**The best interests of the child and the Constitutional Court: A critical appraisal**

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# 1 Introduction

The South African Constitutional Court has a rich children's rights jurisprudence. A significant contribution made by this Court to the development of the rights of children is its comprehensive jurisprudence on the best interests of the child, for which the Court has been praised by international bodies.[[1]](#footnote-1) The constitutionalisation of the best interests of the child in section 28(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) has facilitated this development. One of the innovative aspects of the Court's jurisprudence is that of declaring that section 28(2) of the Constitution contains an independent right – meaning a right that applies independently of the more specific rights of the child in section 28(1) of the Constitution. This is a far-reaching approach, which considerably extends the ambit of section 28.

The Court has not offered a comprehensive explanation for deciding that section 28(2) contains an independent right, and has explicitly refrained from assigning it a fixed content arguing that this would go contrary to the flexibility needed for this section to fulfil its purpose.[[2]](#footnote-2) It is submitted that this is problematic. Once a concept is declared a right, it is expected that its content is ascertainable and the Court ought not to shirk its duty to identify it. Not identifying the content of the right contained in section 28(2) runs the risk of negating the potential benefits which arise from declaring it a right - its predictability, uniformity in application and certainty. This can reverse the gains achieved by declaring it a right and fails to capitalise on the changed nature of the best interests of the child, as discussed below.

In this contribution it is argued that the Court should overcome its reluctance to define the content of the right contained in section 28(2). Arguably if the Court declared that section 28(2) contained a right it accepted that its content is discoverable and can be spelled out. Further, it is argued that to a certain extent, the Court has made important steps in this direction, despite its reluctance to acknowledge that it was doing so. The Court has not systematised its jurisprudence and it has taken a piece-meal approach, but arguably its case-law gives an indication of what may constitute the content of section 28(2) when approached as an independent right. It will be argued in this submission that of importance for the Court in overcoming its reluctance is an acknowledgement of the complex functions which the best interests of the child can play in adjudication and the change in the nature of the best interests of the child with the advent of the Constitution and the UN Convention on the Rights of the Child, 1989 (the CRC) which has inspired it. Despite certain criticism which can still be levelled at how the Court employs section 28(2), it will be shown in this contribution that the case-law is evolving and that two more recent cases - *J v National Director of Public Prosecutions and another* (*Childline South Africa and others as amici curiae*)[[3]](#footnote-3) and *Raduvha v Minister of Safety and Security* (*Centre for Child Law as amicus curiae)*[[4]](#footnote-4) - indicate that the Court might provide more clarity on the independent application of section 28(2) in the future.

This contribution is structured as follows: Part 2 contains a discussion about the changed legal nature of the concept of the best interests of the child in the era of human rights, inclusive of a presentation of the multifaceted nature of this concept. Part 3 provides a brief summary of the Court's jurisprudence on the best interests, followed by a discussion of positive and problematic aspects of the Court's approach. In part 4, this contribution looks at the *Radhuva* and *J v NDPP* cases, with a focus on the former as the more recent case, and their contribution to developing the Court's jurisprudence on the independent application of section 28(2). Part 5 contains the conclusions of this work.

# 2 The best interests of the child in the era of human rights

The best interests of the child is a concept known in the South African law prior to the advent of the new constitutional dispensation. It has been used by courts from the late 19th century in cases concerning custody and the relationship between children and their parents.[[5]](#footnote-5) The concept was also applied in the context of adoptions and child protection. The scope of the application of the best interests of the child was therefore fairly limited.

Article 3(1) of the CRC extended the scope of application of the best interests of the child significantly, by providing that

In 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.

Similarly, the African Charter on the Rights and Welfare of the Child, 1990/1999 provides in article 4(1) that ‘In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration’. The two international instruments extend the relevance of the best interests of the child to ‘all actions’ concerning children or the child, going well beyond the traditional scope of the concept. Inspired by the CRC, section 28(2) of the Constitution provides that ‘A child's best interests are of paramount importance in every matter concerning the child’. Leaving aside some differences in the textual formulations,[[6]](#footnote-6) this section brings into the South African law the wider scope of application of the best interests of the child endorsed internationally.

The extension of the ambit of the best interests of the child has been an important change in relation to the best interests of the child. Domestic courts and international bodies have seized the opportunity and applied 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]](#footnote-7)

Despite its recognition in powerful legal instruments, the concept of the best interests of the child remained somewhat controversial. The main concerns in relation to it are its alleged indeterminacy or vagueness, and its potential to mask paternalistic decisions concerning children. The domestic and international jurisprudence on the best interests of the child grew nonetheless, and the concept developed substantially. With it came an understanding of the complexity of the best interests of the child as a legal norm. The recognition of the best interests of the child in human rights instruments added a new layer to the meaning of the best interests of the child. What was once a principle or a guideline in making decisions concerning children mainly in disputes between parents, was now adorned with human rights dimensions, which were still to be figured out.

