presentation of several arguments in favour of more judicial clarity in relation to the application of s 28(2). Part V, analyses *J v NDPP* and *Raduvha*, focussing on the contribution of these two cases in developing the Court's jurisprudence on the independent application of s 28(2). Part VI contains this work's conclusions.

II THE BEST INTERESTS OF THE CHILD IN THE ERA OF HUMAN RIGHTS

To understand the difficulties involved in defining the content of s 28(2) it is necessary briefly to present the changes which the concept has undergone as a result of being enshrined in a binding international instrument, the CRC. Article 3(1) of the CRC provides that –

> [i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[5]

A simple reading of the text suggests that its scope is wide, and includes 'all actions concerning children' taken by all branches of the state. This was an unprecedented enlargement of the scope of a concept most often encountered in private, family law litigation, or child protection proceedings concerning individual cases. The concept took off internationally, with the Committee on the Rights of the Child ('the CRC Committee') including art 3 amongst the four general principles of the CRC.[6] Domestically, art 3 catalysed the extension of the standard of the best interests of the child in areas of law where this concept has not been applied before (such as juvenile justice and immigration) and to matters concerning children indirectly and not only directly.[7]

In 2013, the CRC Committee issued a general comment in which it interpreted art 3(1). It stated that this article contains a principle, a rule of procedure and an independent right.[8] A striking (although not unusual for South African lawyers[9]) feature of the CRC Committee's position is that art 3(1) contains an independent right despite the text not being formulated in rights language.[10] It defined that substantive right as being –

> [t]he right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.[11]

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[5] African Charter on the Rights and Welfare of the Child, 1990/1999, art 4(1) reads: 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'.

[6] CRC Committee *General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by State Parties under Article 44, Paragraph 1(a), of the Convention* (1991) CRC/C/5 at para 13 (The other general principles are the rights to equality, survival and development, and participation).

[7] *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 ('*Teoh*') (Australia); *M v S* (*Centre for Child Law Amicus Curiae*) [2007] ZACC 18, 2008 (3) SA 232 (CC); Child Justice Act 75 of 2008.

[8] CRC Committee *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration art. 3, para. 1* CRC/C/GC/14 ('*General Comment 14*') at para 6.

[9] *Fitzpatrick* (note 2 above).

[10] Other courts have applied (directly) art 3(1) of the CRC without declaring that it contains an independent right. T Liefaard & J Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015)(on Belgium, France and the Netherlands).

[11] *General Comment 14* (note 8 above) part I.A.

Article 3(1) has become one of the 'stars'[12] of the CRC; and popular and successful as a litigation and advocacy tool. A few examples should suffice. In France, although courts are cautious in applying international treaties directly, art 3(1) is applied frequently, with significant positive consequences for children.[13] It has been used in individual cases, but also as a supra-legislative provision capable of controlling the validity of legislation or secondary legislation.[14] Article 3(1) has also been applied in other jurisdictions, both in ordinary and constitutional jurisprudence.[15] The European Court of Human Rights often engages with the concept of the best interests of the child, including by referring to art 3(1).[16]

Despite its recognition in the CRC, the concept of the best interests of the child remains controversial. Concerns include its indeterminacy or vagueness;[17] its potential to mask paternalistic decisions concerning children; and more recently, concerns about its over-use in argument and courts' reasoning.[18] A critical discourse on the use of the best interests of the child is therefore starting to emerge. Particularly relevant for this article is the view of Nigel Cantwell, who has criticised both the content of art 3(1) and its interpretation by the CRC Committee.[19]

The thrust of Cantwell's view is that 'the prominent role now assigned to the "best interests of the child" is mistaken, even dangerous in a context where children have human rights'.[20] The best interests was 'a product of an era prior to children being explicitly granted human rights',[21] but the concept was nonetheless included in the CRC although children were to

[12] A Gouttenoire '*L'application de la Convention Internationale des Droits de l'Enfant*' (2012) 50 *Petites affiches* 17. One of the members of the CRC Committee said (paraphrase) that should there be an alternative name for the CRC that would be 'The Best Interests of the Child Convention'. B Mezmur 'The Convention on the Rights of the Child, the Migration crisis, and the Government of Australia: Counting its days or making its days count' *The Australian Human Rights Institute Annual Lecture* (University of New South Wales, 22 March 2018).

[13] M Couzens 'France' in Liefaard & Doek (note 10 above) at 123.

[14] Ibid at 131.

[15] *Teoh* (note 7 above); *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2011] UKSC 4; *A, B, C and the Norwegian Association for Asylum Seekers (NOAS) v The State, Represented by the Immigration Appeals Board* HR-2012-02399-P (case no. 2012/1042)(Norway Supreme Court).

[16] J Scott 'Conflict between Human Rights and Best Interests of Children: Myth or Reality?' in E Sutherland & L Barnes Macfarlane (eds) *Implementing article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (2016) 67.

[17] U Kilkelly 'The Convention on the Rights of the Child after Twenty-five Years: Challenges of Content and Implementation' in M Ruck, M Peterson-Badali & M Freeman (eds) *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (2017) 80, 85. See also, discussion of vagueness in E Sutherland 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in E Sutherland & L Barnes Macfarlane (eds) *Implementing article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (2016) 21.

[18] D Bryant 'It's My Body, Isn't It? Children, Medical Treatment and Human Rights' (2009) 35 *Monash University Law Review* 193, 207; P Verdier '*Pour on Finir avec L'interest de l'Enfant*' (2008) 280 *Journal du Droit des Jeunes* 34; E Bonthuys 'The Best Interests of Children in the South African Constitution' (2006) 26 *International Journal of Law, Policy and the Family* 23; M Couzens '*Le Roux v Dey* and Children's Rights Approaches to Judging' (2018) 21 *Potchefstroom Electronic Law Journal*, available at https://doi.org/10.17159/1727-3781/2018/v21i0a3075; A Skelton 'Child Justice in South Africa: Application of International Instruments in the Constitutional Court' (2018) 26 *International Journal of Children's Rights* 391, 415.

[19] N Cantwell 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in T Liefaard & J Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2016) 61.

[20] Ibid at 62.

[21] Ibid at 64.

have rights of their own.[22] The extension of the scope of art 3(1) from *specific* matters to 'all matters concerning children' during the drafting of the CRC was not explained or justified and its implications were not assessed.[23] Later, the CRC Committee unilaterally elevated art 3(1) to the rank of a general principle of the CRC,[24] and embraced a 'sacrosanct stance' that the concept is of fundamental value for the CRC, without determining how and when its application could improve the protection of children's rights.[25] In its further developments of the concept in *General Comment 14*, the CRC Committee added to the confusion when it 'invoked [it] pointlessly, that is, when reference to a right would or should suffice'.[26] Cantwell argues that to recalibrate the approach to the best interests of the child, the concept should be used to fill gaps in the legal framework when 'rights considerations alone do not provide sufficient guidance or grounds for decision-making'.[27] Cantwell's views are persuasive, but cogent views supportive of the position of the CRC Committee have also been expressed.[28] It is beyond the scope of this article to delve into the debate, but two observations can be made.

First, the Cantwell criticism overlooks the possibility that the nature of what is monolithically called 'the best interests of the child' has changed under the influence of human rights standards.[29] A new feature has been added to the concept: its traditional nature as a *practical* standard that enabled decision-makers to make decisions concerning individual children has been supplemented with human rights dimensions that strengthen it as a *legal* standard. Thus, what was essentially a checklist of factors (or a scale to weigh competing interests), has changed into a legal standard amenable to giving rise to entitlements and obligations. Early children's rights writers, in similar vein to Cantwell, have argued that art 3(1) does not create specific obligations and entitlements.[30] However, the law has developed in a different direction. More specifically, the transformation of the best interests of the child into a human rights standard requires that when determining what is in a child's best interests, the rights of the child (i.e., not only the child's welfare or what adults perceive to be the child's welfare) be considered, and that a child capable of forming views has a right to be heard in all matters concerning the

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22 Ibid at 65.

23 Ibid at 63.

24 CRC Committee *General Guidelines* (note 6 above).

25 Cantwell (note 19 above) at 64.

26 Ibid at 66.

27 Ibid at 69.

28 Sutherland & Barnes (note 16 above) (offers a more positive approach to the current development of the concept of the best interests of the child).

