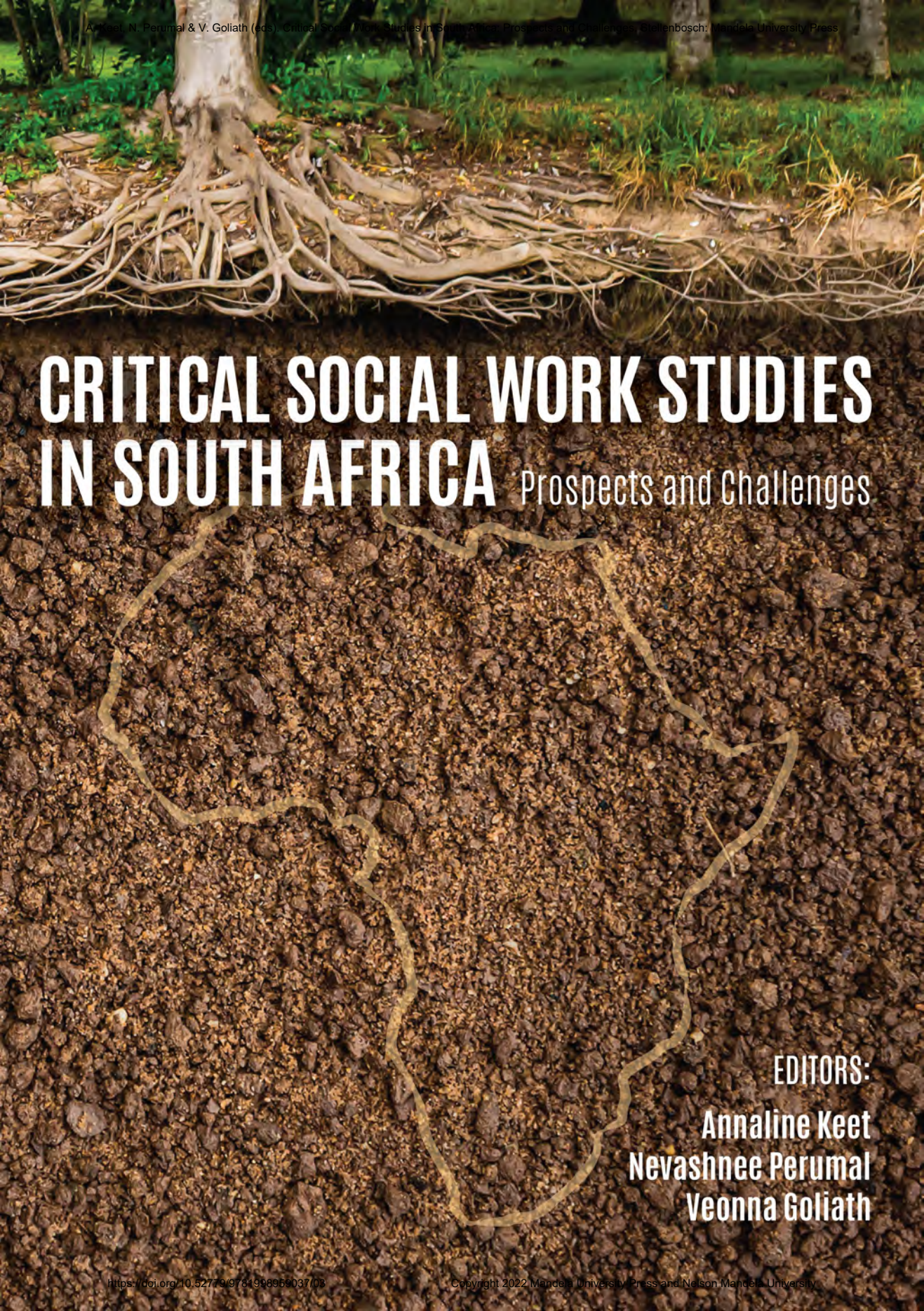


The background of the cover is a photograph of a tree's root system exposed in the soil. The roots are light-colored and spread out across the dark, textured earth. In the center of the cover, a yellow outline of the map of South Africa is superimposed over the roots and soil.

CRITICAL SOCIAL WORK STUDIES IN SOUTH AFRICA

Prospects and Challenges

EDITORS:

**Annaline Keet
Nevashnee Perumal
Veonna Goliath**



BREAKING DOWN THE BARRIERS TO MEDIATION PRACTICES IN THE SOUTH AFRICA LAW SYSTEM

The experience of unmarried fathers

Razia Nordien-Lagardien

Nelson Mandela University

ABSTRACT

There has been progressive development in the field of mediation globally over the past few decades. The family law system in South Africa has undergone significant changes in recent years with an increased emphasis placed on mediation. The amended Children's Act 38 of 2005 (RSA, 2006) has instituted mediation as mandatory in all matters of disputes regarding the care of children. Mandatory mediation is required in the following scenario: in terms of Section 21 (3a) of the Children's Act disputes between a child's unmarried biological parents as to whether the father meets the requirements for acquiring full parental responsibilities and rights in terms of the Children's Act 38 of 2005 (RSA, 2006) must be referred for mediation to a Family Advocate, social worker, social service professional or another suitably qualified person. While it can be said that steady progress has been made in terms of legislation pertaining to mediation in South Africa, it is also evident that mediation practice is largely based on Westernised models and approaches, contrary to the demographics of South African families at large. The qualitative study on which this chapter is based (Nordien-Lagardien, 2019) employed a multiple case study design to explore and understand the experiences of the parties with mediation. Semi-structured interviews were conducted with three participant groups that included: seven unmarried fathers, seven unmarried mothers and eight mediators. Data were analysed using within-case analysis and cross-case synthesis. The findings highlight the need for more culturally responsive approaches to mediation given the diverse context of South African families.

KEYWORDS

culture, culturally responsive, mediation, unmarried fathers

3

Critical Social Work Studies in South Africa: Prospects and Challenges**INTRODUCTION**

There has been progressive development in the field of family mediation in South Africa over the past decade. Prior to the amended Children's Act 38 of 2005, mediation was offered by the Family Advocate and specifically focused on divorce matters (De Jong, 2005). The Mediation in Certain Divorce Matters Act 24 of 1987 came into operation in cases of divorce or family breakdown. This Act states that before granting a divorce, parties could be required to attend mandatory mediation by the office of the Family Advocate.

The report from the Hoexter Commission in 1997 recommended that South Africa introduce family courts, which would offer mediation services (SALRC, 1997). It was further recommended that South Africa utilise the Australian and New Zealand family law courts as a model owing to the progressive development of family law and mediation in these countries (De Jong, 2005:35). De Jong (2005:35-36) supported these recommendations and also recommended that the Family Advocate regulate mediation services and that a true family court be created to deal with all family law issues, including divorces, maintenance, adoptions, family violence, children's guardianship and curatorship, as well as disputes arising out of cohabitation and other family relationships which had not been recognised by the family law system at the time. While these recommendations were significant in the development of mediation processes in the South African family law system, a limitation is that international Westernised models were recommended as a basis for developing mediation, neglecting to centralise indigenous knowledge in the process. This is why there is tension between culture and the law when it comes to mediation in South African cases.