One of the most striking features of the contemporary approach to the best interests of the child is the view that some relevant best interests provisions contain an independent right. This is so despite the fact that the relevant texts do not use an explicit rights language in relation to the best interests of the child.[[8]](#footnote-8) This rights approach is endorsed, nonetheless, by the South African Constitutional Court and the Committee on the Rights of the Child.[[9]](#footnote-9) Thus, in *Minister for Welfare and Population Development v Fitzpatrick and Others* (*Fitzpatrick*),[[10]](#footnote-10) the Court declared that section 28(2) contains a right independent of the more specific rights contained in section 28(1) of the Constitution.[[11]](#footnote-11) The Court’s position in *Fitzpatrick* was a strong rebuttal of the position expressed by the High Court in *Jooste v* *Botha,[[12]](#footnote-12)* where it was held that section 28(2) ‘is intended as a general guideline’.[[13]](#footnote-13) Thereafter, the position was reiterated in other cases, such as *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others,*[[14]](#footnote-14) *Sonderup v Tondelli and Another,*[[15]](#footnote-15) *M v S,*[[16]](#footnote-16) and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others.*[[17]](#footnote-17)

In 2013, the Committee on the Rights of the Child issued General Comment 13, in which it declared that article 3(1) of the CRC contains, amongst others, a substantive right which it defined as

The 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.[[18]](#footnote-18)

The Constitutional Court has not explicitly articulated its vision in relation to the best interests of the child, despite the frequency with which it refers to section 28(2). Thus, in its case-law, section 28(2) if referred to alternatively as containing a ‘standard’,[[19]](#footnote-19) a ‘guiding principle’,[[20]](#footnote-20) a ‘right’.[[21]](#footnote-21) The children’s rights literature has pointed out that the best interests of the child plays in the jurisprudence of the Constitutional Court three functions: an interpretation tool for section 28(1) of the Constitution; a tool to establish the scope and potential limitations of other constitutional rights; and a right in itself.[[22]](#footnote-22) Although the constitutional text uses the same terminology as the common law, it was argued that the constitutional concept of the best interests goes further in that it applies not only to decisions made by high courts as upper guardians of all children but to ‘every matter concerning the child’.[[23]](#footnote-23)

The differences between the common law standard and the constitutional concept extend, however, further, as suggested further in this paper. The best interests of the child has been enriched further with the coming into force of the Children’s Act 38 of 2005. Chapter 2 deals with the general principles of the Act, and the best interests is referred to at several junctions. Section 6(2)(a) requires that in all proceedings concerning a child, there is respect, protection, promotion and fulfilment of the best interests of the child. Section 7 states that when the Act requires the application of the best interests of the child, the factors in section 7(1) are considered. Further, section 9 requires that ‘[i]n all matters concerning the care, protection and well-being of as child the standard that the child’s best interests is of paramount importance, must be applied.’ The best interests of the child enshrined in the Act has therefore a more limited scope than the constitutional best interests, being applicable when the Act requires so; further, the best interests of the child is of paramount importance in all matters concerning the care, protection and well-being of children presumably whether provided for in the Act or not. The Child Justice Act 75 of 2008 also refers to the best interests of the child in numerous sections,[[24]](#footnote-24) and implies that the proceedings in which a child are involved are dealt with in a manner which ensures that ‘the best interests of the child are at all times of paramount importance’.[[25]](#footnote-25) The complexity of the best interests of the child is visible even from the brief presentation above. The common law standard of the best interests does not seem to have been completely displaced by the constitutional and statutory regulation of the standard.[[26]](#footnote-26) There are differences in scope between the constitutional standard of the best interests of the child in section 28(2) and the scope of the standard in the Children’s Act and Child Justice Act, the former comprising ‘every matter concerning a child’, while the latter are more restricted to the matters related to the field of application of the respective acts. Further, none of the provisions define the best interests of the child in general terms; some, however, identify the factors which can assist in identifying the best interests (section 7 of the Children’s Act) or the weight which is to be attached to the best interests of the child.

The Committee has been slightly clearer in conceptualising the best interests of the child as a human rights concept.[[27]](#footnote-27) It explained that article 3(1) of the CRC contains a substantive right, a fundamental, interpretive principle and a rule of procedure, which the Committee briefly defines.[[28]](#footnote-28) However, neither the Court nor the Committee clarify when the respective legal provisions are to be applied as independent rights, and when can they be applied independently.

