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SOUTH AFRICA

IMPLICATIONS OF THE OFFICIAL DESIGNATION OF MUSLIM CLERGY AS AUTHORISED CIVIL MARRIAGE OFFICERS FOR MUSLIM POLYGYNOUS, INTERFAITH AND SAME-SEX MARRIAGES IN SOUTH AFRICA

*Najma Moosa and Muneer Abduroaif**

Résumé

Entre 2014 et 2017 quelque 227 religieux musulmans sud-africains, dont trois femmes, ont accédé au rang de célébrant des mariages civils en application de loi 25 sur le mariage de 1961. Bien qu'ayant désormais le pouvoir de célébrer tant le mariage religieux (nikah) que le mariage civil, cette désignation ne leur permet de célébrer et d'enregistrer que le mariage civil. Le mariage religieux, notamment le mariage musulman polygame, n'est pas formellement reconnu en Afrique du Sud. Le nikah doit normalement précéder la cérémonie civile mais il s'agit bien de deux mariages distincts. Les auteurs soutiennent qu'un des objectifs de l'introduction d'officiers célébrants musulmans était de simplifier le processus en permettant la célébration du nikah et du mariage civil dans une seule cérémonie, comme c'est actuellement le cas pour les mariages chrétiens et juifs. Pour être valide, le mariage civil musulman doit être monogame et célébré entre personnes de sexes opposés. Étant donné qu'il s'agit d'un projet-pilote, la désignation des officiers célébrants musulmans a également été soumise à des limitations ministérielles. Ainsi, ces officiers ne peuvent célébrer des mariages interreligieux et leur mandat est limité dans le temps. Le présent texte examine les implications constitutionnelles et religieuses que représentent ces limitations en regard des mariages polygames, interreligieux et entre personnes de même sexe. Il s'intéresse également aux raisons qui ont conduit à la mise sur pied de ce projet-pilote ainsi qu'aux implications de ce qui selon les auteurs deviendra ultimement une forme unique de mariage civil 'conditionnel' en phase avec les exigences de la loi islamique (Shari'a) en matière de nikah.

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From 2014 to 2017 some 227 South African Muslim clergy, including three females, graduated as civil marriage officers in terms of the Marriage Act 25 of 1961. Although now vested with dual capacity to perform both Muslim marriages (nikahs) and officiate at civil marriages, their designation authorises them to solemnise and register only civil marriages. All religious marriages, including Muslim polygynous marriages, remain formally unrecognised in South Africa. The nikah is expected to precede the civil marriage ceremony; however, they remain two separate (unrelated) marriages. The authors contend that one of the goals of introducing Muslim marriage officers should have been to streamline the process in order for a nikah and a civil marriage to be concluded during one ceremony, as is currently the rule for Christian and Jewish weddings. For Muslim civil marriages to be regarded as valid, they must be monogamous and entered into by opposite-sex couples. Since this is a pilot project, the designation of Muslim marriage officers has also been subjected to several ministerial limitations which includes precluding them from officiating at inter-faith civil marriages and subjecting their appointment to a time limit. This chapter examines the possible constitutional and religious implications of these limitations for Muslim polygynous, interfaith and same-sex marriages; the rationale for introducing the pilot project; and the implications of what the authors contend will ultimately be a 'conditional' civil marriage of a unique kind that has been brought into line with the Islamic law (Shari'a) requirements of a nikah.

I INTRODUCTION

On 30 April 2014, just prior to South Africa's fifth democratically held elections on 7 May 2014, the Ministry in the Department of Home Affairs (DHA),¹ in collaboration with the leadership of the Muslim Judicial Council (MJC),² a religious tribunal based in the Western Cape province,³ graduated and certified some 114 Muslim clerics (all males) as authorised (Muslim) civil marriage officers (MMOs) in terms of s 3⁴ of the Marriage Act of 1961⁵

¹ The DHA is a department of the South African government. It is responsible for the maintenance of the National Population Register (NPR) which includes the recording of marriages and deaths. For detail see www.dha.gov.za:8086/index.php/about-us/minister-of-home-affairs (accessed 10 April 2017).

² The MJC, an umbrella body established in 1945, describes itself on its website as 'one of the oldest, most representative and most influential religious organizations in South Africa'. See www.mjc.org.za/index.php?option=com_content&view=article&id=104&Itemid=21 (accessed 10 April 2017). Although without legal force in South Africa, the pronouncements of the MJC on Muslim personal law issues are generally accepted as morally binding by those members of the Muslim community who seek its assistance and involvement in their religious disputes, including those pertaining to matters of Muslim personal law.

³ In 1994 South Africa was geographically reorganised from four to nine provinces: Eastern Cape, Free State, Gauteng, Kwazulu-Natal, Limpopo, Mpumalanga, Northern Cape, North West and Western Cape. Muslims are predominantly located in four of these provinces: Eastern Cape, Western Cape, Gauteng and Kwazulu-Natal.

⁴ 'The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position,

(Marriage Act). The Marriage Act is an Act of the Parliament of South Africa and as such governs the solemnisation and registration of civil marriages. In order for such civil marriages to be regarded as valid, they must be: monogamous; entered into by opposite-sex (heterosexual) couples and solemnised by authorised marriage officers who are expected to strictly comply with the formalities prescribed by the Marriage Act.

Although the MMOs include religious authorities (ulama) with varying status, most MMOs hold the rank of imam (literally 'leader'). Subsequent training opportunities have increased the current number of MMOs to 227 and include the first three female MMOs. Although the civil marriage has its basis in the Roman-Dutch Law (common law), as evident from its terminology, the Marriage Act⁶ reflects a bias towards Christianity. Most of the major local textbooks on family law refer to religious marriages in the context of Indian, Jewish and Muslim marriages as if these exclude Christian marriages. Nonetheless, although Christianity is the dominant religion, all of the above religious marriages remain formally unrecognised in South Africa. Furthermore, the option of becoming civil marriage officers was always available to clergy of all these main religions in terms of the Marriage Act. While the appointment of ministers of religion as marriage officers is therefore not a novel step in South Africa, the fact that this was the first time that imams became MMOs, and did so in such large numbers, was deemed historic.⁷ This may have justified why the then Deputy President of South Africa, Kgalema Motlanthe, the then Home Affairs Minister, Naledi Pandor, and her (still current) Deputy Minister, Fatima Chohan (both Muslim women)⁸ were all in attendance at the graduation ceremony.

Since it is also the first time that a project of such a nature was rolled out, not everyone may be aware of the fact that this is a pilot project in terms of which the designation of MMOs has been subjected to several ministerial limitations which include precluding them from officiating at inter-faith civil marriages and which subjects their designation to a time limit after which it expires. Although currently these are no longer serious obstacles to recognition, Muslim marriages

a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion' (s 3 (1)). This section is still clothed in pre-democracy patriarchal language. It assumes the Minister of Home Affairs and ministers of religion to be males and still refers to the colonially coined term 'Mohammedans' to refer to local Muslims.

⁵ The Marriage Act 25 of 1961. Civil marriages are governed by the Marriage Act since its date of commencement on 1 January 1962 and the regulations issued in terms of the Act.

⁶ As, for example, evidenced by the explicit reference to 'church' in ss 3 and 29 (2).

⁷ On 22 September 2016 Sheikh Emandien, Head of the Social Development Department of the MJC, confirmed the authors' query that, to his knowledge, there were no imams in the Western Cape who were civil marriage officers before this pilot project was introduced.

⁸ Ms Pandor has since 26 May 2014 been replaced by Minister Mr Malusi Gigaba and Ms Chohan has been re-appointed as his deputy. Gigaba was head of the DHA until 31 March 2017 when the President of South Africa unexpectedly appointed him to another portfolio.

(nikahs)⁹ remain formally unrecognised in South Africa because they permit polygyny and are not solemnised by authorised marriage officers in terms of the Marriage Act. To remedy this, an essentially Islamic law (Shari'a) compliant draft Muslim Marriages Bill (MMB)¹⁰ has been approved by Cabinet in 2010 but has yet to be enacted. If enacted, it would be the nikah that would be recognised as legally valid and given separate legal standing in terms of South African law. The MJC, which has a long history in South Africa of being at the forefront of campaigning and championing for recognition of Muslim marriages, remains supportive of the proposed separate recognition of Muslim marriages through the MMB.¹¹

The conducting of nikahs usually forms an integral part of the role of imams in South Africa and, although it does occasionally occur elsewhere, the solemnisation of such marriages usually takes place in a mosque (Muslim house of worship). The rationale for introducing the project provided by the DHA for having a ready supply of MMOs in place when the legal recognition of Muslim marriages does indeed occur, may be deemed a positive, proactive preparatory step and may to a large extent justify the reason the MJC may have given this DHA pilot project its support. However, there were other practical reasons which have contributed to this alliance between the DHA and MJC, which in its turn, may also have been motivated by judicial and political considerations. Whether or not the accreditation of MMOs before recognition of Muslim marriages may be deemed to be a premature step, such accreditation has been largely welcomed by local Muslims, including activists,¹² as a positive step. Although the MJC had the blessing of a major national umbrella body, the United Ulama Council of South Africa (UUCSA),¹³ of which it is also a founding member,¹⁴ not all ulama (including some MJC members)¹⁵ were in support of this initiative or participated in the process.¹⁶ Some older MMOs

⁹ The Arabic word 'nikah' is usually used to denote an Islamic marriage although the terms 'marriage ceremony' and 'wedding' are also used interchangeably in this chapter to refer to the 'nikah' ceremony.