In 2005, the new Children's Act 38 was enacted, which introduced a new discourse regarding parental responsibilities and rights and the way care and contact arrangements were constituted and determined (SALRC, 2015). Traditionally, disputes concerning children were decided in a state-sanctioned adversarial legal system. The new Act to some degree shifted the focus from an adversarial inquiry or investigation to mediation and agreement between parties. The introduction of mediation helped to empower parents, as compared to the traditional adversarial approach that disempowered due to the nature of the court system.

The amended Children's Act 38 of 2005 encourages and mandates Alternative Dispute Resolution (ADR) processes and procedures in several key areas, although it assumes that the most appropriate forum to decide matters affecting children is the Children's Court.

The Draft Mediation Rules (RSA, 2014:2) provide the following definition of mediation: “the process by which a mediator assists the parties to litigation to resolve the dispute between them by facilitating discussions between the parties, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute”.

A significant effect of the new Act was that the status of unmarried fathers changed, as the law accords them parental responsibilities and rights with regard to their children born out of wedlock. The Act recognises that unmarried fathers should have inherent right of contact, guardianship and care. However, the biological mother of a child, married or unmarried, has full parental responsibilities and rights in respect of a child. The biological father of a child also has full parental responsibilities and rights in respect of the child if he is married to the child’s mother, or if he was married to the child’s mother at any time between conception and birth. These rights accorded to the biological mother and married father is part of common law, which has its roots in colonialism. But, according to Section 21 of the Children’s Act, an unmarried father of a child only acquires full parental responsibilities and rights in respect of the child if he lives with the mother in a permanent life-partnership, or if he consents to be identified as the child’s father and contributes in good faith to the upbringing and maintenance of the child for a reasonable period.

It is clear that Section 21 of the Children’s Act advances the rights of unmarried fathers, but unmarried fathers are still not placed in a position equivalent to married fathers and biological mothers (Makhanya, 2021). The automatic allocation of parental responsibilities and rights to unmarried mothers affords mothers, as the primary caregivers, a certain degree of autonomy as far as decisions regarding the child are concerned (Louw, 2010), and it can thus be argued that the Children’s Act 38 of 2005 continues to give mothers decision-making power and autonomy. A further indication regarding the inequality of the rights of unmarried fathers was highlighted in 2021 by the Constitutional Court ruling regarding Section 10 of the Births and Deaths Registration Act as unconstitutional in respect of the rights of unmarried fathers to register the birth of their children. The court found this section to be discriminatory against both unmarried fathers and children (Van den Berg, Ratele & Makusha, 2021).

Despite these disparities with regard to unmarried and married parents, the change to the status of unmarried fathers was widely welcomed as research shows the importance of father involvement for both children and fathers. It was especially welcomed in South Africa since the country has high statistics of father absence, which has a negative impact on families, especially children. In fact, South Africa has the highest rate of father absence in the world (Posel & Devey, 2006; Statistics South Africa,

3

Critical Social Work Studies in South Africa: Prospects and Challenges

2012; Swartz, Bhana, Richter & Versfeld, 2013; Swartz & Soudien, 2015). Most young children live with their biological mothers only, and fathers appear to be more absent from households than mothers (Statistics South Africa, 2012). Meintjes, Hall and Sambu (2015) report that in South Africa just 3.3% of children live with their fathers only in comparison to about 39.5% living with their mothers only, whereas 34.7% live with both parents.

While this legislation aims to empower unmarried fathers in terms of their parental involvement by theoretically giving them rights as per Section 21 of the Act, a number of unmarried fathers still feel powerless as they are denied access to their children despite the change in their legal position as fathers, and they have had to take the matter further through court processes, seen as a disempowering process (Louw, 2010; Nordien-Lagardien, 2019; RSA, 2013, 2014; SALRC, 2015; Scheepers, 2011).

The Act stipulates mediation when there is a dispute between the unmarried father and the biological mother regarding the child/ren, and mediation has become mandatory in terms of South African law, in line with international developments in this regard. Thus, family law in South Africa has undergone significant changes in the past decade with an increasing emphasis on mediation and alternative dispute resolution mechanisms.

While mediation can be viewed as a positive step for enhancing the parental rights of unmarried fathers, Eurocentric structures and systems remain inherent in the South African family law system. The system still has its roots in colonialism as Westernised models and approaches remain dominant in the field of family mediation practice. Indigenous knowledge systems need to be recognised and appreciated for policy to make a difference on the ground.

This chapter will report on the author's findings on parents' and mediators' experiences of mediation in relation to child-related disputes between unmarried parents and will highlight the challenges in mediation that serve as barriers to father involvement. The findings discussed here are part of a bigger study (Nordien-Lagardien, 2019) that focused on developing guidelines for mediation to enhance the parental involvement of unmarried fathers.

METHODOLOGY

This chapter is based on a larger PhD study titled *Descriptive guidelines for mediation to enhance the parental involvement of unmarried fathers* (2019). This study emanated from the author's observations in practice where they worked with unmarried fathers trying to acquire their parental responsibilities and rights through the process of family mediation. The purpose of this research was to create guidelines for mediation

that are informed by the multiple perspectives of unmarried fathers and mothers, as well as mediators, and by the existing literature on mediation, in order to enhance the parental involvement of unmarried fathers.

The study was explorative, descriptive and contextual in nature, employing a multiple case study design. It was conducted in three phases, of which Phase 1 was the explorative study focusing on the participants' experiences of mediation. Phase 2 was an Integrative Literature Review (ILR), using the five-stage approach of Whittemore and Knafl (2005), based on the framework of Cooper (1998). The aim of the ILR was to present an overview of mediation practice and the theoretical underpinnings of mediation, to define concepts and to uncover current understandings, attributes and characteristics of the process and practice of mediation by reviewing and critiquing theoretical literature on the topic. Phase 3 focused on the synthesis of the data from Phases 1 and 2 to generate descriptive guidelines for mediation to enhance the parental involvement of unmarried fathers after separation with the biological mother of the child. The draft guidelines were appraised using the AGREE II tool (2009), adapted for the purpose of this study. An expert panel comprising unmarried fathers, unmarried mothers and mediators also appraised the guidelines.

A sample of seven unmarried fathers, seven unmarried mothers and eight mediators were selected through non-probability, purposive sampling and maximum variation sampling techniques to select the most appropriate participants for the purpose of the study. A small sample size was selected as this was congruent with qualitative research and specifically with case study research. The location of the study was the Eastern Cape and the sample group was selected from the Gqeberha/Uitenhage/Despatch area.

