Falling through the cracks: The plight of "over-aged" children in the public education system

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SUMMARY

The legislative and policy framework regulating compulsory education in South Africa requires that learners beyond the age of fifteen enrol in an adult education centre to meet their educational needs. Adult education which has been called the "dysfunctional stepchild" of South African education, is poorly regulated in terms of access and quality control. Therefore, learners who are forced to leave the formal schooling sector are not necessarily guaranteed a placement in an adult education facility. This article focuses on a specific cohort of learners between the ages of fifteen and eighteen who are technically children in terms of South African law and therefore in need of special protection. In particular, the article assesses the extent to which the constitutional rights of these learners are violated by the current compulsory education legislative and policy structure. These rights include the rights to basic education, equality as well as the bests interests of the child.

1 Introduction

The first democratic South African government inherited a vastly unequal public education system stratified predominantly along the lines of race and class from the apartheid regime.[1] The ANC-led government was tasked with transforming the education system during a time of severe financial restraint in the 1990s.[2] As a result, the new dispensation was fiscally restrained to effectively address the resource constraints in primarily former black schools which included acute infrastructural deficiency and a shortage of qualified teachers.[3] Furthermore, these schools were characterised by exorbitantly high learner-to-educator ratios and in an effort to tackle this, the first post-apartheid government turned its attention to reducing the vast amount of over-aged learners in

1 Arendse "The South African Constitution's empty promise of 'radical transformation': Unequal access to quality education for black and/or poor learners in the public basic education system" 2019 *Law, Democracy and Development* 100-147.

2 Chisholm "Apartheid education legacies and new directions in post-apartheid South Africa" 2012 *Storia del donne* 90.

3 Arendse 2019 *Law, Democracy and Development* 111-127; Burger, Van Der Berg and Von Fintel "The unintended consequences of education policies on South African participation and unemployment" 2015 *South African Journal of Economics* 74; Chisholm 2012 *Storia del donne* 90.

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the education system, among other things.[4] According to the then Department of Education,[5] "many such over-aged learners were learning little, were unlikely to eventually pass Matric and were diverting resources from younger learners."[6] The majority of learners beyond the suitable school-going age at that time consisted of black youths who reached advanced ages in school because of several reasons, including entering school later than normal and grade repetition.[7] In an attempt to diminish the large class ratios and free up limited resources in the schooling system, the Department adopted several policies with the effect of limiting access to schools for over-aged learners and restricting the amount of times a learner could repeat a grade.[8] To this end, state policy defines the suitable age for admission to a grade as "the grade number plus 6."[9] For example, in Grade 2, a learner is supposed to be eight years old. In order to ensure that learners remain the appropriate age for their grade level, the repetition of a grade is only allowed once during any of the education phases.[10] At the stage when a learner reaches Grade 9, they must be fifteen years old, coinciding with the definition accorded to the compulsory schooling period in South Africa.[11] Section 3(1) of the South African Schools Act[12] regulates compulsory education in South Africa and provides that:

> "… [E]very parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first."

4 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 74-75. See Chisholm 2012 *Storia del donne* 81-103 for an analysis on how the first post-apartheid government approached the resource deficit in former black schools.

5 In 2009, the National Department of Education split into two separate departments, namely the National Department of Basic Education and the Department of Higher Education and Training. See https://www.education.gov.za/AboutUs/AboutDBE.aspx (accessed 2021-02-24).

6 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 74-75.

7 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 80.

8 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 80.

9 Department of Education: Age Requirements for Admission to an Ordinary Public School (GG 2433, 1998).

10 The four education phases are "the foundation phase (Grades R to 3), intermediate phase (Grades 4 to 6), the senior phase (Grade 7 to 9) and the further education and training phase (Grades 10 to 12)." See https://www.education.gov.za/Curriculum/CurriculumAssessmentPolicyStatements(CAPS).aspx (accessed 2021-02-25).

11 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 81.

12 84 of 1996.

The status of a learner who has reached the age of sixteen years or older, is regulated in terms of section 29 of the Admissions Policy for Ordinary Public Schools:[13]

> "A learner who is 16 years of age or older and who has never attended school and who is seeking admission for the first time or did not make sufficient progress with his or her peer group, must be advised to enroll at an Adult Basic Education and Training (ABET) centre."

Provincial education departments adopt their own age-related policies in line with the national regulations. Western Cape schools, for example, refuse admission to learners who have reached an age that are two years beyond the suitable grade-age.[14] Since learners are legislatively required to stay in school until the age of fifteen, the students affected by age-related policies obviously include those who are beyond the age of fifteen.[15] Therefore, once a person reaches an age older than fifteen, two scenarios become possible: First, if they apply to a school for the first time or seeks re-admission after having dropped out at an earlier stage but is now beyond the appropriate grade-age, admission will be refused; or second, if they are an existing member of a school but has reached an age not suitable for a particular grade, they will be forced out of school and advised to approach an adult education centre for their education needs.

The main purpose of this article is to call attention to the violation of the constitutional rights of children between the ages of fifteen and eighteen that are considered too 'old' for the conventional schooling system in terms of the compulsory education legislative and policy framework explained above. In many instances, this group of learners are caught between the proverbial rock and a hard place: They are too old to gain admission into a formal school, however the state alternative, an adult education centre is not always accessible to them due to the state's failure to effectively administer adult education as this article will show. Although these learners are technically children in terms of the South African Constitution[16] and therefore constitute a group worthy of special protection in terms of South African law,[17] they are severely marginalised by the current public education system as this article will show.

13 Department of Education: Admission Policy for Ordinary Public Schools (GG 19377, 1998.)
14 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 82.
15 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 81-82.
16 S 28(3) of the Constitution of the Republic of South Africa, 1996.
17 See s 3.1 below.