¹⁰ The MMB was published for public comment in January 2011. For a link to the Draft Muslim Marriages Bill, 2010 (General Notice 37, Government Gazette 33946 of 21 January 2011, 3-29) see www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 10 April 2017).

¹¹ See 'Marriage officers vital: MJC' *The Voice of the Cape*, VOC News 6 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12659-marriage-officers-vital-mjc (last accessed 22 May 2014).

¹² See 'Marriage officers hailed' *The Voice of the Cape*, VOC News 1 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12628-marriage-officers-hailed (last accessed 22 May 2014).

¹³ The UUCSA was established in 1994. It is one of two major national ulama umbrella bodies.

¹⁴ See N Moosa *Unveiling the Mind. The Legal Position of Women in Islam – A South African Context* (2nd edn, Juta, Cape Town, 2011) at 152 and its note 49.

¹⁵ For example, well respected Imam Moutie Saban, current Imam of the Jameah Mosque (est 1850), although affiliated to the MJC, was not supportive of this training.

¹⁶ In a statement issued on 30 April 2014 by the Islamic Unity Convention, an organisation also based in the Western Cape, they deemed the action of those ulama, who willingly sought accreditation as MMOs, as 'opportunistic and self-servicing'. It also appears from this statement that Islamic Unity Convention officials have confused accreditation of MMOs with the instant recognition of Muslim marriages. The Islamic Unity Convention statement, titled

have also indicated that given their age, they will themselves not be entering into civil marriages at this late stage in their lives but will encourage the younger generation to do so.

Since Muslim marriages remain formally unrecognised, it is only the civil marriage that can be registered by MMOs as a valid marriage. It is therefore unfortunate that during a congratulatory speech delivered to MMOs at their graduation, the then Deputy President of South Africa (Kgalema Motlanthe) incorrectly intimated that the registration of Muslim marriages by MMOs would henceforth accord such marriages legal status:

‘As a result of the Imams being designated as Marriage Officers in terms of the Marriages Act ... the registration of Muslim unions will accord Muslim Marriages legal status and with that, the protective instruments of the secular state may be accessed to ensure that these Qur’anic values are realised and complied with, within the Constitutional state.’¹⁷

The DHA itself also provided incorrect information on its website as follows:

‘The significance is that for the first time in South Africa’s history, *Muslim marriages* conducted by these *Imams will be recorded on the National Population Register [NPR]*, thereby receiv[ing] legal status and recognition afforded by the Constitution.’¹⁸

Comments like these, fuelled by ulama of the MJC and widely reported as such in the media, were therefore the cause of much confusion. To their credit, soon thereafter the MJC¹⁹ (and later the umbrella body the UUCSA²⁰) provided

‘Legalisation of Muslim Marriages raises concern-IUC [Islamic Unity Convention]’ was republished in *Al-Qalam*, Vol 40 No 5, May 2014, p 8.

¹⁷ See ‘SA: Kgalema Motlanthe: Address by the Deputy President of South Africa, on the occasion of the Graduation Ceremony for Imams qualifying as marriage officers, Old Mutual Park, Cape Town’ (30 April 2014) available at www.polity.org.za/article/sa-kgalema-motlanthe-address-by-the-deputy-president-of-south-africa-on-the-occasion-of-the-graduation-ceremony-for-imams-qualifying-as-marriage-officers-old-mutual-park-cape-town-30042014-2014-04-30 (accessed 10 April 2017).

¹⁸ Emphasis added. See the full statement at ‘Deputy President Kgalema Motlanthe to speak at the graduation ceremony of the Imams in Cape Town – 30 April 2014 at 10h00’ available at www.home-affairs.gov.za/index.php/statements-speeches/456-deputy-president-kgalema-motlanthe-to-speak-at-the-graduation-ceremony-of-the-imams-in-cape-town-30-april-2014-at-10h00 (accessed 10 April 2017).

¹⁹ It did so through media statements, radio panel discussions and its official website. See, for example, ‘Marriage officers vital: MJC’ *The Voice of the Cape*, VOC News 6 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12659-marriage-officers-vital-mjc (last accessed 22 May 2014). On its own website, the MJC indicated the following: ‘The statement that with the graduation of the Muslim Marriage Officers, the Muslim marriage has been legalised is not correct. We wish to rectify any incorrect perception created through the graduation of the Muslim Marriage Officers or media reporting ... It must be stressed that there are no new laws in this regard that have been passed ... The Muslim Judicial Council (SA) apologises for any confusion caused in this regard.’ The ‘MJC Muslim Marriage Officers statement’ was available on the official website of the MJC at www.mjc.org.za/index.php?option=com_content&view=article&id=553:mjc-marriage-officers-statement&catid=15:press-releases&Itemid=13 (last accessed 22 May 2014). See ‘Community notice: MJC

clarity and rectified the misconception. It therefore initially appeared that many people, lay and professional alike, may not have clearly understood the implications recording and civil status have on hitherto unrecognised Muslim marriages, or even that the imams themselves understood the extent of their powers and duties in their new role despite their training.

An MMO (one person) is vested with dual capacity to perform both nikahs and officiate at civil marriages. Their designation as MMOs legally authorises imams to solemnise civil marriages in terms of the Marriage Act and to register only these civil marriages at which they officiate. It is therefore the civil marriage that receives legal status and recognition and only its details are recorded in the NPR managed by the DHA.

While this implies that the parties to these civil marriages ought to be able to automatically access the protective provisions of secular state laws, and that this ought to be good news for Muslim women and their children, this chapter will highlight that that may not necessarily be the case because of what we contend will ultimately be a 'conditional' civil marriage brought into line with the Islamic law (Shari'a) requirements of a Muslim marriage (nikah). The civil option was always available to Muslims. In addition to a nikah, some Muslim couples enter into a civil marriage in order to guarantee the validity of their relationship in terms of South African law. However, the majority of Muslims do not enter into civil marriages because of fundamental differences between the two (religious and secular) systems. Many therefore still prefer the option of formal recognition of Muslim marriages. We contend that the argument that a ready supply of MMOs would be in place by the time Muslim marriages were recognised may not have been sufficient motivation to get the ulama on board. Given that the status quo of Muslim marriages remains unchanged, and that the MJC remains supportive of recognition, the DHA had to make the option of a civil marriage much more attractive in order to convince ulama to participate in the project. We contend further, as this chapter will detail, that, apart from various practical and political reasons which may have motivated the MJC to cooperate with the government, with the support of the provisions of the Marriage Act itself, ministerial limitations and negotiations between the MJC and the DHA, it appears that MMOs may not merely advise as marriage officers normally do. They may in fact prescribe to Muslim couples that the civil marriages over which they officiate must not be interreligious and must contractually conform to financial consequences in accordance with the requirements of Islamic law (Shari'a) and others that do not (negatively) impact on Muslim personal law. Failing this, they may refuse to officiate the wedding (in terms of the Marriage Act) or face censure by the MJC (umbrella body) which can request to have their authorisation as MMOs revoked (in terms of a

announces new leadership' The Voice of the Cape, VOC News 24 April 2016, available at www.vocfm.co.za/community-notice-mjc-announces-new-leadership/ (accessed 10 April 2017).

²⁰ See Press Statement issued by the UUCSA on 20 May 2014 titled 'Accreditation of Muslim Marriage Officers Sends Confusing Signals'. It was posted in Vol 9 No 20 of an online newsletter of one of its member bodies on 21 May 2014 and is available at www.jmmtsa.co.za/online-newsletter-vol-09-20/ (accessed 10 April 2017).

ministerial limitation). We contend that these conditions may in fact give rise to a civil marriage of a unique kind and that they exceed even those options provided by the proposed 2010 MMB. This may dissuade Muslims with more liberal understandings of Islamic law, who do not wish the terms of the civil marriage options to be dictated to them, from making use of the services of an MMO. These may instead opt to enter civil marriage using the services of other state authorised marriage officers who are appointed in terms of s 2 of the Marriage Act.²¹ One also has to question whether these conditions, and their refusal, may therefore leave MMOs and the religious bodies to which they may be attached open to constitutional challenge?