29 This transformation view can find support in treaty interpretation arguments such as a dynamic interpretation of the treaty (see *Case Concerning the Dispute Regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) 13 July 2009, ICJ para 64) or an interpretation in good faith of art 3(1) of the CRC (as per art 31(1) of the Vienna Convention on the Law of Treaties, 1969/1980), which does not render this article meaningless (*Costa Rica v Nicaragua* 2009 para 52) and which demands an integration of the best interests of the child concept into the rights-based reasoning endorsed by the CRC.

30 P Alston 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 1994 (8) *International Journal of Law and the Family* 1, 15; and G Van Bueren *The International Law on the Rights of the Child* (1998), 46.

child.[31] The weight to be given to the best interests of the child may also be different in that some human rights instruments[32] contain a compromise between a lower weight to be given to them[33] and expanding the ambit of the concept (to 'all matters concerning a child' – directly and indirectly, individually or collectively).

Second, putting aside the legal correctness of the current expansive approach to the best interests of the child, the reality remains that this perspective has been embraced in some jurisdictions, where it has had positive consequences for children individually and collectively. Thus, pragmatism surpassed the theoretical vulnerabilities of this concept. This raises questions for children's rights researchers. For example, are concerns about the cogency of the current use of art 3(1) to be ignored because of the benefits that it can deliver? Or, can the best interests jurisprudence develop a sounder conventional legal foundation – meaning one that is unadventurous or one that conforms to mainstream legal discourse? Would the latter involve a decrease in the influence that the best interests of the child legal provisions have had as drivers of a special legal treatment for children? These questions cannot be fully addressed here, but the existing South African case-law suggests that the best interests of the child jurisprudence can develop more cogently. This requires an acknowledgement that the concept of the best interests of the child is complex and displays a multitude of dimensions. Distinguishing between these dimensions would enable some of the aspects of the concept to be defined, increasing legal certainty, while preserving the flexibility inherent in some other aspects of the concept.[34]

[31] CRC Committee *General Comment No 14* (note 8 above) at para 6; *J v NDPP* (note 3 above). Consideration of relevant rights and of the views expressed by a child result in the best interests of a child being determined based on some objective factors rather than on the subjective views and values of the decision-makers (T Boezaart 'General Principles (ss 6–17)' in C Davel & A Skelton (eds) *Commentary on the Children's Act* (Revision Service 9, 2018; updated to August 2018) (Jutastat) at 8).

[32] CRC, art 3(1) compare with African Charter, art 4(1).

[33] CRC, art 3(1)(the best interests of the child are 'a primary consideration'), and Constitution, s 28(2)(the best interests of the child are of 'paramount importance'). The African Charter (art 4(2)) confers the highest weight, referring to the best interests of the child as 'the primary consideration'.

[34] This issue is developed in part VI below. Nonetheless, to understand better the arguments that follow, it is useful to mention that the legal dimensions of the best interests of the child (i.e. the *in abstracto* entitlements and obligations arising from s 28(2) of the Constitution) could be spelled out by a court, but what may be in the best interests of a child in a concrete dispute cannot be pre-determined in the abstract. As put by Boezaart, '[t]he question of precisely what a child's best interests are is a factual question that has to be determined according to the circumstances of each individual case' (Boezaart (note 31 above) at 6 (foonote omitted)).

III THE BEST INTERESTS OF THE CHILD IN SOUTH AFRICAN LAW: A COMPLEX CONCEPT

The best interests of the child as a concept was used in South African law prior to the new constitutional dispensation,[35] primarily to deal with child custody and the relationship between children and their parents,[36] but also in relation to adoptions and child protection. With the advent of democracy, s 28 of the Constitution was drafted under the influence of the CRC.[37] Section 28(2) reflects art 3(1) of the CRC to a significant extent,[38] and it reads: '[a] child's best interests are of paramount importance in every matter concerning the child'.

Like the CRC Committee, albeit independently, the Court employed a generous perspective in relation to s 28(2). In *Fitzpatrick*, the Court made the far-reaching pronouncement that the section contains a right independent of the more specific rights in s 28(1) of the Constitution,[39] rejecting earlier views that it 'is intended as a general guideline'.[40] Thereafter, the position was reiterated in other cases, such as *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others,*[41] *Sonderup v Tondelli & Another,*[42] *M v S (Centre for Child Law as Amicus Curiae),*[43] and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & Others.*[44]

The Court has not explicitly articulated its approach to the best interests of the child despite the frequency with which it refers to s 28(2).[45] Thus, in its case-law, s 28(2) is referred to

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[35] Skelton & Carnelley argue that 'the concept of the best interests of the child has been part of the South African law since the 1948 case of *Fletcher v Fletcher* 1948 (1) SA 130 (A), in A Skelton & M Carnelley (eds) *Family Law in South Africa* (2014) 239. See also L Mills 'Failing Children: The Courts' Disregard of the Best Interests of the Child in *Le Roux v Dey*' (2014) *South African Law Journal* 847, fns 1 and 2); G Barrie 'The Best Interests of the Child: Lesson from the First Decade of the New Millennium' 2011 *Tydskrif vir die Suid-Afikaaanse Reg* 126–134; Boezaart (note 31 above); Bonthuys (note 18 above); S Burman 'The Best Interests of the South African Child' (2003) 17 *International Journal of Law, Policy and the Family* 28–40; J Heaton 'An Individualised, Contextualised and Child-centred Determination of the Child's Best Interests, and the Implications of such an Approach in the South African context' (2009) 34 *Journal for Juridical Science* 1–18; A Skelton 'Constitutional Protection of Children's Rights' in T Boezaart (ed) *Child Law in South Africa* (2009) 265.

[36] Mills (note 35 above) at 847–848.

[37] J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 *South African Journal of Human Rights* 401; Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bill of Rights and Party Submissions* (not dated), available at http://www.justice.gov.za/legislation/constitution/history/REPORTS/tc4-SUPPL.PDF; Panel of Constitutional Experts *Memorandum* (1996) paras 3.3 and 3.4, available at http://www.justice.gov.za/legislation/constitution/history/LEGAL/CP005026.PDF .

[38] Some differences exist in the textual formulation (note 33 above).

[39] *Fitzpatrick* (note 2 above) at para 17.

[40] *Jooste v Botha* 2000 (2) SA 199 (T) 210D.

[41] [2003] ZACC 19, 2004 (1) SA 406 (CC) ('*De Reuck*').

[42] [2000] ZACC 26, 2001 (1) SA 1171 (CC)('*Sonderup*').

[43] *M v S* (note 7 above).

[44] *DPP* (note 2 above).

[45] In this sense, its attitude is similar to that of the CRC Committee. Neither body has explained its far-reaching statements that the relevant best interests provisions contain an independent right. The reasons remain therefore a matter of speculation, creating concerns about the cogency of this approach.

alternatively as containing a 'standard',[46] a 'guiding principle',[47] or a 'right'.[48] The children's rights literature has pointed out that in the jurisprudence of the Court the best interests of the child plays three functions: an interpretation tool for s 28(1) of the Constitution; a tool to establish the scope and potential limitations of other constitutional rights; and a right in itself.[49]

It is apparent therefore that the best interests of the child plays a complex role. This complexity is compounded by s 28(2) being superimposed on the existing law, which already contained the principle of the best interests of the child, and by the utilisation of the best interests concept in child law legislation: Children's Act 38 of 2005 ('the Children's Act') and the Child Justice Act 75 of 2008 ('the Child Justice Act'). Although the Constitution, the common law and statutes may all operate with nominally the same concept – 'the best interests of the child' – its purpose and meaning may differ. In terms of the common law, the best interests of the child has a limited ambit, and concerns the relationship between parents and children. It focuses on the individual child, is outcome-oriented (it seeks to deliver the best outcome for the child by giving priority to his/her interests), and when applied it determines the outcome.