Data were generated through conducting semi-structured interviews with all three participant groups.

The research process's trustworthiness was achieved by using Guba's 1985 model (Lincoln & Guba, 1985), which focused on credibility, transferability, dependability and conformability. The inclusion of three participant groups in the study enhanced the credibility of data through the triangulation of data from multiple perspectives including unmarried fathers, unmarried mothers and mediators. The participants could verify the findings in a feedback session that also enhanced the credibility of the findings. The use of an independent coder contributed to the trustworthiness of the study by ensuring confirmability of the findings.

THEORETICAL FRAMEWORK OF THE STUDY

This study was underpinned by family systems theory and conflict perspectives. This theoretical framework was relevant as it highlighted systemic issues which, if not addressed, could lead to challenges in mediation. Conflict perspectives were informative as conflict was a significant factor affecting co-parenting and mediation after separation. The selected theoretical perspectives enhanced the understanding of family functioning and how the dynamics of the family system, when change occurs, influence mediation processes. A systemic lens allows the mediator to understand human behaviour and interaction more holistically (Regina, 2011). Family systems theory suggests that members of a family are interconnected and influence each other to maintain the system in a healthy or unhealthy manner (Bowen, 1978; Minuchin, 1974).

The significance of the parental involvement of fathers

It is widely documented that fathers contribute to the well-being of their children. They provide social capital, emotional support, a kin identity, gender development and, most importantly, love and care (Drozd, Saini & Olesen, 2016; Milkee & Denny, 2014). Father absence may therefore have negative ramifications for the child's development. A study conducted with young men in the Eastern Cape and KwaZulu-Natal highlighted the emotional impact of father absence, as well as the identity challenges for children when they experience their fathers as absent from their lives (Lesch, Gittings, Dunn, Maharaj, Louw, Enderstein, Nell, Nordien-Lagardien & Pretorius, 2021). Acknowledging the importance of father involvement has resulted in the development of policies that seek to strengthen the link between children and their biological fathers (Makusha & Richter, 2016; Richter, Chikovore & Makusha, 2010; Sloth-Nielsen & Gallinetti, 2011). A key feature of family policies in South Africa is a focus on family preservation, and a strategic priority of the White Paper on Families in South Africa (RSA, 2012a) is to promote healthy family life, encourage fathers' involvement in the upbringing of their children and responsible co-parenting, thereby underlining that the stability of the family is dependent on responsible parenting.

While these policies and legislative developments are a positive development for fathers in South Africa, an important question to answer is: "Do we understand the nature and meaning of parenting for fathers within the diverse South African contexts in order for these policies to work effectively in practice?" How do these policies align with the South African context of parenting for fathers? This chapter focuses on the study findings pertaining to the complexity of traditional cultural practices regarding parenting and the ensuing tension between these cultural practices and legislation, resulting in culture being viewed as a hindering factor to mediation and to ongoing father involvement for unmarried fathers.

In addition, unmarried South African fathers experienced further limitations to their parental involvement during Covid-19, specifically with regard to their rights of access to their child/ren. The Minister of Social Development announced on 25 March 2020 that the movement of children between co-holders of parental responsibilities would be suspended and that children remain with the primary caregiver (in most cases the mother) (RSA, 2020), causing significant uproar among parents, which led to the minister amending regulations on 16 April 2020, stating that separated parents were allowed to move their children between houses during the Covid-19 lockdown, provided they met certain legal requirements: only those parents with a court order or a parenting plan registered with the Family Advocate could move children between homes. The amended regulations brought relief to these parents, but not to those without a court order or parenting plan in place. These now had to navigate new ways of maintaining contact with their children, which mainly involved electronic communication. While Covid-19 brought about uncertainty for all, these regulations nevertheless impacted negatively on father-child involvement during the lockdown period and was another social injustice for unmarried fathers.

In the next section, parenting will be discussed from the perspectives of African fathers as emanating from the study (Nordien-Lagardien, 2019).

FINDINGS

The main findings that will be highlighted here are cultural practices affecting parenting and the tensions between culture and the law when it comes to parenting and mediation practices.

Parenting from an African cultural perspective

It is important to look at parenting practices in cultural contexts and to critically assess how these practices are accommodated in terms of the newly developed legislation pertaining to unmarried fathers and family mediation. Suffice it to say South Africa has a diverse population and this diversity requires an understanding of cultural context as it pertains to issues of parenting. This is ultimately what should guide legislation regulating family matters.

Unmarried fatherhood is a global phenomenon, with an increase in non-marital childbirth across the globe. In South Africa, the rate of non-marital childbearing is high, especially among Black and Coloured groups (RSA, 2012a).

Given the increase in non-marital childbearing, it is important to understand parenting from the perspective of unmarried fathers. What does non-marital childbirth mean in an African context? For African fathers, this means no parental rights over their

3

Critical Social Work Studies in South Africa: Prospects and Challenges

child/ren born out of wedlock unless damages (*Intlawulo*) have been paid, and even if damages are paid, the fathers' rights are still limited. It is the maternal family of the biological mother who reserve the rights over the child/ren born out of wedlock.

Fathers offered their own perspectives of what it means to be an African unmarried father in a South African context. Fathers identified the African culture/customs as having a significant influence on their role as an unmarried father. In fact, they viewed culture as a barrier to their involvement with their children as expressed in the following:

Hmm ... it did to such an extent that I almost didn't see my child. Yes, the law doesn't. In African culture it is believed that if you have not paid damages, you are not allowed to see the child.

I was, I was very angry for not seeing my kids, but I didn't know that I would go to court because with our beliefs as Xhosa, is that you are not married, so you do not have the right to the kids, because she is not your wife and you are not married. Your kids are your girlfriend's family's kids and not yours.

If *Intlawulo* were not paid then the father is not recognised as the biological father by the maternal family (Eddy, Thomson-de Boor & Mphaka, 2013; Makusha, Richter & Bhana, 2012). A study conducted in rural KwaZulu-Natal with a group of Zulu mothers indicated that the payment of *Intlawulo* fosters a relationship between the maternal and paternal family of the child while also enhancing father involvement (Mbokazi, 2021). However, it appears that in customary law, parental responsibilities and rights also do not follow automatically once damages have been paid. Even if *Intlawulo* has been paid the child remains and 'belongs' to the maternal family though the father is allowed to have a relationship with the child (Nathane-Taulela & Nduna, 2014:67). Paying damages does not confer any rights of care or contact to the unmarried father – this right is conferred by the payment of *lobola*. Only the marriage of the parents will legitimise the child and give the father rights to the child as the child is then perceived to belong to him as well. Culture is thus seen to be a barrier against a role for unmarried African fathers as this role is constructed in relation to the prescriptions of the specific culture of the father and the mother (Eddy, Thomson-de Boor & Mphaka, 2013; Nathane-Taulela & Nduna, 2014). This is not dissimilar to many Coloured families where the concept of a *huiskind* has been associated with a child born out of wedlock, seen to be the child of the maternal family. So, the question to be interrogated is: how are these notions of parenting in African culture being considered in mediation, when the law recognises the parental responsibilities and rights of unmarried fathers while from a cultural perspective these rights are not recognised? Where does this leave unmarried fathers?