Local family law authors do not make the distinction between religious and civil marriages very clear:

‘... if a religious marriage ... is solemnised in terms of the Marriage Act or Civil Union Act (as Jewish and Christian marriages are), the marriage is fully recognised. In such event, the marriage has dual validity; in other words, the religious and civil marriages exist side by side, with the consequences of the civil marriage being governed by the South African common law and legislation relating to civil marriages, and the consequences of the religious marriage being governed by the particular system of religious law in terms of which the marriage was celebrated.’²²

This creates a mistaken impression that if the religious ceremony complies with the formalities of the civil marriage laws, that it too is fully recognised. It seems that similar mistaken impressions are created by foreign authors in other Muslim minority countries like the USA²³ and Australia.²⁴ However, authors in the UK make the distinction quite clear.²⁵

Although a preceding nikah is not required in rare cases where civil marriages (officiated by s 2 marriage officers) are also entered into, the Muslim wedding ceremony (nikah) conducted by an imam would usually precede it. The MJC requires that there should be a preceding nikah. MMOs are now continuing in this vein. Whether an MMO performs both the nikah and the civil marriage for

²¹ Certain functionaries, like magistrates and justices of the peace, are automatically marriage officers *ex officio* by virtue of the offices that they hold. These marriage officers occupy this position by virtue of their being civil servants of the state. However, the Minister of Home Affairs (or an official authorised to act on behalf of the Minister) can appoint other civil service employees as marriage officers. In practice, many employees in local offices of the DHA are appointed as marriage officers. See s 2 (1) and (2) of the Marriage Act.

²² J Heaton and H Kruger *South African Family Law* (4th edn, LexisNexis, South Africa, 2016) at pp 3–4.

²³ See A Quraishi and N Syeed-Miller ‘No Altars: a Survey of Islamic Family Law in the United States’ Chapter 11: The Muslim family in the USA: law in practice 188–198 in L Welchman (ed), *Women’s Rights and Islamic Family Law: Perspective on Reform* (Zed Books, London, 2004) at 188–189.

²⁴ A Black ‘Can there be a compromise? Australia’s state of confusion regarding shari’a family law’ In E Giunchi (ed) *Muslim family law in Western courts* (Routledge, United Kingdom, 2014) at Part III pp 149–167 at 154–155.

²⁵ See, for example, D Pearl and W Menski *Muslim Family Law* (3rd edn, Sweet & Maxwell, London, 1998) at pp 169–170 and 228.

the same couple or their civil marriage as an independent event, the nikah is expected to precede the civil ceremony and they remain two separate (unrelated) marriages. The DHA may have supported and encouraged this. The main reasons that they will not be simultaneously entered into (as may be the case in a Christian or Jewish marriage) are because of clear conflicts between the formalities for the solemnisation of a Muslim and a civil marriage and the dictates of local custom. There is therefore also no question of couples having to 'convert' a nikah to a civil marriage or of the nikah being formally recognised. The rationale for two separate marriages is motivated by the fact that if the couple is already religiously married, then they are able to easily comply with the formalities of the Marriage Act. We contend that one of the goals of having MMOs introduced should have been to streamline the process so that a nikah and a civil marriage can occur on one occasion as is usual with all other religious marriages officiated by civil marriage officers. It appears that the then Minister of Home Affairs (Naledi Pandor), who initiated the project, may share this view. At the graduation and quoted in the media, she commented: 'When I got married, we were taken by our parents to a civil ceremony ... [I] was told the real ceremony would happen later. The minister pointed out the goal had been for all unions to be recognised, so that there only needs to be one wedding.'²⁶ This makes the case for a more integrated, inclusive and streamlined process so that both the nikah and civil marriage (albeit still continuing as two separate marriages) can be concluded during one ceremony.

In support of our arguments and above contentions, this chapter will be divided into 11 sections, inclusive of the Introduction (Section I) and Conclusion (Section XI). Section II provides a necessary explanatory context. Section III provides a brief overview of further types of marriages that are currently legal in South Africa and the context in terms of which Muslims may validly enter into or officiate at these marriages, especially same-sex marriages. Section IV provides a brief overview of Muslims and the current progress with the proposed MMB to determine whether there may be a link between this recognition process and the introduction of MMOs and whether recognition may still be necessary. Section V highlights the practical reasons that justified the alliance between the DHA and MJC. Section VI provides an overview of the training process and graduation of MMOs in the context of women as MMOs, ministerial limitations attached to the role of MMOs, and possible constitutional implications.

Sections VII and VIII, respectively, highlight some of the differences between the requirements for the validity, and the formalities for their solemnisation, of Muslim marriages and civil marriages. Section IX highlights some of the differences between the matrimonial property regimes and the financial effects of Muslim and civil marriages. Section X makes the case for a more integrated,

²⁶ K Legg 'Historic day for Muslim marriages' Cape Argus, 30 April 2014 p3, available at www.iol.co.za/news/south-africa/western-cape/historic-day-for-muslim-marriages-1.1681947#.U2PXmYGSySo (accessed 10 April 2017). Ms Pandor converted to Islam upon marriage to a Muslim man.

inclusive and streamlined process so that both the nikah and civil marriage (albeit still existing as two separate marriages) can be concluded during one ceremony.

II EXPLANATORY CONTEXT

The label ‘clergy’ is conveniently used in this chapter to refer to essentially conservative local male Muslim religious authorities (ulama) even though they all belong to the *Sunni* branch of Islam which does not have a formal clergy. Although the label ‘imam’ was generally used by the media to denote all MMOs, Muslim clerics, in their roles as leaders in the Muslim community or as members of religious tribunals like the MJC, are also variously referred to as ‘sheikh’, ‘moulana’ or ‘mufti’, depending on their qualifications, and the location and religious orientation of the organisation or institution to which they belong. These terms are therefore used interchangeably in this chapter to refer to MMOs.

Although the training of MMOs was rolled out in three of the four provinces where Muslims are predominantly located, the focus of the chapter will be limited to the MJC²⁷ and to marriages between Muslims residing in the Western Cape.²⁸ Muslim personal law refers to the Muslim religious-based personal law which covers a gamut of areas pertaining to, among others, marriage, polygyny, divorce, maintenance, custody, guardianship and succession.²⁹ MPL is regulated by the prescriptions of the eighth century classical Shari’a rules developed by male jurists who were founders of the four Sunni schools (madhhabs or versions) of law, namely, Hanafi, Maliki, Shafi’i and Hanbali, as established in the two seventh-century primary sources of Islam, namely, the Qur’an³⁰ (the holy book of Islam) and Sunna³¹ (the traditions) of Prophet Muhammad, from which Islamic law is derived and on which it is based. After Muhammad’s death his traditions were embodied in a body of texts compiled as books called

²⁷ This is because of the pivotal role it played in initiating the process and because the co-author is an MMO and member of the MJC and was able to consult with other members of the MJC in order to clarify, confirm and provide answers to many of the questions raised in the chapter.

²⁸ This is because the authors are resident in, and more familiar with, the position in this province.

²⁹ See N Moosa, *Unveiling the Mind* 10.

³⁰ All excerpts from the Qur’an in this chapter are translations by Ali Y, *The Holy Qur’an: Text, Translation and Commentary* (Islamic Education Centre 1946). For ease of reference they are, for example, cited as follows: Q.1:2 which refers to the Qur’an, chapter (surah) one, verse (ayat) two.

³¹ Technically hadith (plural: ‘ahadith’) ‘is an item of information related to the Prophet, containing either something he did or said or (tacitly) consented to, and it is sometimes translated “tradition” as transmitted orally from reporter to reporter’ (See N Moosa, *Unveiling the Mind* at 26). All references to ahadith in this chapter are English translations from the authentic collection by Imam al-Bukhari (an imam of traditions as distinguished from an imam of Islamic jurisprudence) which were sourced from four of the nine volumes edited by MM Khan *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English* Volumes 2, 3, 7 and 8 (Saudi Arabia: Darussalam, 1997). For ease of reference, a hadith will, for example, be cited as follows: 7/52 which refers to Volume 7, p 52.

hadith. Jurists of the four schools of law hold different opinions about the requirements for a valid Muslim marriage and of the process to be followed during its solemnisation. South African-born Muslims and their ulama are essentially followers, in more or less equal numbers, of the Hanafi and Shafi'i schools.³² Hence, given their dominance, this chapter focuses only on these two schools. The description of a nikah in Section VIII is based on the experiences of the main author (who is a follower of the Hanafi school of law) and the co-author (who is a follower of the Shafi'i school) as members of the greater Cape Town Muslim community. Due to space constraints, in the case of both Islamic law and South African law the focus will be only on some areas that highlight potential conflict between the two systems by detailing, without necessarily motivating, any religious rationale. The 2010 MMB is the latest of three such published versions and is an amended version of the 2003 MMB. While brief reference is made to its progress and some of its provisions, the historical context and process leading up to the publication of the draft 2010 MMB, its constitutionality, and the mixed reception it received from the Muslim community, also fall beyond the scope of this chapter due to space constraints.³³ The MJC has since the introduction of the pilot project undergone a leadership change³⁴ and updated its website. The website therefore no longer contains information relating to the MMO process referred to in some of the references used in this chapter.

III FURTHER MARRIAGES THAT ARE CURRENTLY LEGAL IN SOUTH AFRICA

The Marriage Act is not the only law under which a marriage may be contracted in South Africa. There are currently two further separately legislated and regulated marriage options available whose solemnisation and registration are also managed by the DHA and which are recorded in the NPR.