# 3 The Constitutional Court and section 28(2) of the Constitution

## 3.1 The approach of the Court

What is the independent right in section 28(2)? As mentioned above, the text of the mention section does not contain the word ‘right’. Nonetheless, the Court declared that the section contains an independent right. What that right was, remained unclear for a while despite the Court referring repeatedly to it.[[29]](#footnote-29) It was in *DPP* that the Court finally referred to ‘the right to have the child’s best interests given paramount importance in matters concerning the child’.[[30]](#footnote-30) Contour to what the right in section 28(2) required was already given in *M v S*: ‘first, 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’.[[31]](#footnote-31)

There are, however, other normative themes which can be identified in section 28(2),[[32]](#footnote-32) albeit it is not certain whether they are a part of the content of the independent right identified by the Court therein or whether they are part of the wider normative content of this provision, which includes its function as a guiding principle. Two obligations arise from section 28(2): to consider (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’.[[33]](#footnote-33) They can be further unpacked. The obligation to consider the interests of the children requires the court to be informed about the impact of its decision on children. This may require the appointment of a curator *ad litem,*[[34]](#footnote-34)or information to be provided by relevant court officers,[[35]](#footnote-35) or listening to children and their parents.[[36]](#footnote-36) 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.[[37]](#footnote-37) 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.

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 section 28(2) can be limited according to section 36 of the Constitution.[[38]](#footnote-38) Section 28(2) requires that individual best interests be safeguarded, including by enabling the delivery of child-centred remedies.[[39]](#footnote-39) The law must create conditions for decision-makers to respond to individual situations.[[40]](#footnote-40)

## 3.2 Positive and negative aspects of the Court’s approach

The declaration of section 28(2) of the Constitution as containing an independent right has significant consequences. As mentioned in *Fitzpatrick*, it extends the reach of the rights of children beyond section 28(1), with the advantage that the children’s interests would be considered even if a specific legal issue does not squarely fit into the more specific provisions of section 28(1). Further, declaring section 28(2) a right makes section 36 of the Constitution the only way in which this section can be limited. One of the concerns in relation to the classic approach to the best interests of the child has been that it could be manipulated to suit the interests of adults. The application of section 36 of the Constitution introduces structure and reduces the potential arbitrariness in the process of limiting the best interests of the child. A further positive aspect is that violations of section 28(2) leads to remedies.

Despite the progress arising from declaring section 28(2) an independent right, there are some potential problems. It was remarked that the Court has seldom treated section 28(2) as an independent right in that it has not defined its content and it has seldom utilised section 36 to justify limitations to the best interests.[[41]](#footnote-41) The Court has systematically avoided clearly defining the legal content of section 28(2), in the name of preserving its flexibility. This is problematic because it continues to expose the best interest of the child to the vagueness and indeterminacy criticism which is often levelled against this standard. The broadness of the standard may represent a temptation for the courts to utilise it even when more specific legal provisions are relevant.[[42]](#footnote-42) In previous writings I expressed concern that the Court or individual judges rely too easily on sections 28(2) taking advantage of the permissiveness of this text, and without making the effort to construct their reasoning on the more structured requirements of relevant section 28(1) provisions.[[43]](#footnote-43) Some cases have exposed the vulnerability of this reasoning. Arguably when a legally diffuse standard such as the best interests in section 28(2) comes face-to-face with well-established, hard-law legal institutions some judges may be reluctant to give it effect.[[44]](#footnote-44) Another difficulty created by the complexity of the best interests is the uncertainty in relation to when the best interests is to operate as an independent right and when as a standard or as a guideline in making decisions.

The problems identified above show that some of the aspects of the Court’s approach to the application of the best interests of the child are not systematised. In *Fitzpatrick* and *DPP* the Court explicitly expressed its reluctance to define the best interests, position which it justified by arguing that the strength of the concept lies in its flexibility. Arguably, this approach is due to an insufficient differentiation between the functions played by the best interests of the child. One cannot declare a legal provision to contain a legal right and thereafter avoid to define it. This undermines the right so identified, and in the context of the best interests of the child specifically, it ‘robs’ the concept of the potential advantages which result from its recognition as a right. The recognition of the best interests of the child 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 section 28(2) or of the right identified by the Court therein invites to a recycling of the old version of the best interests with its ills.