2 The constitutional right to basic education, including adult basic education

2 1 The textual formulation of the right

Section 29 (1) of the Constitution states:

> "Everyone has the right –
>
> a to a basic education, including adult basic education;[18] and
> b to further education, which the state, through reasonable measures, must make progressively available and accessible."

The explicit reference to the word 'including' suggests that the right to adult basic education is not a separate right, but part and parcel of the right to basic education. Adult basic education is merely a form of basic education as suggested by Sloth-Nielsen and Mezmur's definition of the term 'basic education.'[19] According to the authors, the latter concept has been defined as "education that includes all age groups, and goes beyond conventional curricula and delivery systems, for example pre-school, adult literacy, non-formal skills training for the youth and compensatory post-primary programmes for school leavers."[20] Thus, basic education is not restricted to learners in a school, but can include non-conventional approaches to education, including adult education that are delivered outside the typic school delivery system.

The Department defines an adult, for the purposes of adult education as a person over the age of fifteen.[21] As noted above, learners who are sixteen years and older must be advised to enrol at Adult Basic Education and Training (ABET) centres which are now known as Public Adult Learning Centres (PALCs).[22] This suggests that learners older than fifteen, and not at their typical grade-age, become ineligible for formal schooling and are considered adults by the state for the purpose of their educational needs. The logical inference, therefore, is that learners beyond fifteen and not at the suitable grade-age for the conventional schooling system, become claimants of the right to adult basic education.

In *Governing Body of the Juma Musjid Primary School v Essay*,[23] the Constitutional Court held:

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18 Italics my emphasis.
19 Sloth-Nielsen and Mezmur *Free Education is a Right for Me: A Report on Free and Compulsory Education* (2007) 9-10.
20 Sloth-Nielsen and Mezmur 9-10.
21 Department of Education: Ministerial Committee on Adult Education (2008) 5 ("Green Paper on Adult Education").
22 Aitchison and Land "Secured, not connected: South Africa's adult education system" 2019 *Journal of Education* 139.
23 2011 8 BCLR 761 (CC). See section 3.2 below for an explanation of the background of the judgment.

> "Unlike some of the other socio-economic rights, [section 29(1)(a)] is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'".[24]

As explained above, the right to basic education is inclusive of adult basic education. The Constitutional Court's interpretation of the unqualified nature of section 29(1)(a) in the Juma Musjid decision, therefore, applies to adult basic education as well.[25] Cameron and Chris McConnachie argue that:

> "In Juma Musjid, the court confirmed that the s 29(1)(a) right to a basic education is different. It is a right to a basic education. Anything less is a limitation of the right. This strongly suggests that learners and their parents (or adult learners, in the case of the right to adult basic education) can approach the courts arguing that they are not being provided such an education."[26]

Therefore, learners older than fifteen who have been excluded from formal schooling, can claim a right to adult basic education on demand from the state in the same way that learners in the conventional schooling system can. In other words, for learners in the adult education sector, the right to adult basic education is immediately realisable, not subject to the availability of state resources, but can be limited in terms of the Constitution's general limitation clause.[27] In identifying the content of section 29(1)(a), the Constitutional Court has provided broad parameters by declaring that access "is a necessary condition for the achievement of this right" and that the state has a duty to ensure the availability of schools.[28] In the realm of adult basic education, this means that the state at least has to ensure that learners in the adult education sector enjoy access to an education and that facilities are available to deliver such education.

24 *Governing Body of the Juma Musjid Primary School v Essay supra* para 37.
25 *Governing Body of the Juma Musjid Primary School v Essay supra* para 37.
26 McConnachie and McConnachie "Concretising the right to a basic education" 2012 *SALJ* 564. Italics my emphasis.
27 *Governing Body of the Juma Musjid Primary School v Essay supra* para 37.
28 *Governing Body of the Juma Musjid Primary School v Essay supra* paras 43-45.

2 2 Adult basic education: The "dysfunctional stepchild" of the education system[29]

Contrary to what the name suggests, adult basic education is not managed by the National Department of Basic Education, but by the National Department of Higher Education and Training.[30] Since the splitting of the Department of Education into two distinct departments in 2009, public adult learning centres have been administered by the DHET.[31] The qualifications that are provided by PALCs, vary. In this regard, at some PALCs, programs of basic literacy are available, while at others, programs up to the level of Grade 9 or Matric (Grade 12) are on offer.[32]

Various challenges have plagued the public adult education system. First, the availability of PALCs across provinces is uneven.[33] Second, due to chronic "under-investment" in adult education, PACLs have been known to close down before an academic year is even completed.[34] Finally, in some cases, educators are appointed without meeting the accreditation requirements set by the South African Council of Educators.[35] This, coupled with the precarious working conditions that adult education educators are subjected to, results in a system plagued by concerns of quality control.[36]

Since 2015, PALCs have been incorporated under nine community colleges, one for each province.[37] A National Plan of Action by the DHET to establish effective community colleges around the country was launched in 2019.[38] However, the changes have been largely symbolic because the challenges of the 'old' PALC system continue unabated.[39]

In sum, learners beyond the age of fifteen and not at their suitable grade-age are caught between the proverbial rock and a hard place: Not only are they prohibited from accessing formal schools, but, the only