South Africa recognises African customary marriages through the Recognition of Customary Marriages Act (RCMA)³⁵ of 1998. These marriages can be monogamous or polygynous but only apply to opposite-sex (heterosexual) couples. The definition of such a customary marriage in South Africa does not include marriages concluded in accordance with religious rites. Civil unions or partnerships are recognised in terms of the Civil Union Act (CUA)³⁶ of 2006. These unions or partnerships are monogamous and available to both opposite-sex and same-sex couples (without reference to whether the individuals are heterosexual or homosexual). Hence, Muslim couples may also

³² See Moosa *Unveiling the Mind* at pp 10, 56, 82 and 151.

³³ For a detailed history of the South African government's engagement with Islamic law and the three versions of the Draft Bill, see Moosa *Unveiling the Mind* at pp 143–162.

³⁴ See 'Community notice: MJC announces new leadership' *The Voice of the Cape*, VOC News 24 April 2016, available at www.vocfm.co.za/community-notice-mjc-announces-new-leadership/ (accessed 10 April 2017).

³⁵ Act 120 of 1998.

³⁶ Act 17 of 2006.

enter into monogamous, opposite-sex civil partnerships using the CUA without necessarily having to fall foul of Islamic law.

The CUA³⁷ provides that marriage officers appointed in terms of s 2 of the Marriage Act are automatically eligible to solemnise civil unions or partnerships. While it has been argued³⁸ that it ought not to be the case given their very public role as civil servants of the state, the CUA³⁹ also exempts these s 2 officiants from being compelled to officiate at unions of same-sex couples on the basis of a right to express a moral or conscientious objection.

The civil marriage option is only available to heterosexual couples and since MMOs are appointed in terms of s 3 of the Marriage Act, their mandate is limited to solemnising marriages of opposite-sex couples only. MMOs cannot therefore be approached, or expected, to solemnise same-sex unions. Marriage was a Sunna (tradition or custom) of Prophet Muhammad and the Qur'an encourages marriage to legitimise sexual relations between two people of the opposite sex.⁴⁰ Marriage between persons of the same sex is prohibited as homosexuality is deemed forbidden in Islam.⁴¹ In the light of comments in this regard made by the MJC,⁴² it is hardly likely that the MJC will ever approve of a gay marriage or of a gay imam as an MMO. The CUA⁴³ does, however, make provision for ministers of religion to officiate at marriages in accordance with the law and the rites of his or her religion. Although many local gay Muslim men and lesbian Muslim women⁴⁴ remain closeted for fear of being ostracised, Cape Town already has an openly gay imam⁴⁵ of a gay mosque⁴⁶ who is,

³⁷ Sections 4(1) and (2).

³⁸ See Helen Kruse 'Conscientious Objection to Performing Same-Sex Marriage in South Africa' (2014) 28(2) *International Journal of Law, Policy and the Family* pp 150–176 at 154.

³⁹ Section 6.

⁴⁰ See Q.24:32–33; Q.24:33 and Q.24:3.

⁴¹ See, for example, Q.7:80–81 and 7/418 (hadith).

⁴² During a roundtable ulama panel discussion on the role of MMOs, the deputy president of the MJC, Sheikh Riad Fataar, addressed the question of gay marriages as follows: 'the imam would have the right to turn away any couple that he felt uncomfortable with, whether that person was homosexual or other. "All that he is required to do by the Department of Home Affairs is to make a note in a file that he is uncomfortable with this, and this is the reason he is not doing the marriage. That was probably one of the first questions we raised when we spoke to the deputy minister..."' ('Marriage officers vital: MJC' *The Voice of the Cape*, VOC News 6 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12659-marriage-officers-vital-mjc (last accessed 22 May 2014)).

⁴³ Section 5 (1–4).

⁴⁴ See C Collison 'Queer Muslim women are making salaam with who they are' 10 February 2017 *Mail & Guardian* available at <https://mg.co.za/article/2017-02-10-queer-muslim-women-are-making-salaam-with-who-they-are> (accessed 10 April 2017).

⁴⁵ Muhsin Hendricks is an openly gay Imam and a grandson of an imam. Subsequent to declaring his status he was ostracised and formally requested 'to leave the mosques where he worshipped and worked. He now has a difficult relationship with other imams. They say that he is sinful' (A Okeowo 'South Africa's Gay Imam and His Disciples' available online at <http://aliciapatterson.org/stories/south-africa%E2%80%99s-gay-imam-and-his-disciples> (accessed 10 April 2017)). For more South African stories in which Muhsin also features, see P Hendricks (ed) *Hijab: Unveiling Queer Muslim Lives* (African Minds, Cape Town, 2009).

⁴⁶ Muhsin Hendricks is also the imam of Cape Town's first gay mosque. For details see L Chutel 'Mixing religion and politics: A gay mosque in Cape Town sounds the call to prayer for

moreover, in an inter-faith and same-sex marriage with a Hindu man. The rights of lesbian, gay, bisexual and transgendered people are protected in the Constitution.⁴⁷ There is nothing that would constitutionally preclude a gay (or a lesbian) imam, wishing to solemnise civil unions for same-sex couples, from applying for approval to become a religious marriage officer in terms of the CUA⁴⁸ as long as they are affiliated with a Muslim organisation that is supportive of such status and alternative Islamic law position.

IV OVERVIEW OF MUSLIMS AND THE CURRENT PROGRESS WITH THE RECOGNITION OF MUSLIM MARRIAGES (NIKAHS)

Dutch (followed by British) colonialism brought Islam from Indonesia (and later India) around the 1650s to what is today known as the Western Cape.⁴⁹ South Africa has a population of around 54 million with women constituting just over half of the population. Muslims, estimated to constitute close to 2 per cent of the population, remain a small religious minority there.⁵⁰ Since their arrival almost four centuries ago, Muslim marriages (nikahs) have remained formally unrecognised and unreformed in terms of South African law. Twenty years ago post-apartheid South Africa became a secular constitutional democracy with a justiciable Bill of Rights. The Constitution guarantees freedom of religion⁵¹ and makes provision for Muslim marriages and/or Muslim personal law to be formally and separately recognised through legislation.⁵² Once recognised, Muslim marriages must be consistent⁵³ with the Constitution's other provisions, like equality.⁵⁴ Although these constitutional provisions apply equally to all religious groups whose marriages are not recognised, the most progress as far as a call for recognition is concerned has thus far been made by Muslims. Progress with the MMB in 2010 occurred only after a 2009⁵⁵ Constitutional Court application was brought by the Women's

everyone' 2 November 2016 Quartz Africa available at <https://qz.com/824711/a-gay-mosque-in-cape-town-sounds-the-call-to-pray-for-everyone/> (accessed 10 April 2017).

⁴⁷ The Constitution of the Republic of South Africa 1996.

⁴⁸ See s 5(4).

⁴⁹ See S Allie 'A Legal and Historical Excursus of Muslim Personal Law in the Colonial Cape, South Africa, Eighteenth to Twentieth Century' in R Roberts, S Jeppie and E Moosa (eds) *Muslim Family Law Colonial Legacies and Post-Colonial Challenges* (Amsterdam, University of Amsterdam, 2017) pp 63–84 and Moosa *Unveiling the Mind* at pp 143–162.

⁵⁰ Christianity is followed by an estimated 80% of the population whilst African traditional beliefs, Judaism, Hinduism, Islam and other faiths together accounted for 3.7%. Muslims form the largest of these religious groups (2%) followed closely by Hindus (1.2%). This information and approximations have been gleaned from mid-year population estimates (2014) and data captured in the 2001 South African Census since the latest Census (2011) excludes religious affiliation.

⁵¹ Section 15(1).

⁵² Section 15(3)(a), s 15(3)(a)(i) and s 15(3)(a)(ii).

⁵³ Section 15(3)(b).

⁵⁴ Section 9.

⁵⁵ *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC). For the judgment see <http://wlce.co.za/wp-content/uploads/2017/02/MPL->

Legal Centre, a non-governmental organisation (NGO), in which it sought to oblige the current government to speed up the process of recognition.