The jurisprudence is nonetheless evolving, and two cases discuss here show the benefits which arise from the Court’s visionary position that section 28(2) contains a legal norm which can be applied independently. This is not to say that in these cases the Court has necessarily applied section 28(2) as a right. What the Court has nonetheless done, in unanimous judgments, was to further cement the recognition of the independent normative force of section 28(2) and in the process offer examples (and guidance) on when section 28(2) may become indispensable as the sole legal justification for a child-centred legal reasoning.

# 4 *Radhuva* and *J v NDPP*

## 4. 1 *Radhuva*

Ms Radhuva instituted a claim for damages against the Minister of Safety and Security for damages arising from an alleged wrongful arrest and detention of the applicant when she was 15 years old. The case raised two overall issues for the Court: the meaning of the best interests and them being accorded paramount importance; and the impact of these best interests on the duty of police officers to arrest under section 40 of the Criminal Procedure Act 51 of 1977.[[45]](#footnote-45) The incident which led to Radhuva’s arrest arrest occurred on 6 April 2008, when two police officers were sent to the applicant’s house to investigate a complaint regarding the applicant’s mother. When the police officers attempted to arrest her mother, Radhuva interposed herself between them and her mother in order to prevent them from arresting her. This was regarded by the officers as being an unlawful obstruction of their lawful duties, for which they arrested the applicant based on section 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 Radhuva was unsuccessful in the High Court; the SCA denied leave to appeal, and the case reached the Constitutional Court in appeal.

Radhuva argued that the officers acted unlawfully and arbitrarily in arresting her, in that although section 40(1) of the CPA authorised them to arrest her, the section was not drafted in a peremptory language, providing instead a discretion which the officers failed to exercise.[[46]](#footnote-46) The applicant also argued that the officers failed to consider and accord her best interests paramount importance, and thus did not give effect to section 28(2) of the Constitution.[[47]](#footnote-47) The detention of the applicant was challenged under section 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 instead of being arrested. The Minister conceded that the arrest and the detention of Radhuva were unlawful. The Court nonetheless analysed the legal issues as they raised novel issues of law.

Two issues identified by the Court are of relevance for this contribution: whether detention, as referred to in section 28(1)(g) of the Constitution includes arrest; and the lawfulness of the applicant’s arrest and detention.[[48]](#footnote-48)

Amongst others, the case raised the question as to the constitutional standard against which the lawfulness of the *arrest* was to be decided. The issue arose because section 28(1)(g) of the Constitution deals explicitly only with the *detention* of children in conflict with the law and not with their *arrest*. The Court looked therefore into whether detention in section 28(1)(g) included the arrest of a child. The consequence of an affirmative answer would have been that not only the detention, but also the arrest of the child, ought to be a measure of last resort for it to be lawful. Relying on the wording of section 35 of the Constitution, the Court decided that arrest and detention are two different processes,[[49]](#footnote-49) and that the same approach is reflected in the CPA.[[50]](#footnote-50)

The lawfulness of the arrest was challenged on two grounds:[[51]](#footnote-51) that the police failed to exercise the discretion granted to them by section 40(1) (j) of the CPA,[[52]](#footnote-52) and that it was contrary to section 28(2) of the Constitution. Because they have a discretion on whether to arrest or not, police officers have to consider and weigh the relevant circumstances in order to decide whether an arrest is necessary and justified.[[53]](#footnote-53) While they have the power to arrest, they are not obliged to do so. The Court then asked the question of the impact of the Bill of Rights on the common law understanding of how police discretion should be exercised.[[54]](#footnote-54) It is in this context that the Court raised section 28(2) of the Constitution. The impact of section 28(2) was that even if the jurisdictional facts in section 40 of the CPA were satisfied, when the arrest of the child is concerned, the police officers need ‘to go further and not merely consider but accord the best interests of such a child paramount importance’.[[55]](#footnote-55) The police officers in this case were however indifferent to the fact that the applicant was a child;[[56]](#footnote-56) they did not consider that she was not a danger to them, did not try to run, was at her parental home with her father.[[57]](#footnote-57) The Court found that this approach to the arrest of a child was incompatible with section 28(2) of the Constitution.[[58]](#footnote-58)

Section 39(1) of the Constitution required courts to consider the evidence in the light of section 28(2) to establish if the officers considered the best interests of the applicant and accorded it a paramount importance.[[59]](#footnote-59) Section 39(1) also requires that their interpretation of legislation is infused with the values promoted by the Constitution.[[60]](#footnote-60) Section 7(2) requires of the state to respect, protect, promote and fulfil the rights in the Bill of Rights, obligations which are also incumbent on the police. The Court discussed the significance of section 28(2) for the arrest of a child, and said that ‘section 28(2) seeks to insulate them 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’.[[61]](#footnote-61) In effect, the Court supported the view that the arrest of the child should be a measure sparsely used (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’.[[62]](#footnote-62) The Court then returned to the issue of the weight to be attached to the best interests of children, and whether they should trump all other legitimate interests. Without referring to section 36, the Court gave a negative answer to the question, remarking that what the Constitution requires is a child-sensitive criminal system which does not react disproportionately to children’s misbehaviour.[[63]](#footnote-63)