29 Ivor and Britt Baatjes refer to the adult education system as the "dysfunctional stepchild" of South Africa's education system. Baatjes and Baatjes "The struggle of adult educators in South Africa continues" 2019 *Adult Education and Development* 48.
30 Department of Higher Education and Training:White Paper on Post-school Education and Training "Building an Expanded, Effective and Integrated Post-school System" 2013 xi.
31 White Paper on Post-school Education and Training xi.
32 White Paper on Post-school Education and Training 21.
33 Green Paper on Adult Education 17-35.
34 Green Paper on Adult Education 17-35.
35 Green Paper on Adult Education 17-35.
36 Green Paper on Adult Education 17-35.
37 Aitchison and Land 2019 *Journal of Education* 142.
38 Department of Higher Education and Training: *The Community Education and Training College System: National plan for the implementation of the White Paper for Post school Education and Training System 2019–2030* (2019).
39 See Aitchison and Land 2019 *Journal of Education* 148-149 for a comprehensive discussion of these challenges.

state alternative, a public adult education centre, may also not be accessible. To add insult to injury: A private adult learning centre may be available in a certain area, but due to the commercialisation of private adult education, it is likely that many indigent learners will not go that route.[40]

3 The violation of constitutional rights

This article concerns a specific group of learners older than fifteen, but younger than eighteen who can be forced out of the formal schooling system in terms of section 3(1) of the Schools Act, read in conjunction with the age-related policy framework. As explained above, learners older than fifteen, and not at their typical grade-age, are regarded as over-aged in the conventional schooling system. Hence, they become ineligible for this system and are considered adults by the state for the purposes of entering the adult education system. However, in actual fact, these learners are not adults, but children in terms of South African highest law.[41] In this regard, the Constitution defines a child as "a person under the age of 18".[42] Therefore, the best interests of the child standard applies to the group of overaged learners. Besides the best interests standard, the rights to basic education and equality of the former group are also implicated as will be discussed next.

40 Private adult education centres do exist "with a range of offerings including literacy training, the ABET General Education and Training Certificate and the Senior Certificate." Their funding is received from various sources, including user fees. The South African government has made it clear that "[w]hile recognising and appreciating the role of private institutions, the Department believes that the public sector is the core of the education and training system. The government's main thrust, therefore, should be to direct public resources primarily to meeting national priorities and to provide for the masses of young people and adult learners through public institutions." White Paper on Post-school Education and Training xv, 42.

41 Italics my emphasis.

42 S 28(3) of the Constitution.

3 1 The right to equality[43]

The Admissions Policy for Ordinary Public Schools states that learners aged sixteen and older who are not progressing on par with their peers, "must be advised" to enter the adult education system.[44] The policy therefore gives effect to the Schools Act which restricts compulsory schooling to learners younger than sixteen and is capped at a Grade 9 education.

In *Harksen v Lane*, the Constitutional Court developed a two-stage enquiry to determine whether differentiation amounts to unfair discrimination in terms of section 9(3) of the Constitution.[45] The *Harksen* test has been framed by the Constitutional Court as follows:

> "Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground [in terms of section 9(3)], then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2) [of the Interim Constitution and section 9(3) of the 1996 Constitution]."

43 S 9 of the Constitution provides:
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

44 S 29 of the Admissions Policy for Ordinary Public Schools.

45 *Harksen v Lane* 1998 1 SA 300 (CC).

> "If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause."[46]

Applying Harksen, a distinction can be drawn between learners of typical grade-age who are allowed to stay in the formal schooling system and overaged learners who are not academically progressing at an acceptable pace and forced to leave school. On the face of it, the differentiation between these groups is based on two factors, namely age and academic competence. Since age is listed in terms of section 9(3) of the Constitution, discrimination is established in terms of this ground. Academic competence is not enumerated in section 9(3), therefore in accordance with Harksen, differentiation based on this ground will result in discrimination if it has the potential to impair a person's dignity or other comparable interests.[47] Section 5(2) of the Schools Act prohibits school governing bodies from administering any test in relation to the admission of learners to a public school.[48] Section 5(2) must be read in conjunction with section 5(1) of the Act which states that "[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way." The purpose of these provisions is to prevent schools from employing measures, such as academic testing that may result in discrimination against potential learners. In other words, the Schools Act aims to prevent a situation where the academic competence of a learner is used as a means of exclusion. In *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng* [49], the Constitutional Court agreed with the Gauteng education authorities that "schools [which] are told in advance of admission that a learner has learning or remedial difficulties, tend to refuse that learner's admission."[50] Therefore, viewed from this perspective, differentiation on the ground of academic competence constitutes discrimination.

A further ground for differentiation that is not immediately apparent, is that of race. The biggest dropout in the South African education system occurs in Grades 10 and 11, thus directly after the compulsory schooling phase.[51] Hartnack defines "dropout" as 'leaving education without obtaining a minimal credential' which in the South African context, amounts to Matric.[52] Approximately half of all South African learners

46 *Harksen v Lane supra* para 53.
47 *Harksen v Lane supra* para 374.
48 S 5(2) of the Schools Act provides: "The governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test."
49 2016 4 SA 546 (CC).
50 *FEDSAS v Member of the Executive Council for Education, Gauteng supra* para 32.
51 Hartnack "Background Document and Review of Key South African and International Literature on School Dropout" (2017) 1-2. (Report prepared for DGMT Foundation).
52 Hartnack 1-2.

drop out of school before obtaining a Matric qualification and black learners constitute the overwhelming majority of this percentage.[53] Therefore, on the face of it, the compulsory education framework appears to be neutral, but its operation results in indirect discrimination against black learners on the basis of race.[54]

The next stage of the Harksen enquiry is to establish whether the discrimination on the basis of age and academic competence amounts to unfair discrimination. The Constitutional Court has distinguished three factors that are considered cumulatively to determine whether discrimination is unfair.[55] These include:

a The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;
b The nature of the provision or power and the purpose sought to be achieved by it.
c With due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental dignity or constitutes an impairment of a comparably serious nature.[56]