The judiciary has in a series of MPL related cases since democracy to date acknowledged that non-recognition of Muslim marriages is discriminatory, and this has prompted some legislative changes favourable to Muslim women and children. Unfortunately, these and other secular protections of South African law apply to Muslim marriages on a piecemeal case-by-case basis and litigation is a very expensive option for lay women to pursue.⁵⁶ In 2013, the Women's Legal Centre brought yet another problematic Muslim marriage application, namely, *Faro v Bingham*,⁵⁷ to the Western Cape High Court. The matter was postponed. However, three astute observations from the case regarding the MJC and the MMB were highlighted as follows:

'[T]he court verified that the [MJC] "has no statutory or religious authority finally to determine questions as to whether a marriage has been validly concluded or dissolved in accordance with the tenets of Islam" [at para 34] ... [T]he court lambasted a government department for not making any progress on the enactment of legislation recognising the validity of Muslim marriages. It ordered the Department of Justice and Constitutional Development to set out the progress it has made in respect of the enactment of the Muslim Marriages Bill ... no later than 15 July 2014 [at para 47(c)(ii)] ... it is envisaged that the comments of the court regarding the status of the [MJC] will not go down well with the council and the conservative members of the Muslim community who regard themselves bound by its decisions.'⁵⁸

Instead of the government changing the status quo through enactment of the MMB, the deadline set by the Court merely prompted the government, through

Judgment.pdf (accessed 10 April 2017). Given the obligation and role that other organs of state, such as, the Ministries of Justice and Home Affairs, among others, ought also to play in the enactment of legislation, it was not surprising that the ruling of the Constitutional Court (highest Court) (at paras 21 and 27–28) did not allow the Women's Legal Centre direct access to it, and not only because it is not a court of both 'first and final instance', but because it also found that the matter would be best served by the intervention of other courts. The Constitutional Court judgment therefore does not consider whether Parliament may be under an obligation to enact legislation recognising Muslim marriages. The Women's Legal Centre describes itself as 'a non-profit, independently funded law centre, started by a group of lawyers in Cape Town in 1999, with a vision to achieve equality for women in South Africa ... The WLC [Women's Legal Centre] has been at the forefront of legal reform in relation to women's equality in South Africa since the Constitution came into effect, having won several precedent setting cases in the past'. See 'After a 10-year reform process, this week the recognition of Muslim marriages will be heard by the Cape High Court' http://wlce.co.za/wp-content/uploads/2017/02/WLC_Media-Release_Muslim-Marriages_130916.pdf (accessed 10 April 2017).

⁵⁶ For an example of one Muslim woman's story, with a case currently before the court, see Tammy Petersen 'Legality of Muslim marriage a religious, human rights issue – divorcee', News24, 24 March 2017. Available at www.news24.com/SouthAfrica/News/legality-of-muslim-marriage-a-religious-human-rights-issue-divorcee-20170324 (accessed 10 April 2017).

⁵⁷ *Faro v Bingham NO and Others ZAWCHC* unreported case number 4466/2013) of 25 October 2013 available at www.saflii.org/za/cases/ZAWCHC/ (accessed 10 April 2017).

⁵⁸ C Rautenbach 'The Modern-day Impact of Cultural and Religious Diversity: "Managing Family Justice in Diverse Societies"' (2014) 17(1) Potchefstroom Electronic Law Journal (PELJ) 521–552 and 536–537.

its Ministry of Home Affairs, put in place the pilot MMO project. The MJC agreed to participate in the pilot project in October 2013. Consultations took place with ulama in KwaZulu-Natal shortly thereafter in November 2013.

The fact that the first graduation of MMOs took place just prior to the national elections held in early May 2014, it has been suggested, may have been expedient and politically motivated given the waning popularity of the ruling majority party, the African National Congress, among Muslims in the Western Cape. Joining forces with the MJC in holding the graduation at that time could appease Muslims sufficiently to garner support for the African National Congress. This much has been theorised by the only registered Muslim community political party to have contested the 2014 elections, namely, the Al Jama-ah party,⁵⁹ in a press statement released by it shortly thereafter. The view was also supported by the Islamic Unity Convention.⁶⁰ Nonetheless, the Al Jama-ah party leader conceded that the MJC's official stance was neutral and a local political analyst rightly opined that the view of Al Jama-ah attributed too much power to clergy bodies like the MJC and gave their congregants too little credit for being able to make their own choices and decisions.⁶¹ This is borne out by the fact that following the elections, the Al Jama-ah party did not manage to secure a seat in Parliament and the Western Cape province was the only (of nine) province that the African National Congress lost to an opposition party.

Prompted by the fact that the government failed to meet the July 2014 deadline to report on the progress of the MMB, the Women's Legal Centre decided to proceed with the judicial route originally advised by the Constitutional Court in 2009. In March 2015⁶² it re-launched its application in the High Court seeking to oblige the government to enact the Bill within a year in a renewed bid to

⁵⁹ 'Organised clergy' derailed us: AJ' The Voice of the Cape, VOC News 13 May 2014 www.vocfm.co.za/index.php/voc/general/item/12720-organised-clergy-derailed-us-aj (last accessed 27 May 2014); 'The MJC's official stance was that you should apply your mind and vote for the party that would best suit you. But individual [clergy] like ... who is a very powerful voice in the MJC openly aligned himself with the ANC [African National Congress] and urged his followers to also vote for that party. That put us at a huge disadvantage.' ('MJC tightlipped on Al Jama-ah' The Voice of the Cape, VOC News 13 May 2014 <http://www.vocfm.co.za/index.php/news/local-news/item/12727-mjc-tightlipped-on-al-jama-ah> (last accessed 27 May 2014)).

⁶⁰ 'Opposition to marriage officers' The Voice of the Cape, VOC News 2 May 2014 available at www.vocfm.co.za/index.php/voc/general/item/12629-opposition-to-marriage-officers (last accessed on 27 May 2014).

⁶¹ The analyst opines that 'as strong as the various ulema and religious lobby groups believe their grip on their followers is; those same adherents will still base their decisions on what they believe in...these groups assume that their adherents will follow their edicts to the letter' ('Ulema can't sway vote: analyst' The Voice of the Cape, VOC News 14 May 2014 www.vocfm.co.za/index.php/news/local-news/item/12737-ulema-can%E2%80%99t-sway-vote-analyst (accessed on 27 May 2014)). As indicated in note 59 above, its leader is in the forefront of new developments relating to recognition of religious marriages.

⁶² See R Isaacs 'WLC [Women's Legal Centre] turns to courts on Muslim Marriage Bill' The Voice of the Cape, VOC News 3 February 2015 www.vocfm.co.za/wlc-turns-to-courts-on-muslim-marriage-bill/ (accessed 10 April 2017). *Women's Legal Centre Trust v President of the Republic of South Africa* (Case No: 22481/14) [2014] ZAWCHC (17 December 2014). See F

speed up the process of recognition. This application has since been postponed several times. When proceedings eventually resumed in September 2016, it was intimated for the first time during the hearing that the government was in fact in the process of investigating a proposal by Naledi Pandor (the same former Home Affairs Minister who was instrumental in rolling out the MMO pilot project) with regard to another controversial Bill which was drafted 2 years after the 2003 version of the MMB in 2005. The Recognition of Religious Marriages Bill (RRMB),⁶³ pertains to the uniform recognition of all religious marriages, including Muslim marriages, but which, unlike the 2010 MMB (based on the 2003 MMB), has not yet been approved by Cabinet. Both the draft MMB and the draft RRMB have yet to enter the parliamentary process. The case was postponed to 20 March 2017⁶⁴ and yet again postponed to 28 August 2017⁶⁵ when it is expected to proceed as a class action (and will include the Faro case).⁶⁶

The surprise development with regard to the RRMB and the introduction of MMOs leads the authors to question whether the MMB will indeed ever materialise. This reservation is supported by the fact that, as will be detailed in Section VI, the number of authorised MMOs has increased to over 200 after two further groups graduated in 2017. One has to question whether the continuation of training signals the need to have a ready supply of MMOs to deal with Muslim marriages in the context of the RRMB (which leaves the regulation of such marriages to religious authorities) rather than the MMB (which also makes provision for the role of Muslim clergy as marriage officers).

Villette 'Muslim marriage dispute lands in court', Cape Times 4 March 2015, available at www.iol.co.za/news/crime-courts/muslim-marriage-dispute-lands-in-court-1827178 (accessed 10 April 2017) p 1.

⁶³ F Schroeder 'Government not delaying marriage law, court told' Cape Argus 15 September 2016. Available at www.iol.co.za/news/crime-courts/government-not-delaying-marriage-law-court-told-2068528 (accessed 10 April 2017). A podcast detailing the very latest developments and some of the proposed revisions to the RRMB can be heard on the following link. 'Muslim marriages are finally recognized in South African Law – Ganief Hendriks' by Salaamedia #np on #SoundCloud <https://soundcloud.com/salaamedia/muslim-marriages-are-finally-recognized-in-south-african-law-ganief-hendriks> (accessed 8 April 2017). Mr Hendricks is the leader of the Al Jama-ah political party referred to above. Subsequent to the airing of this podcast around 8 April, this information has also been reported in local newspapers on 11 April 2017.

⁶⁴ F Schroeder 'Muslim marriages case thrown out ... for now', The Argus 20 September 2016. Available at www.iol.co.za/news/crime-courts/muslim-marriages-case-thrown-out-for-now-2070418 (accessed 10 April 2017).

⁶⁵ See T Petersen 'Muslim marriage case to be heard in August' News24 20 March 2017. Available at www.news24.com/SouthAfrica/News/muslim-marriage-case-to-be-heard-in-august-20170320 (accessed 10 April 2017).

⁶⁶ It was gleaned (on 17 March 2017) from correspondence between the MJC and the Women's Legal Centre, that the Judge President of the Western Cape High Court has ordered that the Faro and the Women's Legal Centre matters be consolidated with another matter (*Esau v Esau & Others* Case No: 13877/2015), in which the Women's Legal Centre is an amicus and which was also set down to be heard in March 2017, in order to be heard jointly.