The conclusion of the Court on this aspect was that the courts were obliged to interpret section 40(1) of the CPA in the light of section 28(2) as required of them by section 39(2) of the Constitution.[[64]](#footnote-64) The Court rejected the amicus argument that section 28(2) of the Constitution should be made an additional jurisdictional requirement to those in section 40 of the CPA. It decided that section 28(2) can be given effect in interpreting legislation, as required by section 39(2), without it needing to be made an additional requirement to those in section 40(1). [[65]](#footnote-65)

The Court rejected a direct application of section 28(2) as requested by the amicus. Section 28(2) was used independently as being the sole substantive Bill of Rights provision relevant for assessing the lawfulness of the arrest. Was it used as a right? The manner in which the Court has formulated the requirements arising from section 28(2) is the same with the wording used by the Court when it refers to this section as an independent right. But the Court does not refer to *Fitzpatrick*, neither does it refer to section 36 of the Constitution when it refers to the best interests not trumping other interests. Thus, no substantial clarification is offered by the Court in relation to section 28(2) as a right. The case advances however the jurisprudence on the independent normative value of section 28(2). This section has proved useful for advancing a child-sensitive approach in a matter which was not explicitly covered by other, more specific constitutional standard. This is obvious when one compares the reasoning of the Court in relation to the arrest of the child with the more straightforward reasoning in relation to the detention of the child which follows closely the wording of section 28(1)(g).

## 4. 2 *J v NDPP*

This case concerned the constitutional validity of section 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 arise from such registration,[[66]](#footnote-66) and in certain cases, including that of J, the particulars can never be removed.[[67]](#footnote-67) The applicant, a 14 year old child at the time of the offences, was sentenced for several accounts of rape committed against younger children, and the sentencing magistrate made an order for the child's details to be entered onto the Register. When the matter came before the High Court, the Court decided, *inter alia,* that the rights of the child offender were violated by the above section, which was declared unconstitutional.[[68]](#footnote-68)

In confirmation proceedings, the contrariety of the impugned text was argued on different basis 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, he relied on section 34 of the Constitution.[[69]](#footnote-69) The respondents conceded contrariety with section 35 of the Constitution.[[70]](#footnote-70) Amici relied on section 28(2) of the Constitution. Skweyiya ADCJ (as he then was) considered as ‘correct’ the position of the amici that ‘the starting point for matters concerning the child is section 28(2)’.[[71]](#footnote-71) He found that the challenged statutory provision was contrary to section 28(2) of the Constitution. Upon deciding so, Skweyiya ADCJ stated that it was not necessary to consider the other grounds invoked by the parties.[[72]](#footnote-72)

The Court found that the mandatory registration was contrary to the best interests of the child. To decide so, the Court established that article 28(2) required a differentiation between adult and child offenders, an individualised treatment for the child and a consideration of the representations made by the child throughout the criminal justice process.[[73]](#footnote-73) The mandatory registration of the child offender was incompatible with these requirements, which prompted the Court to engage with the issue as to whether the limitations to section 28(2) were justified as per section 36.[[74]](#footnote-74) The Court found no justification for the limitations, and declared the impugned section incompatible with section 28(2). It was the special position of children in law, whose essence is reflected in section 28(2) that was the backbone of the Court’s reasoning. *J v NDPP* is perhaps the most streamlined judgment of the Court in which it engaged with section 28(2) as the sole substantive reason of a judgment and as an independent right. The Court also moved beyond the primarily procedural approach to section 28(2) espoused in the central judgment of *M v S*, and derived a new layer of specific entitlements arising from this section in the context of juvenile justice.

## 4.3 Discussion

In the two cases discussed above, the Court has approached section 28(2) from two different perspectives: in *J v NDPP* as an independent right and in *Radhuva* as a principle or constitutional standard which informed the interpretation of a statute. In both cases, section 28(2) was applied independently (albeit in different capacities) because no other, more specific, constitutional provisions were relevant. This suggests that an independent application of section 28(2) can take place regardless of the function played by the best interests of the child: interpretation tool or independent right.