The constitutional best interest differs. It applies not only to decisions made by high courts as upper guardians of all children but to 'every matter concerning the child',[50] and to children individually and collectively. Statutory provisions held to be inconsistent with s 28(2) of the Constitution have been invalidated,[51] arguably the most far-reaching constitutional remedy. Importantly, s 28(2) of the Constitution was declared by the Court on several occasions to be subject to limitations under s 36.[52] This interpretation is clearly different from the common law best interests concept. Under the common law, the best interests analysis is not subject to such structured limitations.[53]

Statutes add to the complexity of the concept. Section 6(2)(a) of the Children's Act requires that in all proceedings concerning a child, his/her best interests must be respected, protected, promoted and fulfilled. Section 7 provides that when the Act requires the application of the best interests of the child, the factors in s 7(1) are to be considered. The factors referred to in this section are to be applied when the Act itself requires the application of the best interests of the child, and are not mandatory in cases beyond the ambit of the Act. In any case, most of the factors mentioned in s 7(1) would be difficult to apply beyond matters governed by the

[46] *Fitzpatrick* (note 2 above) at para 18 (best interests of the child is referred to as a 'standard'); *Fitzpatrick* (note 2 above) at para 17 (best interest of the child described as an independent 'right').

[47] *M v S* (note 7 above) at para 22.

[48] *Fitzpatrick* (note 2 above) at para 17; *M v S* (note 7 above) at para 22. *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another* [2013] ZACC 35, 2014 (2) SA 168 (CC) ('*Teddy Bear*') used all the above terms; see, for example, para 79 where the Court finds the impugned legislation contrary, *inter alia*, to the 'best-interests *principle*', only to say a few lines later that 'the *right* in terms of section 28(2)' can be limited under s 36 (my emphasis).

[49] A Friedman, A Pantazis & A Skelton 'Children's Rights' (2nd Ed, RS 1: 07–09) in S Woolman & M Bishop *Constitutional Law of South Africa* (2nd Ed) (2009).

[50] Ibid at 40–47.

[51] *Fitzpatrick* (note 2 above); *J v NDPP* (note 3 above); and *C & Others v Department of Health and Social Development, Gauteng & Others* [2012] ZACC 1, 2012 (2) SA 208 (CC)('*C v Department of Health, Gauteng*').

[52] *Fitzpatrick* (note 2 above) at para 20; *Sonderup* (note 42 above) at para 29; *De Reuck* (note 41 above) at para 55; and *J v NDPP* (note 3 above).

[53] The standard applied in limited circumstances which involved people with special responsibilities in relation to the child (i.e. the parents).

Act. Further, s 9 states that '[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied'. The later provision is similar to s 28(2) of the Constitution by giving 'paramount importance' to the best interests of the child,[54] but has a more limited scope in that it concerns only matters concerning the care, protection and well-being of children. There are, however, provisions which make the best interests of the child the determining factor for the courts, such as in the context of adoption,[55] HIV testing,[56] etc.[57] The Child Justice Act also refers to the best interests of the child in several sections,[58] and implies that in proceedings involving children 'the best interests of the child are at all times of paramount importance'.[59] The 'paramount importance' of the best interests of the child is mentioned only once (above), and in other instances, the best interests of the child is approached as one of the factors potentially relevant.

This brief presentation shows the variety of meanings and roles compressed into a single expression: 'the best interests of the child'. Common law, statutory and constitutional approaches to the best interests coexist,[60] but there is no perfect overlap between their scope, application and effects. Different legal sources deal with different aspects of the best interests of the child in different ways, but none defines the best interests or exhausts its meaning and its legal consequences. While the aim of securing the best possible outcome for the child is central to all approaches, the routes taken are different. Considering this complexity, it is difficult for the Court to invoke the need to preserve the flexibility of the best interests of the child in order to refrain from giving more structure to its approach to this concept. Its position is particularly problematic when it concerns the far-reaching and novel statement that s 28(2) contains an independent right.[61]

It is not certain why the Court declared that s 28(2) contains an independent right. The s is not formulated in rights language,[62] and declining to characterise it as a right would not have denied it legal effect. Legal norms are not deprived of normative force just because they do not contain substantive rights or because they have a more general formulation than other norms. The Court's own jurisprudence shows that constitutional norms and principles – including provisions in the Bill of Rights,[63] the rule of law or separation of powers – are

[54] A similar approach is to be found in Children's Act, s 64(1)(a)('[T]aking into account the best interests' of the child).

[55] Children's Act, s 230(1)(a).

[56] Children's Act, s 130(1).

[57] Children's Act, ss 29(1)(3), 55(1), 61(1)(c), 116(2), 151(8).

[58] Child Justice Act, ss 9(1)(b), 24(3)(a), 30(3)(a).

[59] Child Justice Act, s 80(1)(d).

[60] *DPP* (note 2 above) para 190 (Court mentions its upper guardian functions alongside s 28(2)). Also *Van der Burg & Another v National Director of Public Prosecutions & Another* [2012] ZACC 12, 2012 (2) SACR 331 (CC)('*Van der Burg*') para 68 ('The High Court is not only the upper guardian of children, but is also obliged to uphold the rights and values of the Constitution').

[61] Bonthuys (note 18 above) at 27 (remarking that the Court has seldom treated s 28(2) as an independent right in that it has not defined its content and it has seldom utilised s 36 to justify limitations to the best interests). However, the Court has considered possible limitations to s 28(2) in terms of s 36 of the Constitution. *C v Department of Health, Gauteng* (note 51 above) at paras 80–83; *Teddy Bear* (note 48 above) at para 79; *J v NDPP* at para 46.

[62] P Visser 'Some Ideas on the 'Best Interests of a Child' Principle in the Context of Public Schooling' (2007) 70 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 459.

[63] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC) (Impugned legislation was found contrary, amongst others to s 7(2), which is not a substantive provision in the Bill of Rights).

judicially enforceable despite not being declared rights and having wide normative spans.[64] International writers[65] and foreign case-law[66] also support the view that abstract norms are judicially enforceable.

To the knowledge of the current writer, no author, court[67] or international body has made similar statements prior to that of the Court in *Fitzpatrick*. The Court itself has only explicitly identified the right in *DPP,* where it referred to it as 'the right to have the child's best interests given paramount importance in matters concerning the child'.[68] Until the CRC Committee embraced the same approach in 2013, there had been no source other than the Court able to clarify this new take on the best interests of the child. Regretfully, the Court failed to do so, although it has continued to apply s 28(2) in ways which have clearly advanced children's interests.

While the Court has been reluctant to assign content to s 28(2), including the right component of the provision, a close analysis of its case-law gives an indication of the obligations and entitlements which the Court associates with this section. This contribution does not inquire into whether this content is commensurate to that of a right or whether it can be equally assigned to a constitutional norm of a different nature. Addressing this question requires a different approach, which is beyond the scope of this article.[69] Nonetheless, several normative themes can be identified in the Court's application of s 28(2),[70] albeit that it is not certain whether they are a part of the content of the independent right identified by the Court, or of the wider normative content of this provision, which includes its functioning as a guiding principle or constitutional standard.

A useful departure point is the unpacking of Sachs J's view on s 28(2) in *M v S* by Gallinetti, who distils the following requirements from the decision:

[64] Examples include the rule of law (*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998(2) SA 374 (CC)), the separation of powers (*South African Association of Personal Injury Lawyers v Heath & Others* [2000] ZACC 22, 2001 (1) SA 883 (CC)). In environmental law, the National Environment Management Act 107 of 1998, s 32(1) makes the principles of the Act independently justiciable, without them containing rights.

[65] Conforti argued that norms with a general or indeterminate formulation cannot be denied judicial application 'especially when they contain declarations of principles rather than specific rules', because legal principles are capable of judicial application. B Conforti *International Law and the Role of Domestic Legal Systems* (1993) 28–29.

[66] *A, B, C and the Norwegian Association for Asylum Seekers* per Justice Bårdsen (joined in dissent by four other judges), who argues that the normative force and the justiciability of a legal norm (CRC, art 3(1) in that case) are not erased by its generality (paras 116–120). It is interesting to note that, like the South African Constitutional Court, this judge would have issued a judicial declaration of unlawfulness in relation to CRC, art 3(1) alone (incorporated verbatim in the Norwegian law) and would have provided a judicial remedy.

[67] Gaudron J in *Teoh* (note 7 above) said that 'it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account …' (para 4). Unlike in South Africa, this thesis that the consideration of the best interests of the child constitutes a right of sorts has not taken off the ground.