V RATIONALE FOR THE ALLIANCE BETWEEN THE DHA AND MJC

While the reasons detailed in Section IV may indeed have contributed to the introduction of the pilot project, this section highlights a less well-known practical reason, namely, an issue pertaining to the changing of surnames.

Islam does not require a bride to change her surname to that of her husband when she gets married. On marriage a wife can keep her maiden surname, join her surname with her husband's (double-barrelled surname), or assume her husband's surname as the new spousal surname. It was complaints received by the MJC from Muslim women within the community that the DHA was not accepting the MJC marriage (nikah) certificate for the purposes of changing surnames that apparently initiated the process of appointing MMOs. In the past it was possible to change surnames without cost. Motivating their decision on the basis of curbing fraud, the DHA now requires a woman wishing to change her surname to do so by making an application and paying a fee of approximately 650 ZAR (roughly €60) which many are unable to afford. The MJC raised the matter with the Deputy Minister, Fatima Chohan, who responded by suggesting that the imams be registered as civil marriage officers.⁶⁷

With a civil marriage, the surname the wife has chosen is recorded on the marriage register and the marriage certificate. The DHA will automatically change the women's surname when the marriage is registered. Couples to a civil marriage therefore get an abridged (less detailed version) marriage certificate free of charge on their wedding day. The wife can use this certificate to change her surname with banks, etc. A week or two after the wedding the bride can apply at the DHA for a new identification (ID) book reflecting her new surname.

VI OVERVIEW OF THE TRAINING AND GRADUATION OF MMOS

The first training programme for imams in the Western Cape was co-ordinated by Mr Mowzer (Director in the office of the Deputy Minister of Home Affairs) in close liaison with Sheikh Emandien of the MJC.⁶⁸ The training was free and facilitated by the Learning Academy of the DHA. MMOs were provided with a study manual tailor-made to suit their designation.

⁶⁷ See 'Marriage officers vital: MJC' *The Voice of the Cape*, VOC News 6 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12659-marriage-officers-vital-mjc (last accessed 22 May 2014).

⁶⁸ This information was gleaned from a letter dated 18 February 2014 which was sent to Emandien by Mowzer and circulated to participating imams.

The training took place at a workshop held over 2 days (26 and 27 February 2014) in a hall at a convenient location. The (then) Minister of Home Affairs, Ms Pandor, delivered the keynote address at the opening. The training covered the principles of the Marriage Act and entailed passing a 2-hour written examination on them.⁶⁹ MMOs had to obtain a mark of 70 per cent. While many were able to exceed that requirement, a few imams either failed to write the examination or failed to pass it. Some of the latter rewrote the examination and passed it.

It was a prerequisite that all the imams be South African citizens who were affiliated to bona fide ulama organisations with constitutions. It was suggested by the MJC, therefore, and deemed more practically feasible by the DHA, that imams who did not meet these requirements do so under the umbrella of the MJC and in this way be able to be eligible for the MMO training.

An estimated 227⁷⁰ MMOs have to date undergone training in five separate groups (in three of the four provinces where Muslims predominate) and graduated at four different ceremonies. The training has excluded the most conservative Muslim scholars from Port Elizabeth in the Eastern Cape province who have also been instrumental in thwarting the progress of recognition of Muslim marriages until now.⁷¹

(a) Women as MMOs

Although the first group of graduates were all men, it did not come as a surprise when the first women graduated as MMOs in Gauteng. Many professional Muslim women employed in the civil service are s 2 marriage officers and therefore already officiate at civil marriages. Both the Marriage Act and the 2010 MMB make provision for such a possibility. The Marriage Act clearly includes women within the ambit of its gender neutral definition of a 'marriage officer' as '*any person* who is a marriage officer by virtue of the provisions of this Act'.⁷² The MMB provision pertaining to marriage officers is

⁶⁹ In terms of Regulation 3 (of 2009) of the 13th Amendment to the Marriage Act which reads as follows: 'The Director-General may direct that any marriage officer, or any person in respect of whom an application is made in terms of regulation 2, be subjected to an oral or written test, or both, for the purpose of ascertaining whether such marriage officer or person has an adequate knowledge of the Act and these regulations.'

⁷⁰ The latest total of 227 was confirmed by Mr Mowzer him in a telecon on 6 April 2017 and were constituted as follows: 106 graduated from the Western Cape; 53 from KwaZulu-Natal; and 68 from Gauteng. Although the first graduation of some 115 MMOs was held at a joint function in the Western Cape, these MMOs underwent separate training in two different provinces (65 in the Western Cape and 50 in KwaZulu-Natal). This was followed by the graduation of two groups in the Gauteng province (34 in 2016 and 30 (including the first three women MMOs) in 2017), and a further group in Cape Town (41 in 2017).

⁷¹ This was confirmed on 26 August 2016 by Sheikh Emandien of the MJC. He confirmed on 3 April 2017 that he knew of no MMOs in Port Elizabeth.

⁷² Section 1 (emphasis added).

also framed as gender neutral and provides that marriage officers may include ‘any [accredited and qualified] Muslim person’⁷³ regardless of gender.

As was also the case with its first course, it is evident from a notice circulated by the MJC⁷⁴ in October 2016 which invited imams to register for its second MMO course, that it excluded women. This did not, however, preclude women from challenging the status quo. Fatima Seedat, who holds a doctorate in Islamic law, and Farhana Ismail, a pre-marital coach and family mediator, are among the first three women to have graduated as MMOs.⁷⁵ These women have officiated at nikahs in South Africa since 2005 and have trained other women to do so.⁷⁶ They were not appointed as the agent (wakil) of the prospective bride. To the authors’ knowledge, there are no women who are officially appointed as imams of any mosques although they may be committee members of mosque boards.

(b) Ministerial limitations

After the first MMOs received certificates of completion, they received official appointment certificates or ‘Notices of Designation as Marriage Officers’⁷⁷ from the Minister of Home Affairs. These both limited the period or duration⁷⁸ of their designation and listed four further ministerial limitations.

It becomes apparent from a specially crafted training guide issued to these imams that they were in fact made aware of these limitations during their training and it appears that they may have been inserted either at the request of the Muslim clergy or on the advice of the DHA and may therefore even have been welcomed by them. However, it appears that some of the MMOs may have been taken by surprise by the time limit attached to their designation and the implication that, unlike other s 3 marriage officers,⁷⁹ they may have to

⁷³ See cl 1 of the Muslim Marriages Bill.

⁷⁴ This has been confirmed by the MJC’s Sheikh Emandien on 4 November 2016 to the co-author of this chapter.

⁷⁵ This has been confirmed in a telecom between the main author of this chapter and Ms Ismail held on 1 April 2017. For a picture of Ms Ismail at the graduation ceremony see @HomeAffairsSA’s Tweet available at <https://twitter.com/HomeAffairsSA/status/832703893754703873?s=08> (accessed 10 April 2017).

⁷⁶ For detail see F Seedat and F Ismail ‘Muslim nuptial contracts – progress at last?’ (2014) available at <https://mg.co.za/article/2014-05-08-muslim-nuptial-contracts-progress-at-last> (accessed 10 April 2017).

⁷⁷ In terms of s 4 of the Marriage Act which prescribes how the designation as marriage officer is to be made.

⁷⁸ Those issued to imams in the Western Cape in 2014, limited the period or duration of their designation to 30 April 2020 (terminating exactly 6 years after the date of their graduation on 30 April 2014).

⁷⁹ On 4 November 2016, an employee of the DHA called the co-author to enquire whether he was still a marriage officer, in order to update their files. When the co-author enquired if the designation of other marriage officers in relation to churches also had expiry dates, he was informed that this was not the case. When he queried this, he was told by the DHA employee to take up the matter with the MJC and the Regional Director of Home Affairs. As a member of the MJC, he will pursue the matter with the MJC.

undergo a re-registration process when their designations comes to an end. In response to the authors' query as to why the accreditation of MMOs is limited in duration, the response from the Office of the Deputy Ministry of Home Affairs was that, given that this was a pilot project, the Department thought it prudent to so limit it. Despite this justification, the limitations may amount to discrimination between imams and marriage officers of other religions.

The first limitation reads as follows:

'(a) No marriage involving any non-Muslim party shall be solemnised by yourself.'

In terms of this limitation, an MMO is therefore expected to solemnise only marriages of couples who are followers of Islam. MMOs can refuse to perform interfaith marriages unless, of course, the non-Muslim party removes this 'temporary impediment' by converting to Islam before the nikah. An MMO can rely on this ministerial limitation and on s 31⁸⁰ of the Marriage Act as motivation that such a marriage does not accord with the tenets of Islam.