One question raised by the approach of the Court is whether the two cases mark the initiation of a subsidiarity approach to the independent application of section 28(2). In other words, whether from now on the Court intends to apply section 28(2) by itself only when more specific constitutional standards are not available to justify its decision. As the Court has not made a statement of principle in this regard, this remains to be established in the light of the Court’s subsequent jurisprudence. Although following this approach would introduce some needed certainty in relation to the application of section 28(2), there is some doubt that the law would evolve in that direction given the statement made by Skweyiya ADCJ in *J v NDPP*, where he said that ‘[t]he amici are correct that the starting point for matters concerning the child is section 28(2)’.[[75]](#footnote-75) This suggests that rather than being a subsidiary legal ground, section 28(2) will be a ‘starting point’ in a legal enquiry.

This may explain the preference of the Court for section 28(2) as a legal ground for its judgment in *J v NDPP*. Various constitutional provisions were invoked by the parties – section 34, and the rights to dignity, privacy, fair labour practices, and freedom of trade, occupation and profession. The Court nonetheless assessed the constitutionality of the relevant statutory provision against section 28(2). The Court does not fully explain its reasons, save to mention section 28(2) as being the ‘starting point’ in matters concerning a child, as discussed above. It may be that the Court simply found it easier to engage with the issues in the light of section 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, section 28(2) provided solid grounds to deliver a child-focused judgment.

A comparison between the reasoning of the Court in the two cases might point toward some answers in relation to the application of section 28(2) as an independent right. In *Radhuva*, although the Court applied section 28(2) independently, it did so in order to give a constitutional interpretation to the CPA. In doing so, the Court did not refer to precedents in which it declared section 28(2) as containing an independent right, neither did it reiterate its previous position that section 28(2) can be limited as per section 36. This may suggest that when applied indirectly, it is not necessary for the Court to approach this section as containing an independent right. In *J v NDPP*, however, the Court engaged with section 28(2) on the basis that it contained an independent right whose legal requirements it identified, and that that right was capable of limitation under section 36. In the latter case, the Court applied section 28(2) directly.

# 5 Conclusions

* The independent normative force of section 28(2) can be asserted either by using this section for the purposes provided for in section 39(2) (as in *Radhuva*) or by applying the section as an independent right (as in *J v NDPP*);
* The two cases show that section 28(2) can be given independent normative value when used as a right or as a tool for statutory interpretation; the two types of usage are not incompatible, as they represent different functions of the same norm;
* The value of the independent normative value of section 28(2) is proved by the two cases: none of them was covered by more specific constitutional provisions, and the mentioned section was relied on to fill that gap;
* *J v NDPP* suggests that the markers of section 28(2) being used as an independent right are the identification of normative requirements arising from it and reliance on section 36 to assess the constitutionality of potential limitations to section 28(2);
* *J v NDPP* shows that the Court may be willing to abandon its reluctance to define the content of section 28(2). The Court could progress onto this path by acknowledging that the indeterminacy, or put more positively, the flexibility of section 28(2) concerns the outcome of its application rather that its legal content. This is in line with what was said by Sachs J in *M v S* (mentioned above);
* A careful unpacking of section 28(2) by the Court is still necessary, and the Court needs to clarify when it is appropriate for the various function of the mentioned section to be employed and why;
* The Court needs to overcome its concern about engaging with section 28(2) in a more structured fashion, and define its legal content. Arguably, acknowledging the different functions 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 is a ‘portmanteau’ concept [it is a abridged version of different concepts, which is sometimes used without an indication of the unabridged concept which it is used *in lieu* of]. For example, the best interests of the child is used to indicate the outcome which may be best for a child in a particular context. It is also used to refer to the right of the child to have his/her best interests considered and given paramount importance. If one only refers to ‘the best interests of the child’, it is uncertain if the term is used to designate a certain outcome or the legal requirements arising from section 28(2). The two categories are conceptually distinct. In *M v S*, Sachs J said that ‘the indeterminacy of outcome is not a weakness’[[76]](#footnote-76) of the best interests of the child. This Justice associated the ‘indeterminacy’ of the best interests with its *outcome* and not the *legal content* of section 28(2). Thus, while the best interests in specific matters cannot be prescribed through general/abstract statements, this is not incompatible with giving contour to the legal requirements arising therefrom.[[77]](#footnote-77) More attention to this distinction would alleviate the Court’s concern about identifying itself the normative content of section 28(2), and overcoming its concern that by doing so it would diminish its flexibility. *J v NDPP* is a positive example in this regard. Without prescribing a certain outcome (and thus not diminishing the flexibility of the constitutional standard), Skweyiya ADCJ identified several normative requirements arising from section 28(2).