[68] *DPP* (note 2 above) at para 73.

[69] Arguably, the clarification of this issue requires a theoretical investigation into the meaning of the term 'right', followed by an assessment of how its judicial enforceability differs from that of legal norms not containing a right.

[70] M Couzens 'The Contribution of the South African Constitutional Court to the Jurisprudential Development of the Best Interests of the Child' in A Diduck, N Peleg & H Reece (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy. Essays in Honour of Michael Freeman* (2015) 521.

> [F]irst, consideration of the interests of children; second, the retention in the inquiry of any competing interests because the best interests principle does not trump all other rights; finally, the apportionment of appropriate weight to the interests of the child.[71]

Two obligations seem to arise from s 28(2): to consider (i.e. take into account) the interests of children, and to give 'appropriate weight … in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned'.[72] This approach is supported by the Court's formulation in *DPP:* 'the right to have the child's best interests given paramount importance in matters concerning the child'.[73]

These obligations can be unpacked further. The obligation to consider the interests of the child requires a court to be informed about the impact of its decision on children. This may be achieved through the appointment of a *curator ad litem,*[74] or information being provided by relevant court officers,[75] or by listening to children and their parents.[76] In cases where the parents are subject to law enforcement actions by the state, the interests of the children are to be assessed independently of those of their parents[77] and the state has to minimize the harmful consequences of its interference with the family environment.[78] Section 28(2) requires consideration of children's interests in matters involving children or only affecting them. At times, a court may need to consider the interests of children *ex officio* if the parents or those supposed to safeguard the interests of the children fail to do so.[79]

Giving 'appropriate weight' to the best interests of the child does not mean that such interests trump all other legitimate interests. The Court has been clear that s 28(2) can be limited according to s 36 of the Constitution.[80] Section 28(2) requires that individual best interests be safeguarded, including by enabling the delivery of child-centred remedies.[81] The law must therefore create conditions for decision-makers to respond to individual situations.[82]

The above entitlements and obligations based on 28(2) arise from an academic analysis of judgments, which ultimately cannot be a substitute for binding judicial pronouncement, which in my view is currently needed.

[71] J Gallinetti '2kul2Btru: What Children Would Say about the Jurisprudence of Albie Sachs' (2010) 25 *South African Public Law* 108, 115. *M v S* (note 7 above) at paras 33, 26 and 32.

[72] *M v S* (note 7 above) at para 42.

[73] *DPP* (note 2 above) at para 73 (per Ngcobo J).

[74] In *Van der Burg* (note 60 above), the *amicus* relied on s 28(2) to request the appointment of a curator *ad litem*, while in *Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) at para 3, the appointment of the curator *ad litem* was linked to s 28(1)(h).

[75] *Van der Burg* (note 60 above) at para 68; *M v S* (note 7 above) at para 36.

[76] *C v Department of Health, Gauteng* (note 51 above) at para 77.

[77] *M v S* (note 7 above) at para 18; *Van der Burg* (note 60 above) at para 68, 70.

[78] *M v S* (note 7 above) at para 42.

[79] *Van der Burg* (note 60 above) at para 68.

[80] See note 51 above.

[81] In *Sonderup*, the Court ordered the immediate return of a child abducted by her mother from the country of habitual residence, but held that '[p]ursuant to s 38, read with s 28(2), this Court is entitled to impose conditions [to her immediate return] in the best interests of Sofia.' *Sonderup* (note 42 above) at para 51. See also *Head of Department, Department of Education, Free State Province and Welkom High School & Others* [2013] ZACC 25, 2014 (2) SA 228 (CC) at para 119 (Although a violation of children's rights was not established, the Court granted a pre-emptive remedy because, otherwise, children would have been exposed to the risk of having their rights violated by school policies that they are unlikely to challenge).

[82] *Fitzpatrick* (note 2 above) at para 20; *M v S* (note 7 above) at para 24.

IV THE NEED FOR MORE JUDICIAL CLARITY IN RELATION TO THE APPLICATION OF S 28(2)

There are several pressing reasons why more clarity is needed on the application of s 28(2), especially as an independent right. These include preserving legal certainty; increasing the legitimacy of the powerful position currently occupied by s 28(2) by justifying the identification therein of a right; preserving the integrity of s 28(2) by ensuring a transparent application of s 36; and the divergent views taken by judges in relation to the application of s 28(2). In this part, I elaborate on these reasons.

First, clarity is needed in order to preserve legal certainty. When a concept plays as many roles and can have as many distinct consequences as the best interests of the child, there should be clarity on how to use the concept (i.e. as an independent right, a guiding principle, a standard, an interpretation tool, or a procedural rule).

Second, declaring that s 28(2) contains an independent right goes beyond the express wording of the section. Apart from raising questions about the legitimacy of this approach, 'reading into' the Constitution a right which has not been spelled out by the drafters extends considerably the sphere of rights for children. While this is no doubt positive for them, it may have an impact on the rights of others and the obligations of the state. In *Fitzpatrick*, the Court stated:

> Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).[83]

Thus, in the view of the Court, the interests of children, to which paramount consideration needs to be given under s 28(2), extend beyond those that are given explicit constitutional protection in s 28(1). This is a far-reaching statement, which results in a constitutionalisation of interests that have not been explicitly protected by the drafters of the Constitution. While it provides a positive counterweight to possible legislative oversight in relation to children's interests, it also raises questions as to whether courts may not be allocating themselves Constitution-making powers.

An illustration is provided by the *Teddy Bear* case, where the Court found statutory provisions criminalising certain consensual sexual acts between teenagers contrary to, among others, s 28(2).[84] The reasoning of the Court was that legislation exposed children to harm consisting of the 'negative impact' of the contact with the criminal law system.[85] A general protection of children from harm is not explicitly provided for in the Constitution. Children have the right to be protected against *serious* forms of harm – 'maltreatment, neglect, abuse or

[83] *Fitzpatrick* (note 2 above) at para 17.

[84] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, ss 15 and 16 were declared constitutionally invalid to the extent that they imposed criminal liability on children below the age of 16.

[85] *Teddy Bear* (note 48 above) at para 71. In the same paragraph, the Court noted: 'The best-interests principle also applies in circumstances where a statutory provision is shown to be against the best interests of children in general, for whatever reason. As a matter of logic what is bad for all children will be bad for one child in a particular case'. Essentially, this seems to say that what is bad for children is contrary to s 28(2). This is a very wide interpretation of the scope of this section that, left unqualified, risks opening the door to paternalistic arguments which define the best interests of the child from an unfettered adult perspective. It might be that the Court deliberately gave s 28(2) a broad construction given that potential limitations may be justified under s 36.

degradation'[86] – but contact with the criminal justice system, without more, does not amount to such prohibited treatment despite being harmful. In the absence of further elaboration, the position of the Court in *Teddy Bear* suggests that *any harm* done to a child/children is a breach of s 28(2) of the Constitution, regardless of whether the harm if grave or not. The consequence of such an approach can be significant, considering the obligation of the courts to invalidate legislation or official conduct inconsistent with the Constitution.

A third reason why it is important to know *what* the content of the right in s 28(2) is, and *when* such a right applies, is that should a limitation of that right be pleaded,[87] it has to meet the stringent requirements in s 36 in order to be defensible. This is a positive feature of the jurisprudence. The concerns in relation to the best interests of the child include the alleged arbitrariness in decision-making and the manipulation of the standard to suit the interests of adults. Reliance on s 36 to justify the limitation of s 28(2) mitigates such risks, introduces structure and reduces the potential arbitrariness in the process of limiting the best interests of the child. Nonetheless, the application of s 36 is difficult if it is not clear what the right allegedly limited requires. Further, given the procedural nature of the right in s 28(2), as formulated by the Court – imposing an obligation to consider and to give appropriate weight to the best interests of the child – one may question whether a limitation to that right can ever meet the criteria in s 36. What can justify a limitation of a right *to give primary consideration* to the best interests of the child, which implies no automatic commitment to an outcome which favours the child? What does a justifiable limitation to this right mean: giving *no consideration* at all to the best interests of the child; or *not prioritising* the interests of the child? If the former, can there be any reasonable and justifiable reason in a society based on dignity, equality and freedom which justifies the interests of children not being seriously considered and weighed against other legitimate interests? If the latter, is it necessary to engage with s 36 considering that s 28(2) does not require that the interests of children be always prioritised? When the Court used s 36 to justify limitations to s 28(2) it arguably envisaged the common law best interests standard and its prioritisation of children's interests, rather than the constitutional standard, which does not require that such priority be automatically given.[88]

Fourth, certain cracks seem to be appearing in the judicial application of s 28(2), which show that a concept whose application was once uncontroversial may have lost its unifying power,[89] with some judges seemingly developing a more circumspect attitude in relation to its application. Arguably, the uncertainty about the scope, role and consequences of s 28(2) has contributed to this. The Court has systematically avoided defining the legal content of s 28(2)

[86] Constitution, s 28(1)(d).