In respect of the first factor, the equality jurisprudence from the Constitutional Court indicates that a claim of unfair discrimination will usually be upheld where the complainant is a member of a historically disadvantaged group.[57] Thus, where the complainant is part of a vulnerable group and suffers discrimination that could lead to the perpetuation of historical disadvantage, it is likely that the Court will find that unfair discrimination is present. As reasoned above, the majority of learners over the age of fifteen years is black and therefore constitutes a historically disadvantaged group. In respect of the second factor, the importance of a societal goal is directly related to the state's justification for adopting a discriminatory measure in the first place, which goes to the heart of the limitation enquiry.[58] This article considers the second factor as part of the limitation analysis below. The third factor is regarded as the most important determinant of unfair discrimination. According to Albertyn and Fredman, "dignity is generally recognised as the core value and standard of [the unfair discrimination enquiry under] section

53 Hartnack 1-2.
54 This argument is reinforced by the Constitutional Court which held in *Pretoria City Council v Walker* 1998 2 SA 363 (CC) para 32 that indirect discrimination occurs where conduct is neutral in appearance, but the consequences thereof result in discrimination.
55 *Harksen v Lane supra* para 51. These factors are not an exhaustive list. The Constitutional Court has not always been consistent in applying these three factors. See Kruger "Equality and unfair discrimination: Refining the Harksen test" 2011 *SALJ* 479 for a critique of the Constitutional Court's application of the *Harksen* test.
56 *Harksen v Lane supra* para 51.
57 See for example *Bhe v Magistrate,Khayelitsha* 2005 1 SA 563 (CC); *Moseneke v The Master of the High Court* 2001 2 SA 18 (CC).
58 Kruger 2011 *SALJ* 496.

9(3)."[59] In *Prinsloo v Van Der Linde*[60] the Constitutional Court held that unfair discrimination "principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."[61] According to Currie and De Waal, unfair discrimination occurs when "law or conduct, for no good reason treats some people as inferior or incapable or less deserving of respect than others."[62] The authors' perspective is clearly grounded in *President of the Republic of South Africa v Hugo* where Goldstone J stated that:

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our … constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[63]

In assessing whether the dignity of the group of overaged learners is infringed, it is imperative to analyse the situation in which these learners find themselves in once they are forced out of formal schooling and become subject to the adult education system. As noted above, public adult learning centres may not be available in the specific area in which over-aged learners are residing, therefore in some cases, they literally would have no education centre to access. Furthermore, even if an adult education facility is provided, the possibility exist that the facility may close down before an academic year is completed due to the state's scant investment in the adult education system. Having been deprived of the choice to access a formal school as well as an adult education centre, these learners will no doubt end up as part of the approximately 50% of young people in South Africa without a matric certificate.[64] A recent World Bank Report on the state of inequality in South Africa confirms that poverty, inequality and unemployment increases with a low level and poor quality of education.[65] Therefore, it is probable that learners without even the minimal education qualification of a Matric certificate, are likely to become part of "the underclass of South African society where poverty and unemployment is the norm."[66] Furthermore, because the overwhelming majority of over-aged learners is black, it is clear that the current compulsory education framework perpetuates past patterns of racial disadvantage. Viewed against this background, the compulsory schooling provision, in conjunction with the age-related policy

59 Albertyn and Fredman "Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments" 2015 *Acta Juridica* 435.
60 1997 3 SA 1012 (CC).
61 *Prinsloo v Van Der Linde supra* para 31.
62 Curie and De Waal *The New Constitutional and Administrative Law, Volume 1* (2001) 244.
63 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 92.
64 Hartnack 1-2.
65 The International Bank for Reconstruction and Development / The World Bank *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) 3, 81.
66 Spaull "Schooling in South Africa: How low quality education becomes a poverty trap" in De Lannoy, Swartz, Lake and Smith (eds) *South African Child Gauge* (2015) 37.

framework has a grave impact on the dignity of learners considered too old for the formal schooling system. To this end, it is argued that a claim of unfair discrimination on the basis of race, age and academic competence against learners between the ages fifteen and eighteen is valid.

3 2 The right to basic education and the best interests of the child

In the Juma Musjid ruling, the Constitutional Court confirmed that access "is a necessary condition for the achievement of [section 29(1)(a)]'.[67] It has been argued above that learners over fifteen years of age are placed in the dire position where once they are forced out of formal schooling, they face the distinct possibility of being denied access to adult education as well. Therefore, it is incontrovertible that an infringement of section 29(1)(a) occurs in respect of these learners.

The best interests standard in terms of section 28(2) of the Constitution is also implicated with regards to learners older than fifteen years. Section 28(2) provides that "a child's bests interests are of paramount importance in every matter concerning the child." The latter provision is not merely a legal principle, but a substantive right that applies to an individual child, a group of children or to children in general.[68] In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*,[69] the Constitutional Court found that section 28(2) obliges all decision-makers in respect of children to guarantee "that the best interests of the child enjoy paramount importance in their decisions."[70] This means that the judiciary, administrative bodies and legislature, among others, must employ a child-centred approach.[71] For instance, legislation must be construed to the extent that it protects and advances children's interests and the courts must consistently show "due respect" for the rights of children.[72] South African jurisprudence does not endorse a fixed formula to determine the best interests standard. Although the indeterminacy of the concept has been criticised, the Constitutional Court per Sachs J argues that "it is precisely the contextual nature and inherent flexibility of

67 *Governing Body of the Juma Musjid Primary School v Essay supra* para 43. Italics my emphasis.