However, limitation (a) is problematic for two reasons. First, Islam allows interfaith marriages. Second, given that South Africa is a multi-cultural and multi-religious nation, such marriages already do occur among Muslims of both sexes and therefore this limitation may be open to constitutional challenge.⁸¹

The Qur'an⁸² extols freedom of religion and emphasises non-compulsion as regards religious belief. However, Islam is also deemed to permit interreligious marriages only between Muslim men and non-Muslim, mainly Christian and Jewish (*kitabī*), women who, because they practise a monotheistic religion, do not have to convert to Islam. Although both parties may be marrying according to the precepts of Islam (*nikah*), it is inferred from the Qur'an⁸³ that a bride does not have to be a Muslim as long as she is a believer and not a polytheist.

However, the same privilege does not extend to Muslim women who may marry only Muslim men. Although there is no express provision in the Qur'an prohibiting a Muslim woman from marrying a male *kitabī*, the majority of Muslim jurists argue that since express permission was given only to men, women must, by implication, be prohibited from doing the same. On this basis,

⁸⁰ Section 31 of the Marriage Act makes it possible for MMOs to refuse to solemnise certain marriages as follows: 'Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization.'

⁸¹ For detail see Moosa *Unveiling the Mind* at pp 32–36 where juristic views of apostasy (or conversion from Islam) in the context of interreligious marriages, including in a South African context, are detailed and where the potential human rights related implications of such marriages are also referred to. Mindful of these implications the MMB, although Clause 1 clearly defines both a 'Muslim' and a 'Muslim marriage' (as a marriage between a man and woman), does not deal directly with interfaith marriages.

⁸² See Q.2:256 and Q.18:29.

⁸³ Q.2:221. See also Q.4:25 and Q.5:5.

a Muslim woman is only allowed to marry another Muslim man.⁸⁴ However, there is a saying or tradition of Muhammed (hadith)⁸⁵ which supports the view that both parties to the marriage must be Muslim.⁸⁶

The ‘Open Mosque’, launched in Cape Town on 19 September 2014,⁸⁷ held its first interfaith marriage between a Muslim woman and a Christian man without requiring him to convert to Islam.⁸⁸ As also indicated in Section III, the imam of the gay mosque is in an inter-faith partnership with a Hindu man. Although the mosque has attracted much criticism and controversy, it is accessible to all, regardless of religion, cultural affiliation, school of law, sexual orientation, or gender. However, the MJC has advised Muslims, in no uncertain terms, not to patronise it.⁸⁹

Should MMOs in the Western Cape not abide by these limitations of their certificates or related rulings of the MJC, their designation may be revoked in terms of ministerial limitation (e).⁹⁰

VII DIFFERENCES BETWEEN THE REQUIREMENTS FOR THE VALIDITY OF MUSLIM AND CIVIL MARRIAGES

In terms of both Islamic and South African law, a marriage must comply with a number of requirements before it can be regarded as valid. Although there may be some overlap between systems, there are also marked variations between them. Legal capacity, consent of parties, presence of witnesses, and dower (mahr)⁹¹ are deemed to constitute the four essential requirements for a Muslim marriage. Although ahadith (plural of hadith) clearly indicate that a woman should consent to her marriage, how her consent is ensured may vary.⁹² Depending on the school of Islamic law that she may belong to, her consent alone may also not be sufficient since she may require the presence of her

⁸⁴ Q.2:221; Q.60:10.

⁸⁵ (7/137). This is borne out by the reference to Q.2:221 in another hadith (7/52).

⁸⁶ See M Abbas *Daughters of the Holy Prophet* (Adam Publishers, New Delhi, 2013) at pp 9 and 15.

⁸⁷ C Coetzee “‘Open Mosque’ to launch in Cape Town’ Cape Times, 15 September 2014, pp 1 and 4 available at www.iol.co.za/news/south-africa/western-cape/open-mosque-to-launch-in-cape-town-1750826 (accessed 10 April 2017).

⁸⁸ L Mofteh ‘South Africa Mosque Holds First Interfaith Marriage: Muslim Woman, Christian Man Marry In Controversial Ceremony’ 23/03/15 International Business Times available at www.google.co.za/amp/www.ibtimes.com/south-africa-mosque-holds-first-interfaith-marriage-muslim-woman-christian-man-marry-1855788%3Famp%3D1 (accessed 10 April 2017).

⁸⁹ F Villette and A Hartley ‘Stay away from Open Mosque, urges MJC’, Cape Times, 19 September, pp 1 and 4.

⁹⁰ Limitation (e) reads as follows: ‘This designation shall be revoked prior to the date stated in (d) above if you are suspended or expelled from the religious body that nominated you or at the instance of the Minister of Home Affairs in terms of section 9 (1) of the Act.’

⁹¹ See Q.4:4, Q.4:24–25, Q.5:5.

⁹² See ahadith 7/58–59.

guardian (*wali*)⁹³ as a contracting party, or his representative (*wakil*). The presence of a *wali* would also depend on whether or not it is her first marriage (she could be widowed or divorced). The hadith ‘marriage only through a guardian’ has to date played an instrumental role in preventing the majority of Muslim women from being active participants in their own marriage. Abiding by this religious rationale and customary practice, their lack of participation is therefore more of a symbolic affront to the brides. However, little mention is made of another hadith in terms of which the Prophet attributed a wider meaning to the role of a guardian with regard to a ward and warned that such role be taken seriously.⁹⁴

A civil marriage may only be solemnised by a marriage officer⁹⁵ in the presence of both parties and not by their representatives.⁹⁶ Proxy marriages are clearly therefore not permitted in terms of the Marriage Act. Moreover, the civil marriage formula requires parties to hold each other’s right hand.⁹⁷ This is significant because it implies their presence and actual, as opposed to virtual, consent.

The presence of the *wali* as a contracting party (or his agent) is deemed by jurists of the Shafi’i school of law to be important for the very validity of the marriage itself. They find the basis for their view in the Sunna (traditions) of Muhammad. However, unlike a Shafi’i bride, in the case of a Hanafi bride who is of marriageable age and who is able to contract herself into marriage, the father is not her *wali*⁹⁸ but may represent her (*wakil*). A civil marriage requires the presence of the bride, two witnesses and the marriage officer at the wedding ceremony to sign the marriage register.⁹⁹ While the presence of two adult Muslim witnesses is also required for a Muslim marriage, they are always two males in terms of the Shafi’i school but may be one male and two females in terms of the Hanafi school based on the Qur’an.¹⁰⁰ In South Africa an existing civil marriage can only be terminated by divorce by the secular courts or death. Parties will need to show a marriage officer proof of termination of a previous civil marriage through a final decree of divorce or the deceased spouse’s death

⁹³ According to Aisha, the wife of the Prophet, he said: ‘A marriage is not valid except through the *Wali* (ie her father or her brother or her relative etc)’ (7/52).

⁹⁴ The Prophet is reported to have said: ‘Everyone of you is a guardian and everyone of you is responsible (for his wards) ... Beware! All of you are guardians and are responsible (for your wards)’ (7/81–82).

⁹⁵ Section 11(1) of the Marriage Act.

⁹⁶ Section 29(4) of the Marriage Act.

⁹⁷ Section 30(1) of the Marriage Act.

⁹⁸ Jurists of the Hanafi school hold that, based on the Qur’an (2:232) itself, previously married women, young and old, may get married on their own accord, that is, without the approval of (and presence of) a guardian, without it affecting the validity of the marriage.

⁹⁹ Section 29A(1) of the Marriage Act. Furthermore, any male and female person present at the ceremony may sign the register as a witness, provided they are 16 years of age or older (albeit still a minor in terms of South African law) and able to produce a South African Identity Document, or, for those not resident in South Africa, their passport, as this information is required for the marriage register.

¹⁰⁰ See Q.2:282. See also Q.5:109–110 and Q.2:143, although unrelated to marriage, but which nonetheless, encourage the use of witnesses.

certificate. The Marriage Act does not deal with the dissolution of marriages, which is governed by the Divorce Act of 1979.¹⁰¹ Although judges, when dealing with a secular divorce, have a discretion to request proof of a religious divorce¹⁰² (the MJC will only issue a final decree of divorce if the prescribed waiting period or idda process has been completed),¹⁰³ it remains to be seen whether an MMO, in the event that a widowed bride-to-be, who was married in terms of Islamic law and is in the process of completing the prescribed idda of widowhood, but wants to civilly marry another man during this period, may refuse to solemnise such a civil marriage on this basis. Although the authors maintain that an artificial link is being created between two separate (legally unrelated) marriages, if the religious 'idda' is an 'impediment' to the finalisation of the civil divorce, then by the same token it may be possible for an MMO to view the idda of a widow as an impediment to entering into a civil marriage and justify refusal on the basis of the Marriage Act.¹⁰⁴ There are also variations in Islamic law regarding the content of an essential requirement as applied in the Muslim world. For example, while Muslim countries may agree that the legal capacity of parties pertains to their having mental and physical capacity and that they are free of several impediments pertaining to age, gender, existing marital status and religion etc, some Muslim countries have, through MPL reforms, bypassed the Islamic law pertaining to puberty¹⁰⁵ by raising the minimum age of marriage of both males and females to 18 years or above. These minimum ages vary from country to country and in most instances the minimum age for boys is always higher than that for females although in some countries the ages for both sexes are the same. If below the required age, the additional consent of a guardian may be required to make up for the consent. Although 18 is the age of majority and therefore also the legal age for marriage in South Africa, and the proposed age for marriage in terms of the MMB of 2010, both South African and Islamic law allow for earlier child marriages (before the age of 18¹⁰⁶) with the necessary permission. Minors (below 18) must have parental consent to the marriage.¹⁰⁷ A male under the age of 18, or a female under the age of 15, will need the consent of the Minister of Home

¹⁰¹ Act 70 of 1979.