For one father in this study who paid damages for both children born out of wedlock, it resulted in him being recognised and acknowledged as the father, and he experienced no challenges when it came to his parental involvement with his children. Another father, however, was unable to pay damages as he was unemployed, but the mother and the maternal family allowed him to be involved with his child as his family was contributing financially towards the upbringing of the child while he was unemployed. Unemployment and poverty in South Africa are directly linked to the inability of fathers to conform to cultural practices such as payment of *Intlawulo*. The result is restricted or absent father-child relationships (Eddy, Thomson-de Boor & Mphaka, 2013). It can thus be concluded that cultural gatekeeping has a significant impact on father involvement, and the non-payment of *Intlawulo* regulates this involvement (Makusha & Richter, 2016) rather than law or policy. To what extent can we then say that unmarried fathers have been empowered with parental rights by law, when in actual fact the mother maintains the power?

While the legislation aims to facilitate the parental involvement of unmarried fathers by giving them rights as per Section 21 of amendments to the Children's Act 38 of 2005, there are a number of fathers who face difficulties in acquiring these rights due to unsuccessful mediation and who often have to proceed to court (Nordien-Lagardien, 2019). For many Black unmarried fathers, the cultural tradition of damage payments is a factor that further hinders them from acquiring their parental responsibilities and rights. Indeed, we can argue that Section 21 of the Act states that for unmarried fathers looking to acquire parental rights a requirement is that damages have been paid. The wording of this section is very broad and open to interpretation and so the practical application is often problematic. How is the spirit of the law to be implemented in practice? Or rather, is it implemented in practice? It appears that the social justice issues of equal parenting rights for unmarried fathers are not only prevalent in legislation but also in the implementation in practice.

This is the tension that arises between the cultural rights of unmarried fathers and the legal rights which the law has bestowed upon them as fathers.

A prominent theme emerging from this study is how the customs and traditional practices of African culture affect the mediation process, particularly for unmarried fathers. These cultural practices have an impact on the decisions made in mediation as there are specific cultural nuances pertaining to the rights of unmarried fathers and the role of the elders in decision-making which cause tensions between the mediating parties (Eddy, Thomson-de Boor & Mphaka, 2013; Makusha, Richter & Bhana, 2012). The following section further outlines these tensions between culture and the law.

3

Critical Social Work Studies in South Africa: Prospects and Challenges

Tension between the law and culture

Bekker (2008:405) says that in practice the dividing line between the application of common and customary law is often obscure, giving rise to a “conflict of laws”, adding that the Children’s Act 38 of 2005 has not really taken account of “customary law and concomitant issues relating to custom and culture”. This could result in problematic implementation of certain provisions of the Act as there is evidence of clashes between mediation principles and the law versus cultural practices, and the professional and personal values of the parties involved in family mediation. This is consistent with Bekker’s (2008) contention that even though South Africa has a dual legal system in which common law and indigenous law are recognised, this Act has not considered customary law and issues relating to customs and culture.

It is evident that Eurocentric structures and systems are inherent in South Africa’s family law system. Given South Africa’s ethnic, cultural and linguistic diversity, it has implemented a dual legal system, which applies common law to all individuals, but also applies indigenous customary law to African people (Bekker, 2008:396). Section 211(3) of the Constitution states: “The court must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law” (RSA, 2012b). The family law system in South Africa is based on Western values and principles and does not reflect or relate to the cultural diversity of South Africa, e.g. religious marriages are not fully recognised. Cultural practices such as the payment of *Intlawulo* and *lobola* are viewed as impediments in the process (Boniface, 2012b; De Jong, 2005; Nordien-Lagardien, 2019; Makusha & Richter, 2016).

Bekker (2008:401–402) argues that Section 21 of the Act poses a problem in practice because, in African culture, the biological father does not automatically gain parental rights of access over the child by merely following the procedure set out in Section 21 since, in African customary law, parental responsibilities and rights do not follow automatically on payment of damages (Bekker, 2008:401–402). This impedes successful mediation and results in negative outcomes for fathers in mediation. This again highlights social injustice for unmarried fathers as the mother still maintains the power despite the fact that the law has granted rights to unmarried fathers. In practice, mediators reported that Xhosa mothers have the power in mediation when it comes to their cultural beliefs which are often in conflict with the process and goals of mediation, which is to establish the parental involvement of the father. This is depicted in the quotes below:

It is also an issue with the father that damages are coming up. And you know that culturally you are supposed to pay damages. “And what are you saying about that?” And for some of them they will say that they will pay damages. Then they will need to follow the process. Although that is not part of the

mediation, we do kind of talk about it, so that it will make ease for the women to understand where it is coming from. And also, to enable us to do the mediation. Because you find that if he said he is not going to pay damages, then there and then mediation has to stop, because she is not willing.

Also, customary law, you know ... cultural interest plays a role in that. For instance, in our culture for a black person, that perception that a child that is born out of wedlock belongs to the maternal family. You know, it is always interesting because you will find that the biological mother is put in a position where she must agree with the father, who for instance has not paid damages. And she is still staying at her home and it is difficult for her to make a decision, because mommy and daddy at home or they are helping me and looking after the child. Now I must decide I cannot ... so sometimes they struggle to reach an agreement in those circumstances.

The father thus remains dependent on the goodwill of the mother and her family to facilitate a relationship between father and child. This frequently results in conflict over the parental responsibilities and rights of unmarried fathers and results in fathers having to approach the courts for further assistance.

A Xhosa mediator related her experience of mediation to be personally challenging as she felt challenged by tensions between culture and the law in mediation. Her personal and professional values were in conflict, which affected the mediation process as it was a challenge to mediate knowing that cultural practices needed to be adhered to. She mentioned that several sessions which she mediated were unsuccessful because of cultural issues arising during the session. Her sentiments are shown below:

It was difficult, that is why I've stopped mediation, because for me it felt like it doesn't respect our culture and it is kind of breaking that. Because in our culture, it is important to do things in a certain way. So now the law is kind of discouraging that as if it is not important. And if it is like that, it means that even the next generation won't see that as that important. But for it to be there, there was a reason for that. And if we are now taking that away, then culturally what is happening?