68 The best interest standard is sourced in the Convention on the Rights of the Child (CRC) to which South Africa is a state party. The Constitutional Court has pronounced that the CRC's general principles, including the one on the best interests of the child, "inform" the interpretation of the section 28(2) provision. The Court has repeatedly confirmed that section 28(2) is an independent right and that its application extends to all rights beyond those listed in section 28(1) of the Constitution. See *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC).

69 2009 4 SA 222 (CC).

70 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development supra* para 73.

71 *S v M supra* paras 14-15.

72 *S v M supra* paras 14-15.

section 28(2) that constitutes the source of its strength."[73] Since the context of each child or group of children is different, it is important that the content of the best interest standard be flexible and contingent on the actual facts of the specific case.[74] Therefore, an authentic child-sensitive approach necessitates a concentrated and personalised evaluation of the exact "real-life" circumstances in which children find themselves.[75]

Does the adoption of a child-sensitive approach mean that children's rights will always trump the rights of others or outweigh societal (or other) interests? In *De Reuck v Director of Public Prosecutions*,[76] the Constitutional Court held that section 28(2) does not mean that the rights of children trump every other right in the Constitution as this would be in conflict with the notion that "constitutional rights are mutually interrelated and interdependent."[77] In *S v M*, the Court confirmed that section 28(2), similar to other rights in the Bill of Rights, may be limited in terms of the limitation enquiry set out in section 36 of the Constitution,[78] thereby confirming the Court's approach in *Sonderup v Tondelli*.[79] In *S v M*, the Court held that the paramountcy of the principle does not mean that the best interests of children are absolute.[80] Cameron J, describes the paramountcy principle as meaning that "the child's interests are more important than anything else, but not that everything else is unimportant."[81]

Having sketched the general principles that guide the application of the best interests standard in South African jurisprudence, the next section will focus on the interpretation of the standard in the seminal Juma Musjid decision. This case originated in the Kwazulu-Natal High court which sanctioned the eviction of Juma Musjid Primary school, operated on private property owned by the Juma Musjid Trust.[82] In reaching this decision, the High court held that the Trust enjoys the constitutional right to property[83] and may choose to make its property available for the purposes of education.[84] The High court stressed that the Trust has no constitutional duty towards the school's learners, as opposed to the state which carries the primary obligation to provide compulsory education.[85] In the appeal judgment, Nkabinde J, writing for

73 *S v M supra* para 24.
74 *S v M supra* para 24.
75 *S v M supra para* 24.
76 2004 1 SA 406 (CC).
77 *De Reuck v Director of Public Prosecutions supra* paras 54-55.
78 *S v M supra* para 112.
79 2001 1 SA 1171 (CC).
80 *S v M supra* para 26.
81 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 29.
82 *Governing Body of the Juma Musjid Primary School v Essay supra* para 1.
83 S 25 of the Constitution.
84 *Ahmed Asruff Essay v The MEC for Education KwaZulu-Natal*, Case No. 10230/2008, KwaZulu-Natal High Court, Pietermarizburg (16 September 2009, unreported) para 23.
85 *Ahmed Asruff Essay v The MEC for Education KwaZulu-Natal supra* para 23.

an unanimous Constitutional Court confirmed that the state incurs the primary duty to provide a basic education.[86] However, the apex Court rejected the High court's finding that the Trust has no constitutional obligation at all in respect of the affected learners. In this regard, the Constitutional Court held that the Constitution imposes a negative obligation on the Trust not to impair the learners' right to basic education in terms of section 8(2).[87] Nkabinde J continued that the High court elevated the property rights of the Juma Musjid Trust over the right to basic education of the learners and failed to properly consider the best interests of the learners before granting the eviction order.[88] She stated specifically that the High court "failed to give consideration to the impact that the eviction order would have had on the learners and their interests."[89] The Constitutional Court concluded that the High court erred in granting the eviction order. For this reason, the Court provisionally set aside the eviction order and ordered the Kwazulu-Natal Education Department, the Trust and the relevant school governing body to engage with one another with the purpose of finding alternative accommodation for the affected learners.[90] The Juma Musjid judgment emphasises that the specific impact experienced by children is a decisive factor taken into account by the Constitutional Court when it determines what constitutes the best interests of children and when it weighs up children's rights against competing rights or interests. For instance, had the eviction order granted by the High court been implemented before alternative accommodation could have been secured, the affected learners would have been left without a school to access. Therefore, it seems that the more severe the impact, the more likely it is that the Constitutional Court will find that the best interests of the child has been violated and grant an order that guarantees that the rights of children trump rivalling rights or interests. Similar to the scenario sketched in Juma Musjid, children older than fifteen years may find themselves in the dire position where they literally have no education facility to access. Drawing on the principles established in Juma Musjid and other best interests standard cases above, it is beyond dispute that the best interests of this category of children are being violated by the compulsory education legal framework.

3 3 The limitation enquiry

A finding of unfair discrimination is not the end of the matter. Any right in the Bill of Rights can be limited under the Constitution's general limitation clause.[91] In order to determine whether the state can justify its

86 *Governing Body of the Juma Musjid Primary School v Essay supra* para 57.
87 *Governing Body of the Juma Musjid Primary School v Essay supra* paras 58-60. S 8(2) of the Constitution provides that: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."
88 *Governing Body of the Juma Musjid Primary School v Essay supra* para 71.
89 *Governing Body of the Juma Musjid Primary School v Essay supra* para 68.
90 *Governing Body of the Juma Musjid Primary School v Essay supra* para 74.

infringement of the rights of children older than fifteen, it is imperative to determine the reason behind these violations. As can be gleaned from the research, one of the reasons why the government has adopted the compulsory education framework, is to reduce the amount of over-aged learners in public schools, with the aim of freeing up resources in the public education system.[92] Therefore, at the core of the state's justification, is a budgetary constraints argument. It is against this background that the limitation enquiry has to be unpacked. Section 36(1) of the Constitution sets out the circumstances under which rights in the Bill of Rights may be limited:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

a the nature of the right;
b the importance of the purpose of the limitation;
c the nature and extent of the limitation;
d the relation between the limitation and its purpose; and
e less restrictive means to achieve the purpose.