[87] It is only rights whose limitations must comply with s 36 requirements, and not the limitations in other legal standards (such as guidelines or principles).

[88] *Sonderup* (note 42 above)(The Court relied on s 36 to justify why it did not prioritise the short term interests of the child). In *Teddy Bear* (note 48 above) or *J v NDPP* (note 3 above), it relied on s 36 to establish if there were any good reasons for the law not to prioritise a best outcome for children. Although these judgments are child rights-friendly, the problem remains that of the chameleonic use of s 28(2) by the Court, which starts by engaging with the constitutional dimension of the best interests of the child but disposes of the legal matter using the common law, outcome-oriented dimension of the concept.

[89] In certain cases in which s 28(2) has played a major role, there was no dissent on the application of this section and its effects (*Fitzpatrick* (note 2 above); *Sonderup* (note 42 above)' *De Reuck* (note 41 above); *DPP* (note 2 above)).

(see, for example, *Fitzpatrick*[90] and *DPP*[91]) in the name of preserving its flexibility (on which the strength of the concept was said to rest).[92] This creates a double danger: a temptation to over-use the best interest of the child given its normative elasticity, which could result in its normative bloating to the detriment of applying and developing the more specific rights of the child; and the risk of being overlooked by the courts given its uncertain scope and legal consequences.

Some clarification is needed on these points. Academics have expressed concern that judges may rely too easily on s 28(2), without making an effort to construct their reasoning on the more precise requirements of s 28(1) provisions.[93] Some cases have exposed the vulnerability of this approach, possibly to the detriment of advancing the rights of children. In *C v Department of Health, Gauteng*, the impugned provisions of the Children's Act were declared constitutionally invalid because they were found to breach s 28(2) (and s 34). Writing for the majority, Yacoob J did not engage with ss 28(1)(b) and (d); which were nonetheless considered by Skweyiya J (with Froneman J; concurring) and Jafta J (with Mogoeng CJ; dissenting). In *Le Roux & Others v Dey; Freedom of Expression Institute & Another as Amici Curiae*[94] ('*Le Roux*') Yacoob J (dissenting), invoked s 28(2) to justify his child-focused approach to the law of defamation. Only Skweyiya J rallied to his reasoning. The disconcerting aspect in *Le Roux* is that, after years of best interests case-law, the majority did not even mention s 28(2) in its reasoning. It is possible therefore that when a legally-diffuse standard such as the best interests of the child comes face-to-face with well-established, hard law (law of delict in this case) some judges may be reluctant to consider it.

Recent Supreme Court of Appeal (SCA) cases add to this concern. In *Centre for Child Law & Others v Media 24 Limited & Others*[95] ('*Centre for Child Law v Media 24*') the majority acknowledged the reliance on s 28(2) by the appellants but then ignored this section in its reasoning. It rejected the appellants' claim to extend the anonymity of the victims after they turned 18, but accepted the claim for victim extension under s 9 of the Constitution,[96] and not s 28(2). No explanation is given for snubbing the latter. Willis JA for the minority (joined by Mocumie JA) relied heavily on s 28(2), which he referred to as 'the animating principle'[97]

[90] *Fitzpatrick* (note 2 above) at para 18, footnotes omitted (The Court said that 'the 'best interests' standard appropriately has never been given exhaustive content in either South African law or in comparative international or foreign law. It is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child).

[91] *DPP* (note 2 above) at para 73 ('It is neither necessary nor desirable to define with any precision the content of the right to have the child's best interests given paramount importance in matters concerning the child').

[92] *AB v Pridwin Preparatory School* [2018] ZASCA 150, 2019 (1) SA 327 (SCA) at para 30 ('*Pridwin Preparatory School*')('It is unnecessary to determine the content of this right because it provides an adequate benchmark for the treatment and protection of children in its present form.'). If the highest court in the land is of the view that it is not necessary to determine the content of the right in s 28(2), then lower courts are entitled to follow its lead.

[93] Bonthuys (note 18 above); Couzens (note 18 above); Skelton (note 18 above); M Couzens 'The Constitutional Court Consolidates its Child-focused Jurisprudence: The case of *C v Department of Health and Social Development, Gauteng*' (2013) 130 *South African Law Journal* 672.

[94] [2011] ZACC 4, 2011 (3) SA 274 (CC).

[95] [2018] ZASCA 140, [2018] 4 All SA 615 (SCA). The case concerned the constitutional validity of s 154(3) of the Criminal Procedure Act 51 of 1977, which failed to protect the anonymity of children as victims of crimes in criminal proceedings. In addition to extending the protection of anonymity to child victims (the victim extensions), the applicants sought the preservation of anonymity of victims beyond the age of 18, except when decided otherwise by a court (the adult extension).

[96] Ibid at para 29.

[97] Ibid at para 64.

of the case. While he relied on s 28(2) to justify the victim extension, the adult extension was justified under the rights to dignity and privacy (rather than s 28(2)).[98] The explanation given by Willis JA as to the distinction between the majority and minority judgments, which he considered to be separated by a 'philosophical ocean', is interesting.[99] This comment alerts us to the fact that the consideration of s 28(2) may be viewed by some judges as a matter of philosophical choice rather than as a matter of applying a relevant and binding legal standard.

Pridwin Preparatory School concerned a challenge by the parents of two children enrolled in a private school to the school's decision to terminate the contract between it and the parents because of the parents' misconduct.[100] The parents argued that by terminating the contract, the school breached ss 28(2) and 29(1)(a) of the Constitution. Cachalia JA for the majority considered s 28(2),[101] but decided that it did not create a right for the parents (or the children) to be heard by the school before the contract was terminated, as argued by the parents.[102] Mocumie JA dissented, and found that the contractual clause which gave the school the right to terminate the contract without hearing the children was unconstitutional and that the termination of the contract was unfair because the views of the two children were not considered and given appropriate weight. The judgment by Mocumie JA pays close attention to s 28(2) and its implications. Without being error-free,[103] her judgment questioned the method followed by the school to assess the best interests of the two expelled children and expressed the view that contracts between private schools and parents are not typical commercial contracts, and they may require that the courts develop the law of contract.[104]

The cases show that best interests arguments do not always enjoy full support from judges or lead to a uniform application of s 28(2). Arguably, absence of clarity in relation to how and when s 28(2) applies may lead to some judges avoiding this standard in favour of more certain, less amorphous norms. It comes as no surprise therefore that when legal reasoning based on s 28(2) is advanced in areas of law not accustomed to child-related concerns, judges are criticised for being 'misdirected by … unwarranted bias towards the children's rights'.[105] An approach to the best interests of the child presented in a conventional legal algorithm may be more appealing for courts and may improve the quality and the consistency of the application of s 28(2). This section has become so important for the children's rights jurisprudence that continuing uncertainty may undermine the benefits it is able to deliver.

The jurisprudence is nonetheless evolving, and the two cases discussed below show the benefits which arise from the Court's position that s 28(2) contains a legal norm which can

[98] *Centre for Child Law v Media 24* (note 95 above) at paras 74 and 83 (per Willis JA).

[99] Ibid at para 97 ('In my opinion, when it comes to the disclosure of the identity of childhood victims of crime, logic, common sense and ordinary, everyday morality generate a constitutional imperative.').

[100] *Pridwin Preparatory School* (note 92 above).

[101] Ibid at para 39 (Cachalia JA found that s 29(1)(a) did not apply, because the school was not performing a constitutional function (i.e. provision of basic education)).