1. The Committee on the Rights of the Child noted 'the excellent jurisprudence of the judiciary on the application of this right in concrete situations' (*Concluding observations* 2016 para 25). [↑](#footnote-ref-1)
2. See *Fitzpatrick* and *DPP* further below. [↑](#footnote-ref-2)
3. 2014 (7) BCLR 764 (CC) (*J v NDPP*). [↑](#footnote-ref-3)
4. 2016 (10) BCLR 1326 (CC) (*Radhuva*). [↑](#footnote-ref-4)
5. Mills, L ‘Failing Children: The Courts’ Disregard of the Best Interests of the Child in Le Roux v Dey’ 2014 *SALJ* 847 at 847 – 848. [↑](#footnote-ref-5)
6. Note the use of ‘a primary consideration’ in article 3(1) of the CRC vis that of ‘the primary consideration’ in the African Charter and ‘paramount importance’ in section 28(2) of the Constitution. [↑](#footnote-ref-6)
7. Ref [↑](#footnote-ref-7)
8. This point has been made in relation to section 28(2) of the Constitution by Visser, P J ‘Some ideas on the ‘best interests of a child’ principle in the context of public schooling’ 2007 (70) *THRHR* 459-469. The point is also valid in relation to article 3(1) of the CRC. [↑](#footnote-ref-8)
9. There are other foreign domestic courts which have recognized the independent normativity of the relevant best interests provisions without however declaring such provisions as containing independent rights. [↑](#footnote-ref-9)
10. 2000 (7) BCLR713 (CC). [↑](#footnote-ref-10)
11. *Fitzpatrick* para 17. [↑](#footnote-ref-11)
12. 2000(2) SA 199 (T). [↑](#footnote-ref-12)
13. *Jooste v Botha* 210D. [↑](#footnote-ref-13)
14. 2003 (12) BCLR 1333 (CC). [↑](#footnote-ref-14)
15. 2001 (1) SA 1171 (CC). [↑](#footnote-ref-15)
16. 2007 (12) BCLR 1312 (CC). [↑](#footnote-ref-16)
17. 2009 (2) SACR 130 (CC). [↑](#footnote-ref-17)
18. 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 part I.A (General Comment 14). [↑](#footnote-ref-18)
19. In *Fitzpatrick*, the best interests of the child is referred to both as a standard (para 18) and as an independent right (para 17). [↑](#footnote-ref-19)
20. *M v S* para 22. [↑](#footnote-ref-20)
21. *Fitzpatrick* para 17; *M v S* para 22. [↑](#footnote-ref-21)
22. Friedman, A, Pantazis A and Skelton, A ‘Children’s Rights’ (2nd ed, RS 1: 07-09), in S. Woolman and M. Bishop, Constitutional Law of South Africa (2nd ed.) (Cape Town: Juta loose-leaf updated, 2009). [↑](#footnote-ref-22)
23. Friedman et al 2009 at 40-47. [↑](#footnote-ref-23)
24. Section 9(1)(b), 24(3)(a), 30(3)(a), etc. [↑](#footnote-ref-24)
25. Section 80(1)(d) of the Child Justice Act. [↑](#footnote-ref-25)
26. In *DPP*, for example, the Court referred to its upper guardian functions (which presuppose the application of the best interests) alongside section 28(2). [↑](#footnote-ref-26)
27. It has to be acknowledged that the Court and the Committee have very different institutional roles, which may account for this. In its general comments, the Committee provides guidance to state parties in the interpretation of the CRC, while the Court does so only indirectly in the process of adjudicating in concrete legal disputes. [↑](#footnote-ref-27)
28. 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 part I.A (General Comment 14). [↑](#footnote-ref-28)
29. *De Reuck, M v S, Sonderup*. [↑](#footnote-ref-29)
30. *DPP* per Ngcobo J para 73. [↑](#footnote-ref-30)
31. Gallinetti, J ‘2kul2Btru: What children would say about the jurisprudence of Albie Sachs’ 2010 (25) *SAPL* 108 at 115. See *M v S* paras 33, 26 and 32. [↑](#footnote-ref-31)
32. See discussion in Meda Couzens 'The Contribution of the South African Constitutional Court to the Jurisprudential Development of the Best Interests of the Child' in Alison Diduck, Noam Peleg and Helen Reece (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy. Essays in Honour of Michael Freeman* (Brill Leiden 2015) 521. [↑](#footnote-ref-32)
33. M v S para 42. [↑](#footnote-ref-33)