A significant obstacle to clear at the justification stage of the section 36 enquiry, is that the measure limiting the right must be "sourced" in a law of general application.[93] Therefore, the limitation of any right will always be unconstitutional if the right is limited by any measure other than a law of general application.[94] The meaning of a 'law of general application' has been interpreted to mean as "something which the Court recognises as law", such as legislation and which applies generally.[95] The Admissions Policy for Ordinary Public Schools limits formal schooling to learners younger than sixteen and subjects over-aged children to adult education. In this regard, the policy gives effect to section 3(1) of the Schools Act which limits compulsory schooling to learners from the age of seven up until fifteen. The effect of the compulsory school framework is that it forces over-aged children out of the formal schooling system and renders them subject to an adult education system, which in and of itself, violates the rights to basic education, equality and the best interests of the child as examined in detail above. Section 3(1) of the Schools Act is a law of general application that applies uniformly across the country. Therefore, first stage of the limitation enquiry is complied with.

The second stage of the enquiry requires that the factors listed in section 36(1) are examined and weighed up against each other. Sachs J,

91 *S v M supra* para 112.
92 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 74.
93 De Vos and Freedman (eds) *South African Constitutional Law in Context* (2014) 360.
94 De Vos and Freedman 360.
95 De Vos and Freedman 361-362.

per the Constitutional Court in *Christian Education South Africa v Minister of Education*,[96] refers to this stage as a "… nuanced and context-sensitive form of balancing."[97] The Court, in *S v Makwanyane* expands on the balancing exercise:

> "In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."[98]

In assessing whether a limitation of a right is justifiable, courts are not required to engage with the factors above as an exhaustive list. These factors are "key considerations" that can be used in combination with "any other relevant factors in the overall determination whether or not the limitation of a right is justifiable."[99]

The right to basic education, like any other right in the Bill of Rights, is subject to the limitation enquiry. The *Juma Musjid* ruling on the unqualified nature of section 29(1)(a) does not mean that the state is always obliged to comply with its section 29(1)(a) duties irrespective of certain restrictions that may deem it impossible to fulfil those obligations. The Constitutional Court has ruled that the right may indeed be limited in terms of the Constitution's general limitation clause.[100] Therefore, where the state is unable to comply with its obligations under section 29(1)(a), there will be a limitation of the right.[101] In *Equal Education v Minister of Basic Education*, the High court held that "in the event that the [Minister of Basic Education] is unable to [comply with her duties in terms of section 29(1)(a)], it is incumbent upon her to justify that failure under section 36 or 172(1)(a) of the Constitution."[102] In other words, where a limitation of section 29(1)(a) occurs, it is up "…to the state to justify this limitation under [the limitation clause] of the Constitution or, if the limitation is not justified, to argue that immediate relief is not just and equitable."[103] Therefore, it seems more probable that the Court will engage in a section 36 analysis and be willing to be convinced "…by the state (with whom the duty to prove the justification lies) that in some situations the state's failure to provide basic education might be reasonable and justifiable."[104]

96 2000 4 SA 757 (CC).
97 *Christian Education South Africa v Minister of Education supra* para 30.
98 *S v Makwanyane* 1995 3 SA 391 (CC) para 104.
99 *S v Manamela* 2000 5 BCLR 491 (CC) para 33.
100 *Governing Body of the Juma Musjid Primary School v Essay supra* para 37.
101 McConnachie and McConnachie 2012 *SALJ* 557.
102 *Equal Education v Minister of Basic Education* 2018 ZAECBHC 6 para 185.
103 McConnachie and McConnachie 2012 *SALJ* 557.
104 Woolman and Fleisch *Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 125.

Concern is directed in this article towards the limitation of the rights of learners older than fifteen who are forced into the adult education system. As indicated above, the state has conceded that it has chronically under-invested in adult education. This means that the government is indeed advancing a budgetary constraints argument in respect of the right to adult basic education in terms of section 29(1)(a) of the Constitution. Taking into account that the Court has already pronounced that section 29(1)(a) is not subject to the internal limitation of "within available resources", the perplexing question arises whether resource constraints can be used as a legitimate justification by the state under a section 36 enquiry? Mandla Seleoane observes that:

> "[T]he desirability of limiting the right to basic … education on the basis of the availability of resources must be problematised. One must proceed on the basis that, where subjecting a social and economic right to the availability of resources was desired, the Constitution specifically provided for that. Therefore it would seem that the omission to subject the right to basic… education to available resources conveys that such subjection is undesirable. To limit the right on account of resource constraints would therefore, it seems, amount to defeating the objective of section 29(1)(a), namely, to free the right from such considerations."[105]

Seleoane seems to contend that the Constitution's explicit exclusion of "within available resources" from the textual formulation of section 29(1)(a) prevents the right from being subject to resource constraints under a section 36 enquiry. In coming to this conclusion, he relies on a pure textual interpretation of the Constitution citing that "where subjecting a social and economic right to the availability of resources was desired, the Constitution specifically provided for that."[106] However, the text of the Constitution also specifically provides that all rights in the Bill of Rights are subject to restriction under the limitation clause. Section 36 (1) does not distinguish between unqualified and qualified rights for the purpose of limiting these rights. The same can be said for section 7(3) which states that "[t]he rights in the Bill of Rights are subject to the limitations contained or referred to in section 36 …". Furthermore, the jurisprudence of the Constitutional Court supports the contention that the Court has the freedom to rely on "any relevant factor in the overall determination whether or not the limitation of a right is justifiable."[107] Therefore, provided that the limitation is through a law of general application, it will be legitimate for the state to bring up resource constraints in proving a justifiable limitation of the right.[108] For that reason, the question that should be focused on, is not whether resource constraints can be relied upon in a limitation analysis of section 29(1)(a), but what weight will a court attach to budgetary constraints as