[102] The Court held that the cases relied on by the parents do not create a general right to be heard and were not relevant for the termination of a private contract. Ibid at paras 33, 37. The parents had relied upon *C v Department of Health, Gauteng* (note 51 above) and *J v NDPP* (note 3 above).

[103] *C v Department of Health, Gauteng* (note 51 above) is not a 'medical treatment' case (at para 96), and s 31(2) of the Constitution (relied on in para 124) is not relevant to the case.

[104] *Pridwin Preparatory School* (note 92 above) at para 124. An appeal by the parents was heard by the Court on 16 May 2019, and judgment was reserved.

[105] M Buthelezi 'In Dissent: A Critical Review of the Minority Judgment of Yacoob J in *Le Roux v Dey* 2011 (3) SA 274 (CC)' (2012) *Obiter* 719, 723.

be applied independently. This is not to say that in these cases the Court has necessarily applied s 28(2) as a right. What the Court has nonetheless done, in unanimous judgments, has been to cement the recognition of the independent normative force of s 28(2) further and, in the process, offer some guidance on when this section can be applied independently in a predictable and principled way.

V *J V NDPP* AND *RADUVHA*: RECENT POSITIVE EXAMPLES OF THE APPLICATION OF S 28(2)

In this part, I provide a brief account of *J v NDPP* and *Raduvha*, followed by a discussion of their significance for developing the jurisprudence of the Court on the independent application of s 28(2).

A *J v NDPP*: Overcoming concerns about identifying the content of s 28(2)?

This case concerned the constitutional validity of s 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which provided that upon sentencing a person for a sexual offence against a child or a disabled person, a court must order the entering of the particulars of that offender in a National Register for Sex Offenders. Several adverse consequences arose from such registration,[106] and in certain cases, including that of the applicant, the particulars could never be removed.[107] The applicant, a 14-year-old child at the time of the offences, was sentenced on several counts of rape committed against younger children. The sentencing magistrate made an order for the child's details to be entered into the Register. When the matter came before the High Court, the Court decided, *inter alia,* that the rights of the child offender had been violated by the above section, which was declared unconstitutional.[108]

In confirmation proceedings, the conflict between the impugned text and the Constitution was argued on different bases by the parties and the *amici*. Thus, the written arguments of the applicant relied on the rights to dignity, privacy, fair labour practices, and freedom of trade, occupation and profession; in oral argument, the applicant relied on s 34 of the Constitution;[109] while the *amici* relied on s 28(2) of the Constitution. The respondents conceded conflict with s 35 of the Constitution.[110] Skweyiya ADCJ (as he then was) considered as 'correct' the position of the *amici* that 'the starting point for matters concerning the child is s 28(2)'.[111] He found that the challenged statutory provision was contrary to s 28(2) of the Constitution, which made it unnecessary to consider the other grounds invoked by the parties.[112]

To decide that the mandatory entry into the registry was contrary to the best interests of the child, the Court established that s 28(2) required that the law should generally provide for a differentiation between adult and child offenders; that the law should make allowance for individualised treatment of the child and a consideration of the representations made by

[106] *J v NDPP* (note 3 above) at paras 21–25.
[107] Ibid at para 25.
[108] Ibid at para 6.
[109] Ibid at para 33.
[110] Ibid at para 34.
[111] Ibid at para 35.
[112] Ibid at para 45.

the child throughout the criminal justice process.[113] The mandatory registration of the child offender was inconsistent with these requirements, which required that the Court assess their justification under s 36.[114] The Court held that the limitation could not be justified.

J v NDPP is perhaps the most streamlined judgment in which the Court engaged with s 28(2) as the sole reason for a judgment and as an independent right. From the multitude of legal grounds invoked by the parties, the Court decided to base its reasoning on s 28(2), which had been raised by the *amici*. Beyond the general statement that this is a 'starting point' in matters concerning children, no other explanation for this choice is provided by the Court. Nonetheless, departing from its reluctance to define the content of s 28(2) as expressed in *Fitzpatrick* and *DPP*, the Court clearly identified three legal requirements arising from the provision. The Court also moved beyond the primarily procedural approach to s 28(2) espoused in *M v S*, and derived a new layer of specific entitlements in the context of juvenile justice (special and individualised treatment for children, and listening to child representations).

B *Raduvha*: The emergence of a subsidiarity approach to the independent application of s 28(2)?

Ms Raduvha, the applicant, instituted a claim against the Minister of Safety and Security for damages arising from an alleged wrongful arrest and detention when she was 15 years old. The case raised two overall issues for the Court: firstly, the meaning of the best interests of the child and these interests being accorded paramount importance; and secondly, the impact of these best interests on the duty of police officers to arrest under s 40 of the Criminal Procedure Act 51 of 1977 ('CPA').[115]

The incident which led to Ms Raduvha's arrest occurred on 6 April 2008 when two police officers were sent to her home to investigate a complaint regarding the applicant's mother. When the police officers attempted to arrest her mother, Ms Raduvha interposed herself between them and her mother. This was regarded by the officers as being an unlawful obstruction of their lawful duties, for which they arrested the applicant based on s 40(1)(j) of the CPA. The applicant's mother was also arrested. They were detained at a police station for 19 hours and thereafter released on warning. The prosecutor refused to prosecute them. Ms Raduvha was unsuccessful in her claim for damages in the High Court; and the case reached the Court on appeal.

Ms Raduvha argued that the officers acted unlawfully and arbitrarily in arresting her, in that although s 40(1) of the CPA authorised them to arrest her, it provided the police with a discretion on whether or not to do so, which discretion the officers failed to exercise.[116] The applicant also argued that the officers failed to consider and accord paramount importance to her best interests, and thus did not give effect to s 28(2) of the Constitution.[117] The detention of the applicant was challenged under s 28(1)(g) of the Constitution, with the argument that it was not a measure of last resort since she could have been left in the care of her father.

[113] Ibid at para 42.
[114] Ibid at para 46.
[115] *Raduvha* (note 4 above) at para 5.
[116] Ibid at para 16.
[117] Ibid at para 17.

Amongst others, the case raised the lawfulness of the applicant's arrest and detention.[118] Important for the purposes of this article is the identification by the Court of the constitutional standard against which the lawfulness of the *arrest* was to be decided. The issue arose because s 28(1)(g) of the Constitution deals explicitly only with the *detention* of children in conflict with the law and not with their *arrest*. Relying on the wording of s 35 of the Constitution, the Court decided that arrest and detention are two different processes,[119] and thus the 'last resort' requirement in s 28(1)(g) did not apply to the arrest of the child.

Alternative grounds had to be used to assess the lawfulness of the arrest. Two such grounds were identified:[120] that the police failed to exercise the discretion recognised to them by s 40(1)(j) of the CPA,[121] and that the arrest was contrary to s 28(2) of the Constitution. Exercise of discretion meant that the police officers had to consider and weigh the relevant circumstances to decide whether arrest was necessary and justified.[122] While they have the power to arrest, they are not obliged to do so. The exercise of police discretion is affected by the Bill of Rights,[123] including s 28(2). According to the Court, even if the jurisdictional facts in s 40 of the CPA are satisfied, police need 'to go further and not merely consider but accord the best interests of such a child paramount importance'.[124] The police officers in this case were indifferent to the applicant being a child;[125] not being a danger and being under parental care at the time of arrest.[126] The Court found that this approach to the arrest of a child was incompatible with s 28(2) of the Constitution.[127]

Section 39(2) of the Constitution requires that the interpretation of legislation be infused with the values promoted by the Constitution,[128] and be informed by s 28(2) which 'seeks to insulate them [children] from the trauma of an arrest by demanding in peremptory terms that, even when a child has to be arrested, his or her best interests must be accorded paramount importance'.[129] In effect, the Court supported the view that the arrest of the child should be rarely done (although the Court fell short of declaring it a last resort): 'an arrest of a child should be resorted to when the facts are such that there is no other less invasive way of securing the attendance of such a child before a court'.[130] Although the best interests of the child had to be given paramount importance in relation to the arrest of a child, it would not at all times prevent such arrest. What the Constitution requires is a child-sensitive criminal system which does not react disproportionately to a child's misbehaviour.[131]

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[118] Ibid at para 28. The other two issues concerned whether s 28(2) of the Constitution created an additional jurisdictional requirement for a lawful arrest under s 40(1) of the CPA, and whether the Court should establish the damages.