34. In *Van der Burg*, for example, the *amicus* relied on s. 28(2) to request the appointment of a curator *ad litem*, for the children concerned. In *Du Toit*, however, the appointment of the curator *ad litem* was linked to section 28(1)(h) (para. 3). [↑](#footnote-ref-34)
35. *Van der Burg* para 68; *M v S* para 36. [↑](#footnote-ref-35)
36. *C v. Department of Health, Gauteng*. [↑](#footnote-ref-36)
37. *M v S; Van der Burg.* [↑](#footnote-ref-37)
38. *Fitzpatrick, De Reuck, Sonderup*, and *M v S*. [↑](#footnote-ref-38)
39. *Bannatyne, C v Department of Health, Gauteng* and *Welkom High School*. [↑](#footnote-ref-39)
40. *Fitzpatrick, M v S, AD v DW,* and *Welkom High School*. [↑](#footnote-ref-40)
41. Bonthuys, E ‘The best interests of children in the South African Constitution’ 2006 (20) *International Journal of Law, Policy and the Family* 23-43. Note, for example, the position in *Fitzpatrick* and *DPP*, where the Court refrained from defining the content of section 28(2) in the name of preserving the flexibility which it considered essential for its operation. However, in relation to the application of section 36 to section 28(2), the position has changed to a certain extent. An example discussed here is *J v NDPP*. [↑](#footnote-ref-41)
42. Bonthuys remarked in 2006 that to that date, although the Court applied section 28(2) independently in several cases, more specific standards were relevant. [↑](#footnote-ref-42)
43. 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; M Couzens 'Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) and Children’s Rights Approaches to Judging' 2018(21) *Potchefstroom Electronic Law Journal*. [↑](#footnote-ref-43)
44. *Le Roux* and the contrast between the position of Yacoob J and Brand AJ are an illustration of this. See discussion in Couzens 2018. [↑](#footnote-ref-44)
45. *Radhuva* para 5. [↑](#footnote-ref-45)
46. *Radhuva* para 16. [↑](#footnote-ref-46)
47. *Radhuva* para 17. [↑](#footnote-ref-47)
48. *Radhuva* para 28. The other two issues concerned whether section 28(2) of the Constitution created an additional jurisdictional requirement for a lawful arrest under section 40(1) of the CPA; and whether the Court should establish the damages. [↑](#footnote-ref-48)
49. *Radhuva* para 36. [↑](#footnote-ref-49)
50. *Radhuva* para 37. [↑](#footnote-ref-50)
51. *Radhuva* para 40. [↑](#footnote-ref-51)
52. Which in the relevant parts reads: ‘a police officer may without a warrant arrest any person who . . . wilfully obstructs him in the execution of his duty’. [↑](#footnote-ref-52)
53. *Radhuva* paras 42-43. [↑](#footnote-ref-53)
54. *Radhuva* para 47. [↑](#footnote-ref-54)
55. *Radhuva* para 48. [↑](#footnote-ref-55)
56. *Radhuva* para 51. [↑](#footnote-ref-56)
57. *Radhuva* para 52. [↑](#footnote-ref-57)
58. *Radhuva* para 52. [↑](#footnote-ref-58)
59. *Radhuva* para 53. [↑](#footnote-ref-59)
60. *Radhuva* para 54. [↑](#footnote-ref-60)
61. *Radhuva* para 57. [↑](#footnote-ref-61)
62. *Radhuva* para 58. [↑](#footnote-ref-62)
63. *Radhuva* para 59. [↑](#footnote-ref-63)
64. *Radhuva* para 63. [↑](#footnote-ref-64)
65. *Radhuva* paras 63-65. [↑](#footnote-ref-65)
66. *J v NDPP* para 21-25. [↑](#footnote-ref-66)
67. *J v NDPP* para 25. [↑](#footnote-ref-67)
68. *J v NDPP* para 6. [↑](#footnote-ref-68)
69. J v Ndpp para 33. [↑](#footnote-ref-69)
70. J v NDPP para 34. [↑](#footnote-ref-70)
71. J v NDPP para 35. [↑](#footnote-ref-71)
72. J v NDPP para 45. [↑](#footnote-ref-72)
73. *J v NDPP* para 42. [↑](#footnote-ref-73)
74. *J v NDPP* para 46 onwards. [↑](#footnote-ref-74)
75. *J v NDPP* para 35. [↑](#footnote-ref-75)
76. *M v S* per Sachs J para 24. [↑](#footnote-ref-76)
77. Meda Couzens 'The Contribution of the South African Constitutional Court to the Jurisprudential Development of the Best Interests of the Child' in Alison Diduck, Noam Peleg and Helen Reece (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy. Essays in Honour of Michael Freeman* (Brill Leiden 2015) 521. [↑](#footnote-ref-77)