105 Seleoane "The right to education: Lessons from *Grootboom*" 2003 *Law, Democracy and Development* 140-141.
106 Seleoane 2003 *Law, Democracy and Development* 140-141. Italics my emphasis.
107 *S v Manamela supra* para 33. Italics my emphasis.
108 Woolman and Fleisch 25.

justification by the state for its limitation of the right to basic education.[109]

The South African courts have not been provided with a case where it was compelled to apply the limitation clause to the right to basic education. However, some guidance can be obtained from jurisprudence stemming from cases dealing with the limitation of the other unqualified rights in the Constitution. An example of such a case is *Centre for Child Law v MEC for Education*.[110] In this case, the Centre for Child Law lodged an application with the former Pretoria High Court (now the North Gauteng High Court) alleging, inter alia, that the deplorable physical environment in which learners at the hostels of JW Luckhoff school were housed, amounted to an infringement of section 28(1)(c)[111] of the Constitution.[112] The latter provision states that "[e]very child has the right to basic nutrition, shelter, basic health care services and social services." Similar to section 29(1)(a) of the Constitution, section 28(1)(c) is unqualified. The court observed that:

> "What is notable about the children's rights in comparison to other socio-economic rights is that section 28 contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation …"[113]

The state argued that it could not improve the physical conditions in which the learners were housed because of "budget constraints."[114] Of interest to this article, is the court's response to the latter justification. The court noted that:

> "[O]ur Constitution recognises that, particularly in relation to children's rights …, that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits, with proper consideration of the circumstances and the potential for negative or irreconcilable resource allocations. The minimal costs or budgetary allocation problems in this instance are far outweighed by the urgent need to advance the children's interests in accordance with our constitutional values."[115]

The approach in Luckhoff alludes to a general principle that has been established in the Constitutional Court's jurisprudence on the section 36(1) enquiry, namely that "…the importance of the right [in light of the values of the Constitution] is a factor which must of necessity be taken into account in any proportionality analysis."[116] In *S v Makwanyane*, the

109 Italics my emphasis.
110 Case No 19559/06 (T) (30 June 2006).("*Luckhoff decision*").
111 S 28(1)(c) is part of the broader s 28 of the Constitution, a clause containing a list of children's rights.
112 *Luckhoff decision supra* 1-2.
113 *Luckhoff decision supra* 7.
114 *Luckhoff decision supra* 7-8.
115 *Luckhoff decision supra* 7-8. Italics my emphasis.
116 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 34.

Court held that "[i]n the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality …"[117] Although the Constitutional Court has denied a hierarchy of rights under the Constitution, some of its pronouncements do indeed imply some sort of hierarchy.[118] For example, in *S v Makwanyane*, the Court held that "the rights to life and dignity are the most important of all human rights."[119] In *Bhe v Khayelitsha Magistrate*, the Court stated that "[t]he rights to equality and dignity are the most valuable of rights in any open and democratic state."[120] De Vos and Freedman reason that "[i]f there is some hierarchy, logically those rights which are directly based on the founding constitutional values of dignity, freedom and equality are likely to receive greater attention than others."[121] Their contention finds approval in the jurisprudence of the Constitutional Court. In *S v Mamabolo,*[122] the Court held that "human dignity, equality and freedom are conjoined, reciprocal and covalent values which are foundational to South Africa."[123] Retired Constitutional Court Judge Kriegler has warned that if the right to dignity is compromised, "the society to which we aspire becomes illusory."[124] He stated further that "any significant limitation [of the right to dignity], would for its justification demand a very compelling countervailing public interest."[125] In *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development*,[126] Mokgoro J took a similar approach by asserting that the rights to life, equality and dignity must be given consideration in socio-economic rights cases.[127] She found that the denial of social security benefits to permanent residents was an infringement of not only section 27(1)(c) of the Constitution, but also of the rights to dignity and equality which were

117 *S v Makwanyane supra* para 104. Italics my emphasis.
118 De Vos and Freedman 374.
119 *S v Makwanyane supra* para 144.
120 *Bhe v Khayelitsha Magistrate supra* para 71.
121 De Vos and Freedman 374.
122 2001 3 SA 409 (CC).
123 *S v Mamabolo supra* para 41. S 1(a) of the Constitution states: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: *Human dignity, the achievement of equality and the advancement of human rights and freedoms.*" S 7(1) of the Constitution provides: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms *the democratic values of human dignity, equality and freedom.*" S 39(1)(a) of the Constitution: "When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on *human dignity, equality and freedom.*" (Italics my emphasis). See also Moyo "The advocate, peacemaker, judge and activist: A chronicle on the contributions of Justice Johann Kriegler to South African constitutional jurisprudence" in Bohler-Muller, Cosser and Pienaar (eds) *Making the Road by Walking:The Evolution of the South African Constitution* (2018) 89.
124 *Ex parte Minister of Safety and Security: In re S v Walters* 2002 4 SA 613 (CC) para 28.
125 *Ex parte Minister of Safety and Security: In re S v Walters supra* para 28.
126 2004 6 SA 505 (CC).
127 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra* paras 40-44.

referred to as founding values lying "at the heart of the Bill of Rights."[128] Thus, based on the aforementioned jurisprudence, it becomes clear that where the values and/or rights of dignity, equality and freedom are implicated in the violation of a right, the Constitutional Court will likely find the limitation of the right unjustifiable unless the state provides compelling reasons for the justification.