[119] Ibid at para 36.

[120] Ibid at para 40.

[121] CPA s 40(1)(j) reads: '[a] police officer may without a warrant arrest any person who … wilfully obstructs him in the execution of his duty'.

[122] *Raduvha* (note 4 above) at paras 42–43.

[123] Ibid at para 47.

[124] Ibid at para 48.

[125] Ibid at para 51.

[126] Ibid at para 52.

[127] Ibid at para 52.

[128] Ibid at para 54.

[129] Ibid at para 57.

[130] Ibid at para 58.

[131] Ibid at para 59.

The Court rejected the *amicus* argument that s 28(2) of the Constitution should be made an additional jurisdictional requirement to those in s 40 of the CPA. It decided that s 28(2) can be given effect in the interpretation of s 40(1) of the CPA, as required by s 39(2) of the Constitution.[132]

Section 28(2) was interestingly used in *Raduvha*, as the only Bill of Rights provision relevant for assessing the lawfulness of a child's *arrest*. The Court proposed both an abstract use of s 28(2) (in the interpretation of a statutory provision which contained no special rules in relation to the arrest of a child) and a concrete use (in assessing the lawfulness of the exercise of police discretion in relation to the arrest of a specific child). It does not seem that the Court relied on the right provided in s 28(2), although it clearly applied that section independently of any other constitutional standard. Indicative of the fact that s 28(2) was not approached as a right is the fact that the Court did not refer to *Fitzpatrick*, or to s 36 of the Constitution.

Although no substantial clarification is offered in *Raduvha* in relation to s 28(2) as a right, the case advances the jurisprudence on the independent normative value of this section. Section 28(2) was used to secure a child-sensitive interpretation of the law and to direct the exercise of discretion on a child-sensitive path where no other, more explicit constitutional standard was applicable. This reliance on s 28(2) as a fall-back provision is apparent when the reasoning of the Court in relation to the *arrest* of the child is compared with that concerning the *detentio*n of the child. In the latter case, the Court simply applied s 28(1)(g) whose wording covered child detention.

C The significance of the two cases for the jurisprudence on the best interests of the child

In the two cases, the Court approached s 28(2) from two different perspectives: in *J v NDPP*, as an independent right; in *Raduvha*, as a principle or constitutional standard which informed the interpretation of a statute and the way police must exercise the discretion to arrest a child. In both cases the Court's decision was driven by s 28(2). It follows that this section can be applied independently of other constitutional provisions regardless of the function it plays: as an interpretation tool/principle of interpretation or as an independent right. In both cases and in both capacities, the application of s 28(2) led to a child-favourable outcome: the invalidation of a statutory provision or a child-focused interpretation of a statutory provision which did not consider the special position of children in conflict with criminal law.

In both cases s 28(2) seemed to have been the only or the most relevant constitutional provision, which means that the Court had little choice in terms of the constitutional provisions it could apply. Does this mean that s 28(2) is to be applied independently only in subsidiary situations,[133] when other, more specific s 28(1) sub-sections are not relevant? In the past, Skweyiya J hinted at this approach in *Le Roux*, where, to justify reliance on s 28(2), he mentioned that 'none of the rights listed in section 28(1) have direct bearing here'.[134] This subsidiary approach to s 28(2) may also be supported by Kampepe J's judgment in *Teddy Bear*. There, the Court applied ss 10 and 14 of the Constitution, and, as a third leg of its reasoning, assessed the constitutionality of the impugned statutory provision against s 28(2).

[132] Ibid at paras 63–65.

[133] It is not argued here that the consideration of the best interests of the child is of a subsidiary nature. The subsidiarity as discussed here refers only to the independent application of s 28(2) as a right.

[134] *Le Roux* (note 94 above) at para 210.

As mentioned in part IV, none of the rights in s 28(1) was relevant in that case, and thus the Court found a violation of s 28(2) in the teenagers' exposure to the harm created by coming into contact with the criminal justice system. The Court has not made a statement of principle in relation to a potential subsidiarity approach to the application of the best interests, and it remains to be seen if this is what the Court intended with these cases.

Following this approach would introduce some much-needed certainty in relation to the application of s 28(2). However, judicial statements contrary to a subsidiarity approach can also be found in the case-law. For example, Skweyiya ADCJ said in the *J v NDPP* that 'the starting point for matters concerning the child is section 28(2)',[135] suggesting that, rather than being a subsidiary legal ground, s 28(2) should be the 'starting point' in a legal enquiry. This may explain the preference of the Court for s 28(2) as a legal ground for its judgment in *J v NDPP*, despite other constitutional provisions having been invoked in that case. The Court did not fully explain its reasons for doing so. It may be that the Court simply found it easier to engage with s 28(2) given this section's support in the Court's jurisprudence and legal culture more generally. It may also be that, in a case in which the Court had to be mindful of differences between children and adult sex offenders, s 28(2) provided solid grounds to deliver a child-focused judgment and to insulate its reasoning from subsequent challenges to the legislation by adult offenders.[136]

Like many aspects concerning the best interests of the child, the 'starting point' expression used by Skweyiya ADCJ invites further reflection. *J v NDPP* is not the first case in which this Justice used the 'starting point' phrase, although in this case it received the approval of the majority. In *Le Roux*, Skweyiya J said (after finding that no right in s 28(1) was relevant)[137] that s 28(2) –

> forms the basis and starting point from which the matter is to be considered. Once the considerations relevant to this foundation are clearly cemented, one can then begin to examine the other rights that enter the balance, without losing sight of the fact that the best interests of the child remain 'of paramount importance'.[138]

The question which immediately arises from Skweyiya J's position is whether the 'starting point' approach applies *only* to matters directly concerning children (as in *J v NDPP* or *Le Roux*) or also to matters concerning children only indirectly but affecting them (as in *M v S* or *Pridwin Preparatory School*).

This may be an important issue to address, and one that could further unpack the application of s 28(2). Following Skweyiya J in *J v NDPP*, it can be argued that the best interests of the child should be the starting point in matters concerning a child directly, if no other more specific constitutional provision is at stake. In that case, the independent right function of s 28(2) can be relied on. Conversely, in a matter indirectly concerning the child, the best interests of the child should not be the starting point. The importance of establishing when the best interests of the child are paramount as a starting point, and when they are not, is apparent in the limitation inquiry. Thus, if s 28(2) is the starting point, this section ought to be given attention as a right (its content must be established by the courts and any limitation of the right must comply with s 36). This is the highest normative position that s 28(2) can occupy.

[135] *J v NDPP* (note 3 above) at para 35.
[136] Similar point in Skelton (note 18 above).
[137] *Le Roux* (note 94 above) at para 210.
[138] Ibid at para 211.

When s 28(2) is not the starting point, it will operate as a justification to limit other rights. Then, courts may not need to give structured attention (i.e. give full clarity on legal obligations and entitlements) to the right in s 28(2) because s 36 allows for a limitation of rights on other than rights-based grounds (i.e. the limiting factor need not always be a right). Thus, s 28(2) can justify a limitation of rights under s 36 by operating as a principle or as a standard.

The 'starting point' approach of Skweyiya J has clear benefits for children as it directs the judges to conceptualise relevant cases starting from the rights of children, regardless of the existence of other competing interests. This means that in a case concerning a child, a court will establish the legal issues to be decided with reference to the best interests of the child/ rights of children, after which the other interests concerned will be considered, possibly to establish whether they can limit the best interests or the rights of the child. By its nature, such an approach makes the rights of children the focal point of the judicial inquiry. The majority judgment in *Centre for Child Law v Media 24* is an example of a case where the starting point approach was not followed, and this is reflected in how the Court dealt with the matter. The 'starting point' for the majority was freedom of expression, to which the Court gave substantial attention,[139] and the interests of children were considered only as factors able to justify a limitation of this freedom.