For most of these fathers, their initial attempt at father involvement was thwarted as they were prevented from fully participating in the life of their child due to the tensions highlighted. It is therefore imperative that current mediation practices be interrogated since family mediation has been mandated as the vehicle for unmarried fathers to acquire their parental responsibilities and rights. We need to look at how mediation can be enhanced to facilitate co-parenting without viewing cultural practices as obstacles to father involvement, but rather consider more culturally responsive approaches to mediation.

3

Critical Social Work Studies in South Africa: Prospects and Challenges

An additional cultural influence on mediation was that of the maternal family, often perceived to influence mediation negatively without being physically present in the session. The grandparents claimed the right to be included in mediation but were excluded from the process, as mediators followed Western models which prescribed that mediation involved only the parents and the child where applicable. This is a challenge the mediator has to deal with, as in African cultures a child born out of wedlock belongs to the grandparents and not to the parents. A mediator's experience in this regard is encapsulated below:

Somehow needed to be addressed more was the whole area of family involvement. I remember a lot of the people were there because they felt pressurised by family to be there, or they were struggling to connect to their child's father or mother, because of the family's idea about that person. Although family members were not allowed into that room, I often feel like I was dealing with 10 people there, and 10 people there in terms of what would come into the room. Hmmm ... there was a lot of family interference that would come into that relationship and that was also a barrier. Because remember children are not ... they are raised by the village, by the family and you could very well come up with a beautiful plan with a partner. But if that woman goes home and her family who are maybe supporting her financially and she is living with them, they don't agree, or they don't have the time of day for the father, and they went into the mediation session with the father to see that he makes some good choices with the mother of the child, they wouldn't necessary back that parenting plan. And that would create problems for the plan to play out.

Bekker (2008:396) argues that in family law, conflicts are exacerbated as common law has its roots in notions of the Western nuclear family system, whereas many Africans are part of extended families. African children 'belong' to the extended family as a group or 'village', whereas in Western culture it is the biological parents who are key role-players in the lives of their children. South Africa has a legal system that has been historically based on Western values (De Jong, 2005) and the findings in the study by Nordien-Lagardien (2019) highlight the lack of transformation and dominance of coloniality in the South African family law system.

The next section tries to locate mediation in current practices and look at traditional cultural practices in the context of mediation.

Interrogating current mediation practices

In reviewing the literature on mediation, it is evident that it has numerous definitions, and the one that resonates is the definition of family mediation offered by Charlton and Dewdney (1995:123-126):

A process in which the mediator, an impartial third party who has no decision-making power, facilitates the negotiations between separating parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfactory settlement agreement that recognises the needs and rights of all family members.

The important feature of this definition for separated families is that of restoring relationships, as it centralises relationship transformation as a core component of mediation. This also aligns with indigenous knowledge systems such as African principles of conflict resolution where healing and harmony is central (Boniface, 2012a:382). Furthermore, the above definition embraces the principles of self-determination and empowerment, key principles in mediation. It is important to mention here that in reviewing the literature on mediation it became evident that South Africa should develop its own definition of mediation, which draws on indigenous knowledge systems and which is contextually and theoretically relevant for diverse family structures among the South African population.

Family mediation pertaining to the parental responsibilities of unmarried fathers has been implemented in practice since 2007 when this section of the Children's Act was promulgated. The specifics regarding the implementation of mediation were not outlined in the Act, causing inconsistencies in how the mediation process is implemented by mediators, who use various Western approaches to mediation, especially since there is no indigenised model for mediation to meet the diverse needs of South African families. These Western models include: facilitative mediation, settlement-focused mediation, evaluative mediation, therapeutic family mediation and transformative approaches to mediation (Boulle, Goldblatt & Green, 2008; Brown & Marriott, 2011; Irving & Benjamin, 2002). In many of these models, the main purpose is to reach a settlement with very little focus on transformation of the family system. However, the transformative and therapeutic models focus on healing and re-building relationships so that families can function more optimally after separation. Given the context of parenting in African families as discussed earlier, there is a vital need to be culturally responsive in our approach to mediation practices. This view resonates with De Jong's (2005) sentiment that historically the South African legal system has been based on Western values and principles and does not reflect the cultural diversity of South Africa's population.

Are mediators being culturally responsive in their approaches to mediation? They have not been trained in culturally responsive approaches so are not adequately equipped to manage culturally diverse issues in mediation and have highlighted their need for training on this:

3

Critical Social Work Studies in South Africa: Prospects and Challenges

I think to be aware of the culture that you have to work with. It might be something with English speaking people, that they might not know, with the Xhosa background in terms of culture, so if we are talking about damages, what it entails and all that. Just so that you know.

Armstrong's (2011) study concurs with the notion of culturally responsive mediation. The study participants indicated that although they felt confident and culturally responsive in assisting families from different cultural backgrounds, they still needed support to develop greater understanding of matters pertaining to cultural nuances, and to increase their professional capacity to do so. More than 90% of participants in the study agreed that understanding in the following matters would support culturally responsive mediation: the role of culture in dispute resolution; community-based dispute resolution; cultural and religious norms and beliefs about parenting, separation and family and cultural influences on child development.

The important point is that culture is multifaceted, and it is imperative for mediators to try to understand the culture of the parents in order to render effective mediation. Mediators who demonstrate cultural awareness and employ culturally relevant approaches in mediation facilitate a process that is centred on the needs of the parents, where their values are respected. This is in line with the fundamental principles of mediation, namely: self-determination, fairness and equity. These sentiments are supported by the findings of the SALRC (2015), which concurs that South Africa is in need of a culturally responsive approach to family mediation.

Several elements in Western models of mediation do reap positive results, but these models lack approaches relevant to the needs of diversity and culture which are very significant to families in South Africa. For example, Western models are insistent that mediation takes place only between the father and the mother (including the child where appropriate) but excludes the extended family from the process. This is contrary to the belief systems of African families and more communalist cultural groups where the extended family forms part of the parenting system. In some instances, the grandparents feel that they have the right to be included in mediation and often accompany the parents to mediation. This is a challenge the mediator must deal with, as in some cultures a child born out of wedlock belongs to the grandparents and not to the parents. The grandparents, however, influence the mediation even if they are not present in the session as the mother is unable to make decisions without first attaining the approval of her parents. This causes a further divide because unmarried mothers feel torn between fulfilling extended family expectations even if they would be inclined to be more rational about sharing parenting responsibilities and access. It must not be forgotten that in a country such as South Africa with its high rates of unemployment, tensions within and between families are often overlaid by dynamics related to financial concerns and realities.

How then are we being relevant to the needs of parties in mediation? The experiences of a mediator capture this sentiment:

And sometimes you know when there is a very strong extended family influence. And sometimes you will agree in a mediation on very specific things, but you are going to have to allow the parent to get back to their family and say “this is what we’ve agreed on, and what do you think about that?” And then come back again. Because you can’t also separate those things completely.