It is very difficult to conceive of a right more directly grounded in the foundational values of the Constitution than the right to basic education. Kollapen J captures the essence of the right:

> "[I]f regard be had to the history of an unequal and inappropriate educational system, foisted on millions of South Africans for so long, and the stark disparities that existed and continue to exist in so many areas and sectors of our society, education takes on an even greater significance. It becomes at the makro[sic] level an indispensable tool in the transformational imperatives that the Constitution contemplates and at the micro level it is almost a sine qua non to the self determination of each person and his or her ability to live a life of dignity and participate fully in the affairs of society."[129]

Bilchitz argues that "the Constitution places three central values at the core of the society it is designed to create: human dignity, the achievement of equality and the advancement of human rights and freedoms."[130] In other words, the ultimate outcome of the South African constitutional project, is the establishment of a society based on these values. As an "indispensable tool in the imperatives that the Constitution contemplates", the right to basic education is therefore essential in the establishment of a South African society based on the foundational values of the Constitution. The right to basic education which has been described as a "… central and interlocking right in the architecture of the rights framework in the Constitution"[131], plays a crucial role in unlocking the realisation of other rights.[132] This means that the right is fundamental to the development of individual lives lived in dignity, equality and freedom. Therefore, it is difficult to conceive that the state can convince any court that a budgetary restraints argument in limiting the section 29(1)(a) right of over-aged learners is justified. Furthermore, the Luckhoff judgment suggests that a lack of state resources cannot be presented as a justifiable limitation on the urgent needs of children. The needs of children older than fifteen, in particular, who are placed in a situation where they are unable to access any type of educational facility,

128 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra* para 85. S 27(1)(c) of the Constitution provides: "Everyone has the right to have access to social security, including if they are unable to support themselves and their dependants, appropriate social assistance."

129 *Section 27 v Minister of Basic Education* 2012 3 All SA 579 (GNP) para 5.

130 Bilchitz "Does transformative constitutionalism require the recognition of animal rights?" in Woolman and Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 173.

131 *Section 27 v Minister of Basic Education supra* para 2.

132 *Section 27 v Minister of Basic Education supra* para 4.

undoubtedly meet the threshold of urgency. Therefore, the state's budgetary restrictions argument would not constitute a justifiable limitation of the section 29(1)(a) entitlement and the best interests standard of the group of learners older than fifteen.

Lastly, this article examines whether the unfair discrimination finding in respect of these learners, is justifiable in terms of the limitation enquiry. An analysis of the equality provision has to take place against the understanding that the Constitution endorses a substantive notion of quality.[133] This particular form of equality was adopted with the purpose of eradicating systemic inequality in South African society so as to ultimately achieve the transformative vision of the Constitution.[134] In *Minister of Finance v Van Heerden*, the Constitutional Court held:

> "This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage."[135]

According to De Vos, the transformative vision of the Constitution requires that the right to equality be interpreted more widely so as to embrace a positive aspect.[136] In practical terms, this mean that the state must take active steps to achieve the transformative objectives of the Constitution.[137] Therefore, whenever the courts examine a violation of equality, it has to determine whether the impact of the infringing measure would further the goal of transformation or not.[138] Measures that contribute towards the "creation or perpetuation of patterns of group disadvantage for groups disfavoured in the past, will be constitutionally suspect." [139]

The current compulsory education framework results in the creation of patterns of perpetual disadvantage against black learners. Therefore, these learners are condemned to a life of unemployment and poverty and are rendered incapable of contributing to the transformation of South African society. The Constitution demands that the state eradicate systemic inequality, not perpetuate it as is currently the case with the compulsory education framework. Viewed from this perspective, a resource constraints argument does not constitute a reasonable and justifiable limitation of the right to equality of over-aged learners.

133 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) paras 25-27.
134 *Minister of Finance v Van Heerden supra* paras 25-27.
135 *Minister of Finance v Van Heerden supra* para 27.
136 De Vos "Grootboom, The right of access to housing and substantive equality as contextual fairness" 2001 *SAJHR* 266.
137 De Vos 2001 *SAJHR* 266.
138 De Vos 2001 *SAJHR* 266.
139 De Vos 2001 *SAJHR* 266.

4 Conclusion

In this article, I have drawn attention to the constitutionality of the compulsory education legislative and policy framework. The focus was placed on a specific cohort of learners between the ages of fifteen and eighteen who are beyond the compulsory school going age and regarded as 'adults' for the purposes of adult education. These learners are recipients of the right to adult basic education in terms of section 29(1)(a) of the Constitution. The age-related legislative and policy framework in combination with government's poor regulation of and chronic underinvestment in adult education have resulted in the violation of various constitutional rights. These include the right to basic education, the best interests of the child standard as well as the right to equality. This article concluded that the importance of the right to basic education (which includes the right to adult basic education) in light of the values of the transformative Constitution will probably outweigh a budgetary constraints arguments advanced by the state in respect of section 29(1)(a).

Finally, thoughts on a possible solutions to the matter raised in this article are outlined here. It is important to emphasise that this article is not in favour of an argument that a learner should have access to a particular grade in a formal school, irrespective of their age. There are various social, psychological and other reasons as to why learners close in age should be grouped together in a specific grade. However, those reasons were not explored in this article because they fall beyond the expertise of a legal academic. Instead, the intention of this article has been to highlight the infringement of various constitutional rights of the affected learners and hopefully, kickstart a debate on how to tackle this multifacted problem.