The 'starting point' approach was mooted by Skweyiya J in *Le Roux* and *J v NDPP*, which were both matters concerning children directly. The question arises as to whether it can (or should) be extended to matters concerning children indirectly. If I am correct in my understanding of the 'starting point' approach, the difficulty turns to establishing what concerns children directly and what concerns them indirectly. Cases like *Le Roux* and *J v NDPP* concerned children directly, but cases like *M v S* and *Pridwin Preparatory School* concerned them indirectly.[140] However, the Court has not yet clarified this aspect. In *M v S*, Sachs J acknowledged the risk of s 28(2) being 'spread too thin'[141] and thus losing its protective function, but did not offer a solution to minimise this risk, leaving the scope of this section to be decided on a case-by-case basis.

Another question raised by the 'starting point' approach is whether it pertains only to cases in which s 28(2) applies as an independent right (as was the case with *J v NDPP* and *Le Roux* per Skweyiya J); or whether it applies when s 28(2) is not applied independently, but is associated with other rights of children. Confining the application of this approach only to when s 28(2) is applied independently as a right creates a hierarchy between the rights in s 28. This is undesirable and unlikely to have been envisaged by the drafters of the Constitution. At the same time, if the starting point approach is used in all cases concerning children (directly and indirectly; or when s 28(2) applies by itself and when it applies in association with other rights), this may result in an artificial elevation of the rights of children above all other rights or other legitimate interests. Such elevation has been consistently rejected by the Court.[142]

It was mentioned above that one of the difficulties with the Court's best interests jurisprudence is that it is not easy to ascertain how it uses s 28(2) (as a right, a principle, a standard, or an interpretive tool). *J v NDPP* and *Raduvha* may help with distinguishing

[139] *Centre for Child Law v Media 24* (note 95 above) at paras 14 and 16.

[140] *Pridwin Preparatory School* (note 92 above)(the starting point was the best interest of the child only because the parties agreed that it is so).

[141] *M v S* (note 7 above) at para 25.

[142] The Court noted that children's rights can be limited in terms of s 36 and that an over-extension of s 28(2) may undermine its effectiveness. Ibid.

between these different uses. In *J v NDPP* the Court engaged with s 28(2) on the basis that it contained an independent right. The 'markers' of such use were the identification of legal requirements arising from that section and the use of s 36 to test the legitimacy of potential limitations to it. The latter is especially significant because a section-36 inquiry is employed only when limiting rights in the Bill of Rights and not when, for example, certain limitations are considered on the application of legal principles.

In *Raduvha*, the Court applied s 28(2) independently but not as a right. In *Raduvha*, the Court did not refer to precedents in which it declared that s 28(2) contains an independent right and did not reiterate its position that it can be limited as per s 36. Two types of usage of s 28(2) can be distinguished in *Raduvha*: an abstract use (which led to a Constitution-compliant interpretation of the relevant provision in the CPA) and a concrete use (the Court assessed how the arresting officers gave effect to the best interests of Ms Raduvha when deciding her arrest). *Raduvha* illustrates the coexistence within s 28(2) of the new, human rights capacity of the best interests of the child standard (manifested in this case in the control exercised over the meaning of a statute by directing a constitutional interpretation) and of the traditional, common law-like capacity of the standard, that of a standard enabling a decision-maker to make decisions concerning a specific child/children taking into consideration all the relevant factors.

VI CONCLUSIONS AND SUGGESTIONS FOR THE WAY FORWARD

J v NDPP and *Raduvha* take small steps toward the clarification of the best interests of the child jurisprudence of the Court. Full clarity can only develop gradually given the multitude of roles played by the best interests of the child, the variety of legal sources operating with the concept, and the currently unsystematic jurisprudence dealing with it. The two cases illustrate the coexistence and the complementarity of the functions played by the best interests concept. They arguably support a subsidiary application of s 28(2) both as an independent right and a constitutional principle when no other s 28(1) rights are applicable. Apart from making the application of s 28(2) more predictable, this approach would also safeguard against the normative bloating of this section, to the detriment of the rights in s 28(1).

In *Fitzpatrick* and subsequent cases, the Court expressed its reluctance to define the content of s 28(2) to preserve its flexibility to respond to the individual circumstances of each child. It seems, however, contrary to the very essence of rights (as legal tools) not to define them and thus rob them of the potential advantages which result from this status. In the context of the best interests of the child, its recognition as a right represents a chance to rehabilitate a concept which has been often misused to the advantage of adults. Refusing to define the legal content of s 28(2) or of the right identified therein creates the risk of recycling the paternalistic version of the best interests with its ills.

Arguably, the reluctance to define the content of s 28(2) is due to an insufficient unpacking of the concept, both judicially and academically. There are many issues which require further analysis. Without intending to be exhaustive, a few can be suggested: the relationship between the constitutional, statutory and common law concepts of the 'best interests of the child', including overlaps, distinctions, similarities and reciprocal influences; distinctions, similarities and scope of application of s 28(2) as a right in itself and as a principle/guideline/standard; and the meaning of 'flexibility' in the context of the best interests of the child. A few thoughts

are presented below on the issue of flexibility to illustrate the need to unpack terms associated with the best interests of the child and perhaps too easily assumed as self-evident.

The complexity of the concept of the best interests of the child means that flexibility can relate to many different issues such as the meaning of the concept through to the outcome of its application and factors influencing its determination. The meaning of 'flexibility' itself ought to adapt to the changed nature of the concept. Thus, the flexibility of the best interests as a *constitutional/human rights* concept should be distinguished from the flexibility of the concept as understood at common law. In this way, the inherent flexibility recognised in the concept at common law (in relation to, for example, a non-exhaustive list of factors influencing it and its ability to secure the best possible outcome for an individual child) can co-exist with a different kind of flexibility which is specific to the *constitutional/human rights* dimension of the concept. Arguably, this nuanced approach to the 'flexibility' of the best interests of the child rests on acknowledging that this concept has both factual and juridical dimensions.

Some judicial support can be identified for this differentiated approach. In *M v S*, Sachs J said that 'the indeterminacy of outcome is not a weakness'[143] of the best interests of the child standard. The 'indeterminacy' of the best interests was thus associated with its *outcome* in specific cases and not the *legal content* of s 28(2). Thus, while the best interests in specific matters cannot be prescribed or pre-determined through general/abstract statements (in that sense, the best interests of a child is flexible) this is not incompatible with knowing what obligations and entitlements arise from s 28(2) (as a constitutional provision with an ascertainable legal content). In the latter sense, the flexibility of the constitutional best interests of the child cannot be much different to that inherent in other human rights norms, whose content develops through judicial application.

In *J v NDPP* the Court broke with its reluctance to spell out the content of the right of children to have their best interests given paramount importance, identifying some specific requirements arising from s 28(2). It demonstrated that doing so does not undermine the capacity of this section to respond to individual circumstances and does not prevent it from securing child-focused legal outcomes. Giving contour to the legal content of s 28(2) is not therefore inimical to its flexibility, if the requirements do not prescribe *in abstracto* a certain outcome for individual children and do not prevent the further development of its content.

Continuing to avoid establishing the content of s 28(2) suggests that this concept is not epistemologically legal (i.e. cannot be known and understood through legal means). This is, arguably, contrary to the rule of law, and also an unnecessary path, as the Court's own jurisprudence illustrates that s 28(2) is amenable to a better-defined legal content. Arguably, acknowledging the different functions or dimensions of the best interests of the child, from which different normative requirements arise, may be a good start. It is useful for the Court to acknowledge that the best interests of the child test is an umbrella term, which has by now accumulated an expansive meaning which requires some systematising to improve its functionality.

The two cases illustrate the coexistence and the complementarity of the functions played by the best interests. They arguably support a subsidiary application of s 28(2) both as an independent right and a constitutional principle when no other s 28(1) rights are applicable. Apart from making the application of s 28(2) more predictable, this approach would also safeguard against this section engulfing the other rights in s 28(1).

[143] *M v S* (note 7 above) at para 24.

As mentioned before, s 28(2) (however applied) has had a significant positive impact on South African law. A challenge arises: how can the law be taken forward and clarified without reversing the gains made with the application of s 28(2) so far? Central to the current achievements of this section has been its ability to secure a child-specific legal treatment, sensitive to the needs of children. This is significant and it is important that all children benefit from such treatment and that s 28(2) therefore be applied consistently. For this to occur, the law has to develop in such a way that judges see the application of s 28(2) as a matter of legal obligation, and not one of philosophical disposition.