Boniface (2012a:382) concurs that in African mediation, conflicts are seen in their social contexts, not as isolated events, and that all relevant background information should be covered in mediation. De Jong’s (2008) proposes a “multi-generational model of mediation” that involves the extended family. The author contends that mediation is compulsory in African culture, including when a family problem occurs (De Jong, 2010:526). During mediation in African societies, there is an opportunity for everyone to “tell their story” (Boniface, 2012b:116). This is important to acknowledge and take into consideration in mediation, as it affects its process and outcome. A strategy outlined in the White Paper on Families in South Africa (RSA, 2012a) to promote healthy family life is to *promote intergenerational solidarity* through facilitating permanent and constructive dialogue between younger and older family members. This strategy thus reinforces the role that older generations of family members such as parents/grandparents have to play in promoting a healthy family life. So why are we ignoring these structures in African contexts that can provide support to families after separation?

How does a mediator handle a situation where an unmarried father is seeking to acquire his parental responsibilities and rights and the mother challenges this due to her cultural beliefs and that of her family? The law states that the father has rights, so we are clear on that, but cultural practices are important to African families. Should one be compromised for the other? How can mediators proceed in this regard?

A project to identify and explore ethical issues with which Australian alternative resolution practitioners are faced with was initiated as a result of an ADR Ethics Symposium in June 2015. The findings from this project indicated that a core factor in ensuring procedural and substantive justice in mediation is the appropriateness of the process based on the needs of the parties, such as their characteristics and the nature of their challenges (Ojelabi & Noone, 2017:15). These findings show that failing to conduct appropriate dispute resolution processes is regarded as an ethical issue for the parties involved and fails to provide justice for parties to the process. Stalford (2010:160) contends that cultural practices and social norms impact profoundly on the dynamics of interpersonal relationships and often dictate the balance of power

between the parties, shape perspectives of the respective roles of mother and father, influence perceptions of the rights and capacities of any children in the family and even have an impact on how individuals engage in the process of dispute resolution.

This confirms the importance of acknowledging culture as a vital aspect of positive outcomes in mediation. It supports the view that being aware of the culture of the parents implies understanding the prescriptions and proscriptions associated with the role of unmarried fathers and the co-parenting relationship in the broader context of the family. Therefore, rendering culturally responsive mediation services based on this awareness implies respect for the parents' cultural needs and values and the provision of mediation with which both parents and their extended families are comfortable.

Can we truly say that family mediation is contributing to social justice when it comes to the parental responsibilities and rights of unmarried fathers in South Africa? Furthermore, when family mediation is not responsive at this level, can mediators claim to be mediating in the best interest of children?

In a reflection on the effectiveness of "Western-style" mediation and whether it can be improved with "African-style" group mediation, Boniface (2012b:392) suggests that South African mediators need to demonstrate a caring and non-judgemental acceptance of the person's humanity, to help people to listen to their preference for peace, and to create a safe place for dialogue to occur, to acknowledge brokenness and to shape the journey towards healing. In support of these suggestions, the SALRC (2015:213) in their review of mediation practices suggested that customary law and culture be taken into account when discussing African Dispute Resolution (AfDR). The SALRC (2015:219) concluded that a dominant dispute resolution system is being imposed as an alternative to traditional systems that are more relevant to the South African context. There have been proposals for the development of an intra-cultural model of mediation in South Africa where mediators use a multi-generational approach and where storytelling takes place and these proposals suggest the use of "mediation with a traditional flavour", which makes use of indigenous values, norms and ethnographic practices as foundations for conflict resolution (Ahorsu & Ame, 2011; Boniface, 2012b). It is argued that these approaches should blend traditional African with Western mediation processes for greater efficiency and effectiveness.

The African Centred Family Mediation (Mickel & Boone, 2001) and the therapeutic family mediation approaches similarly focus on strengthening relationships between families, acknowledging conflict in its social context. The common element in the African Centred Family Mediation, the AfDR approach and the Therapeutic Family Mediation (TFM) model is that they are rooted in systems theory while incorporating elements from conflict perspectives recognising the various systems within the family

and focusing on conflict resolution through compromise. Furthermore, the AfDR approach recognises customary law and upholds African humanistic principles, while the African Centred Family Mediation approach is holistic, inclusive of the extended family system, integrating traditional knowledge, values and skills in working with family (Mickel & Boone, 2001). Both approaches are relationally centred, focusing on healing and the empowerment of parties.

There is clear evidence supporting the call to improve family mediation processes by incorporating indigenous knowledge systems to dispute resolution in order to enhance the mediation process and outcomes. However, there remains an ongoing debate about how this should be done for optimal outcomes in mediation. An important step is to acknowledge indigenous approaches and the importance of these approaches for African families. Dialogue should be encouraged between practitioners and traditional leaders in the community to discuss traditional customs. This is also important to communities in order to develop cultural awareness and to develop culturally responsive approaches for mediation between separating parents.

IMPLICATIONS FOR SOCIAL WORK

A significant implication from the study is the need for social workers to be more active in research on mediation as social workers play an important role in research and more specifically the family mediation processes. Currently in South Africa, there is limited research and literature pertaining to mediation that has been developed by social workers, therefore social workers need to be at the forefront of research involving the development of mediation. A second implication for social workers to develop culturally relevant approaches to mediation requires them to encourage dialogues between practitioners and traditional leaders in the community to discuss the traditional customs and values which are important to communities. This will help develop cultural awareness and culturally responsive approaches for mediation between separating parents, thereby also developing mediation practice in South Africa further. Social workers should also be involved in policy development and consultation to derive an appropriate definition of mediation that is congruent with the rich diversity in family types and cultures in South Africa by consulting with relevant service providers and service users in the mediation field. This will ensure that policy takes into consideration the diverse context and social realities of South African families.

DISCUSSION AND RECOMMENDATIONS

Implementing holistic and inclusive approaches to mediation practice

Family mediators should actively engage family members to participate meaningfully in collaborative problem-solving. The findings indicate that the maternal family can, at times, serve as a barrier to father involvement and mediation. This was shown to be a greater challenge when it came to African families owing to their cultural beliefs about the role of the unmarried father. In general, the participation of the extended family in mediation may play an important role in decision-making and their participation is essential as decisions being made in mediation, and their implementation, are likely to have an impact on them. Mediators should view the family system in its totality, recognising the dynamics of the larger system rather than confining mediation to the stereotypical view of the notion of the nuclear family. African-centred approaches to mediation have been recognised as being holistic and integrated approaches that should be adopted.

Integrating culturally relevant approaches

The empirical findings indicate that culture can serve as a barrier to father involvement and mediation. Therefore, cultural responsiveness should be reflected throughout mediation in its principles, goals, operations, standards, professional development, service delivery and practice by mediators. The findings of the ILR in the larger study highlighted the African-centred models/approaches to mediation to be culturally responsive. The need to provide culturally appropriate services is driven by the demographics of South Africa. It is thus imperative for practitioners to recognise the diversity of South African families in all initiatives aimed at assisting families (RSA, 2012a). A guiding principle of the White Paper for Families in South Africa (RSA, 2012a) is family diversity.

Self-awareness is fundamental to culturally competent practice (Azzopardi & McNeill, 2016:294). Cultural competence begins with an awareness of one's own cultural beliefs and practices, and the recognition that others believe in different truths/realities than one's own (Kohli, Huber & Faul, 2010:257). Scheafor and Horejsi (2012:125) concur, stating that "it is critical for the social worker to first develop self-awareness and strive to understand how these aspects have shaped his/her own views".

Practice and policy recommendations

It is further recommended that dialogues be encouraged between practitioners and traditional leaders in the community to discuss the traditional customs and values that are important to communities in order to develop cultural awareness and to develop culturally responsive approaches for mediation between separating parents.

Policy should take into consideration the diverse context and social realities of South African families. Continuous professional development in cultural diversity should be provided for mediators to develop their increased awareness of cultural influences on mediation. Finally, policies must be developed that facilitate integrated, holistic services and that aim to strengthen families and prevent non-compliance.

CONCLUSIONS

While there have been significant developments in family law with specific reference to father involvement and mediation, there has also been critique regarding the practical implications of these matters. Social justice in the legal system for unmarried fathers remains a challenge as mothers maintain power over parental responsibilities and rights. More social injustice for fathers is that of cultural gatekeeping of father involvement, which is contradictory to the law, and leaves open the question as to whether the status of unmarried fathers has indeed changed.

Empirical findings indicate that the current process of mediation being implemented in the South African context needs to be improved in order to achieve more positive outcomes for families after separation. The Eurocentric approaches used as models for mediation create a further injustice to the parties in mediation, as these approaches fail to recognise the needs and beliefs of the parties.

In general, the participation of the extended family in mediation may play an important role as they serve as the gatekeepers to father involvement. Mediators should view the family system in its totality, thus recognising the dynamics of the larger system rather than confining mediation to the stereotypical view of the notion of the nuclear family. Indigenising family mediation practice holds potential for facilitating transformation of the co-parenting relationship and thus achieving parental involvement that serves the best interest of children of unmarried parents.

Critical Social Work Studies in South Africa: Prospects and Challenges

3

REFERENCES

- AGREE. Agree Next Step Consortium. 2009. *The agree II instrument*. [ONLINE]: <http://www.agreetrust.org>
- Ahorsu, K. & Ame, R. 2011. Mediation with a traditional flavour in the Fodome chieftaincy and communal conflicts. *African Conflict and Peacebuilding Review*, 1(2):6-33. <https://doi.org/10.2979/africonpeacevi.1.2.6>
- Armstrong, S.M. 2011. Encouraging conversations about culture. Supporting culturally responsive family dispute resolution. *Journal of Family Studies*, 17(3):233-245. <https://doi.org/10.5172/jfs.2011.17.3.233>
- Azzopardi, C. & McNeill, T. 2016. From cultural competence to cultural consciousness: Transitioning to a critical approach to working across differences in social work. *Journal of Ethnic and Cultural Diversity in Social Work*, 25(4):282-299. <https://doi.org/10.1080/15313204.2016.1206494>
- Bekker, J.C. 2008. Commentary on the impact of the Children's Act on selected aspects of the custody and care of African children in South Africa. *Obiter*, 29(3):395-408.
- Boniface, A.E. 2012a. African-style mediation and Western-style divorce and family mediation: Reflections for the South African context. *Potchefstroom Electronic Law Journal*, 15(5):378-401. <https://doi.org/10.4314/pelj.v15i5.10>
- Boniface, A.E. 2012b. A humanistic approach to divorce and family mediation in the South African context: A comparative study of western-style mediation and African humanistic mediation. *African Journal on Conflict Resolution*, 12(3):101-129.
- Boulle, L., Goldblatt, V. & Green, P. 2008. *Mediation principles, process, practice* (2nd ed.). New Zealand: Lexis Nexis.
- Bowen, M. (ed.). 1978. *Family therapy in clinical practice*. New York: Jason Aronson.
- Brown, H.J. & Marriott, A. 2011. *ADR principles and practice*. London: Sweet and Maxwell.
- Charlton, R. & Dewdney, M. 1995. *The mediator's handbook: Skills and strategies for practitioners*. North Ryde, NSW: LBC Information Services.
- Cooper, H. 1998. *Synthesizing research: A guide for literature reviews* (3rd ed.). Thousand Oaks, CA: Sage Publications.
- De Jong, M. 2005. An acceptable, applicable and accessible family-law system for South Africa: Some suggestions concerning a family court and family mediation. *Tydskrif vir die Suid-Afrikaanse Reg (TSAR)*, 1:33-47.
- De Jong, M. 2008. Opportunities for mediation in the Children's Act 38 of 2005. *Tydskrif vir Hedendaagse Romeins- Hollandse Reg (THRHR)*, 630-641.
- De Jong, M. 2010. A pragmatic look at mediation as an alternative to divorce litigation. *Journal of South African Law*, 3:515-531.
- Droz, L., Saini, M. & Olesen, N. 2016. *Parenting Plan Evaluations: Applied research for the family court* (2nd ed.). New York: Oxford University Press. <https://doi.org/10.1093/med:psych/9780199396580.001.0001>
- Eddy, M.M., Thomson-de Boer, E.H. & Mphaka, K. 2013. *So we are ATM fathers: A study of absent fathers in Johannesburg, South Africa*. Johannesburg: Centre for Social Development in Africa, UJ and Sonke Gender Justice.

- Irving, H.H. & Benjamin, M. 2002. *Therapeutic family mediation: Helping families resolve conflict*. London: Sage Publications. <https://doi.org/10.4135/9781452231747>
- Kohli, H.K., Huber, R. & Faul, A.C. 2010. Historical and theoretical development of culturally competent social work practice. *Journal of Teaching in Social Work*, 30(3):252-271. <https://doi.org/10.1080/08841233.2010.499091>
- Lesch, E., Gittings, L., Dunn, S., Maharaj, P., Louw, H., Enderstein, A.M., Nell, E., Nordien-Lagardien, R. & Pretorius, B. 2021. *State of South Africa Fathers: Father connections and disconnections*. Stellenbosch: Stellenbosch University, Human Sciences Research Council. [ONLINE]: <https://bit.ly/3SST6Mp>
- Lincoln, Y.S. & Guba, E. 1985. *Naturalistic enquiry*. London: Sage Publications. [https://doi.org/10.1016/0147-1767\(85\)90062-8](https://doi.org/10.1016/0147-1767(85)90062-8)
- Louw, A. 2010. The constitutionality of a biological father's recognition as a parent. *PER/PELJ*, 13(3):156-206. <http://dx.doi.org/10.4314/pelj.v13i3.63672>
- Makhanya, T.B. 2021. Has the children's Act 38 of 2005 changed the position of unmarried fathers? Legislative Discourse in South Africa. *Gender & Behaviour*, 19(2) June:7883-17891. Centre for Psychological Studies/ Services, Nigeria. [ONLINE]: <https://bit.ly/3gXNJx3>
- Makusha, T. & Richter, L. 2016. Gatekeeping and its impact on father involvement among black South Africans in rural KwaZulu-Natal. *Culture, Health and Sexuality*, 18(3):308-320. <https://doi.org/10.1080/13691058.2015.1083122>
- Makusha, T., Richter, L. & Bhana, D. 2012. Children's experiences of support received from men in rural KwaZulu-Natal. *Africa Development, Special Issue on Parents' Involvement in Children's Lives in Africa*, 37(3):127-152. [ONLINE]: <https://www.jstor.org/stable/afdevafdev.37.3.127>
- Mbokazi, N. 2021. *State of South Africa's Fathers: Inhlawulo and mothers' reports of father connection in urban and rural KwaZulu-Natal*. Stellenbosch: Stellenbosch University, Sonke Gender Justice, Human Sciences Research Council. [ONLINE]: <https://bit.ly/3RSWDZu>
- Meintjes, H., Hall, K. & Sambu, W. 2015. Demography of South Africa's children. In: A. de Lannoy, S. Swartz, L. Lake & C. Smith (eds.), *South African child gauge*. Cape Town: Children's Institute, University of Cape Town.
- Mickel, E. & Boone, C. 2001. African-centered family mediation. Building on family strengths. *Journal of Reality Therapy*, 21(1):38-41
- Milkee, M.A. & Denny, K.E. 2014. Changes in the Cultural Model of Father Involvement: Descriptions of Benefits to Fathers, Children, and Mothers in 'Parents' Magazine, 1926-2006. *Journal of Family Issues*, 35(2):223-253. <https://doi.org/10.1177/0192513X12462566>
- Minuchin, S. 1974. *Families and family therapy*. Cambridge, MA: Harvard University Press. <https://doi.org/10.4159/9780674041127>
- Nathane-Taulela, M. & Nduna, M. 2014. Young women's experiences following discovering a biological father in Mpumalanga Province, South Africa. *The Open Family Studies Journal*, 6(1):62-68. <https://doi.org/10.2174/1874922401406010062>
- Nordien-Lagardien, R. 2019. *Descriptive guidelines for mediation to enhance the parental involvement of unmarried fathers*. Port Elizabeth: Nelson Mandela University.

- Ojelabi, L.A. & Noone, M.A. 2017. ADR Processes: Connections between purpose, values, ethics and justice. *Law in Context* 35(1):5-23. <https://doi.org/10.26826/law-in-context.v35i1.29>
- Posel, D. & Devey, R. 2006. The demographics of fatherhood in South Africa: An analysis of survey data, 1993-2002. In: L. Richter & R. Morrell (eds.), *Baba: Men and fatherhood in South Africa*. Cape Town: HSRC Press: 4:38-42.
- Regina, W.F. 2011. *Applying family systems theory to mediation: A practitioner's guide*. New York: University Press of America.
- Republic of South Africa (RSA). 2006. *Children's Act 35 of 2005*. 2006. *Government Gazette*, 492(28944):1-217. Cape Town: Government Printing Works. [ONLINE]: <http://www.refworld.org/docid/46b82aa62.htm>
- Republic of South Africa (RSA). 2012a. *White Paper on Families in South Africa*. South Africa: Department of Social Development.
- Republic of South Africa (RSA). 2012b. *South Africa's Constitution of 1996 with Amendments through 2012*. Constitute. Constituteproject.org
- Republic of South Africa (RSA). 2013. *Consolidated Amendments Report: Third Amendment of the South African Children's Act 38 of 2005*. Pretoria: Department of Social Development.
- Republic of South Africa (RSA). 2014. South African Draft Mediation Rules, 2014. *South African Government Gazette* No. 37448.
- Republic of South Africa (RSA). 2020. *Children's Amendment Bill. [B18-2020]*. *South African Government Gazette* ,No. 43656.
- Richter, L, Chikovore, J. & Makusha, T. 2010. The status of fatherhood and fathering in South Africa. *Child Education*, 86(6):360-365. <https://doi.org/10.1080/00094056.2010.10523170>
- Scheafor, B.W. & Horesji, C.R. 2012. *Techniques and guidelines for social work practice* (9th ed.). New Jersey: Allyn and Bacon.
- Scheepers, C. 2011. *The general responsibilities and rights of an unmarried father in terms of the Children's Act 38 of 2005*. Potchefstroom: North-West University LLM (Comparative Child Law).
- Sloth-Nielson, J. & Gallinetti, J. 2011. Just say sorry? Ubuntu, Africanisation and the child justice system in the Child Justice Act 75 of 2008. *Potchefstroom Electronic Law Journal*, 14(4):63-92. <http://dx.doi.org/10.17159/1727-3781/2011/v14i4a2584>
- South African Law Reform Commission (SALRC). 1997. Alternative dispute resolution. Discussion document 8. Project 94.
- South African Law Reform Commission (SALRC). 2015. *Family dispute resolution care and contact with children*. Issue Paper 31. Project 100D.
- Stalford, H. 2010. Crossing boundaries: Reconciling law, culture and values in international family mediation. *Journal of Social Welfare and Family Law*, 32(2):155-168. <https://doi.org/10.1080/09649069.2010.506311>
- Statistics South Africa (Stats SA). 2012. *Social profile of vulnerable groups in South Africa 2002-2011*. Report No. 03-19-00. Pretoria: Statistics South Africa.
- Swartz, S. & Soudien, C. 2015. Developing young people's capacities to navigate adversity. In: A. de Lannoy, S. Swartz, L. Lake & C. Smith (eds.), *South African Child Gauge*. Cape Town: University of Cape Town, Children's Institute: 2:92-97.

- Swartz, S., Bhana, A., Richter, L. & Versveld, A. 2013. *Promoting young fathers' positive involvement in their children*. Policy Brief, Human Science Research Council. [ONLINE]: <https://bit.ly/3Cpokn9>
- Van den Berg, W., Ratele, K. & Makusha, T. 2021. *State of South African fathers: Introduction*. Stellenbosch: Stellenbosch University, Human Sciences Research Council. [ONLINE]: <https://bit.ly/3RSWDZu>
- Whittemore, R. & Knafl, K. 2005. The integrative review: Updated methodology. *Journal of Advanced Nursing*, 52(5):546-553. <https://doi.org/10.1111/j.1365-2648.2005.03621.x>