¹⁰² In terms of s 5A of the Divorce Act, primarily to avoid a scenario of hanging religious marriages or divorces, a secular court judge has a discretion to refuse to grant a civil divorce unless parties produce evidence (for example, a certificate from a credible religious body like the MJC) that a religious divorce (whether initiated by a husband (talaq) or wife (faskh)), has first been obtained. However, it is possible for Muslim couples to contractually regulate a husband's delegation of his right to divorce his wife to her before the marriage, so that ultimately only a final (secular) divorce decree needs to be obtained.

¹⁰³ A specified amount of time must therefore have elapsed (usually 3 months for a divorcee and 4 months and 10 days for a widow) before they are allowed to re-marry.

¹⁰⁴ Section 31 of the Marriage Act.

¹⁰⁵ See N Moosa 'Women, gender and child marriage: Sub-Saharan Africa, overview' in S Joseph, A Najmabadi, J Peteet, S Shami, J Siapno and J Smith (eds) *Encyclopedia of Women and Islamic Cultures* Family, Body, Sexuality and Health Vol 3 (Leiden: Brill Academic Publishers, 2006), pp 61–63.

¹⁰⁶ Section 28(3) of the Constitution and s 1 of the Children's Act (Act 38 of 2005) define a minor as a person below the age of 18.

¹⁰⁷ Section 24(1) of the Marriage Act.

Affairs in addition to parental consent.¹⁰⁸ This discrimination on the basis of sex may be unconstitutional but has not yet been challenged. While it is presumed, given its paramountcy in South African law and its application in many Muslim countries, that such permission ought to be guided by the principle of what is in the ‘best interest’ of the child, it appears that in South Africa such permission may be sought and granted without having to supply any real reason, including a religious or cultural rationale therefor. In South Africa only age, gender, and existing marital status would be regarded as essential. Religion, for example, will not be an impediment when state-authorized marriage officers solemnise a civil marriage. Unlike the position according to the Shafi’i school, but similar to that adopted by the Hanafi school, in South Africa a minor girl attains the status of majority upon marriage and retains it after the marriage is terminated through death or divorce. The consent of a third party requirement is therefore dispensed with thereafter.¹⁰⁹ The 2010 MMB¹¹⁰ allows the wali or guardian of a minor to contract a marriage on behalf of that minor. Furthermore, the MMB¹¹¹ also allows a Muslim person or body designated by the relevant Minister to authorise a marriage between minors. The Marriage Act prescribes that civil marriages be both heterosexual and monogamous. However, although the Qur’an encourages monogamy for both sexes,¹¹² it also contains provisions that permit Muslim men to enter into polygynous marriages with up to four wives at any one time.¹¹³ It is also evident from various Qur’anic verses,¹¹⁴ that polygyny was not intended to be a privilege for all believing men that would continue in the future. A man is mandated to treat all wives equally and if he fears that he will not be able to meet these conditions then he is not allowed to have more than one wife.¹¹⁵ Since bigamy is a crime in South Africa,¹¹⁶ it is illegal to re-marry civilly if there is already an existing civil marriage. The DHA will not register a further civil marriage if a person is recorded as ‘married’ on its system.¹¹⁷ While nothing would preclude a civilly married man from entering into a further nikah, the courts will not recognise the religious marriage as a valid.¹¹⁸ Although an MMO cannot solemnise a further civil

¹⁰⁸ Section 26(1) of the Marriage Act.

¹⁰⁹ Section 24(2) of the Marriage Act. This section (and s 26(1) referred to above) may be in violation of the equality clause (s 9) of the Constitution. The rationale that the female body may be more developed for childbearing may be true but is nonetheless exploitative and tantamount to denying a girl the further opportunities to develop herself intellectually.

¹¹⁰ Clause 5(4).

¹¹¹ Clause 5(5).

¹¹² The Quran (24:32) encourages men and women to marry persons who are single (which would include widows/widowers and divorcees). See also Q.4:24.

¹¹³ See Moosa *Unveiling the Mind* at pp 33 and 37.

¹¹⁴ See Q.33:50; Q.4:3 and 129 and Q.33:4.

¹¹⁵ Q.4:3.

¹¹⁶ Bigamy is defined as follows: ‘Bigamy consists in unlawfully and intentionally entering into what purports to be a lawful marriage ceremony with one person while being lawfully married to another.’ J Burchell *Principles of Criminal Law* (4th edn, Juta, Cape Town, 2013) p 656.

¹¹⁷ The DHA has an online marriage verification service which allows a person and marriage officers, via SMS or email, to check a man or woman’s marital status. See www.home-affairs.gov.za/index.php/marriage-certificates (accessed on 10 April 2017).

¹¹⁸ See *Ismail v Ismail and Others* [2007] ZAECHC 3 (8 February 2007) available at

marriage for the same man to another woman whilst the man is already civilly married as he would fall foul of the civil law, his dual role as an imam may not necessarily preclude him from performing a further religious marriage between such a civilly married Muslim man and another woman. There is also nothing precluding such a civilly married man from approaching an imam who is not an MMO to solemnise such further (polygynous) Muslim marriages for him. In both cases the husband cannot be guilty of bigamy since the nikah is not recognised as a valid civil marriage. For the same reason nothing would preclude an MMO from solemnising a (first) civil marriage for a man to a woman other than the wife to whom he may already be religiously married only, or, for that matter, inadvertently solemnising a (first) civil marriage of a woman to a man other than a husband to whom she may already be religiously married (tantamount to polyandry which is not allowed in Islam). These are precisely the type of application problems that the provisions of the MMB propose to regulate.

VIII DIFFERENCES BETWEEN THE FORMALITIES FOR THE SOLEMNISATION OF MUSLIM MARRIAGES (NIKAHS) AND CIVIL MARRIAGES

It can be inferred from the primary sources of Islam, the Qur'an and the Sunna, that a Muslim marriage can be both sacramental (religious) and contractual (legal) in nature. While certain Muslim authors may disagree on the extent to which a Muslim marriage, deemed by some to be a contract (civil act) only, may be of a 'sacramental' nature, many agree that Muslim marriages be regulated in terms of Islamic religious law to give their effects a character of sanctity.¹¹⁹

www.saflii.org/za/cases/ZAECHC/2007/3.html (accessed 10 April 2017) and *Rose v Rose* (unreported Case No: 14770/2011) [2015] ZAWCHC, judgment delivered on 29 January 2015). In the Ismail case the first and second (first wife) respondents were the parties to a civil marriage. The applicant was the second wife of the first respondent married to him in terms of Islamic law, and the marriage subsequently broke down. The Court upheld the right of a second wife (Islamic marriage) to interdict her husband and his first wife from selling 'her home' in respect of which she had an unregistered 99-year lease although the property legally belonged to her husband and his first wife. However, it was the lease that was upheld, not the polygynous marriage. The *Rose* case was another controversial Muslim personal law case brought to the Western Cape High Court by the Women's Legal Centre. In this case a couple concluded a Muslim marriage after the husband was already civilly married to another party in terms of the Marriage Act. The Court granted the Muslim wife relief which was deemed to be in excess of what she would strictly speaking have been entitled to in terms of Islamic law, and its outcome also contravened South African law since, as correctly pointed out by Heaton and Kruger *South African Family Law* at p 246, the Muslim marriage would be void in terms of South African law.

¹¹⁹ See J Nasir *The Islamic Law of Personal Status* vol XXIII, Arab and Islamic Laws Series (3rd edn, Kluwer Law International, 2002) at p 45. See also N Moosa 'A comparative study of the South African and Islamic law of succession and matrimonial property with special attention to the implications for the Muslim woman' (1990) (Master thesis dissertation) University of the Western Cape at pp 24–25.

While a Muslim marriage may often be seen as a religious function, Islamic law (Shari'a) does not prescribe any particular form of marriage ceremony.¹²⁰

The more social part of the nikah ceremony has been encouraged by the Prophet Muhammad who is reported to have said: 'make the marriage publicly known, and perform it in mosques, and beat it with duff [type of tambourine]'.¹²¹ The Marriage Act makes provision for a civil marriage to be conducted in various locations, including a mosque, hall or private home.¹²² Although the Marriage Act no longer requires that banns of marriage or notices of intention to marry be published or that special marriage licences be obtained. Anyone may still raise objections to a civil marriage, causing the union to be investigated by the marriage officer.¹²³

The Qur'an describes a Muslim marriage as a sacred agreement or pledge ('solemn covenant').¹²⁴ The Qur'an encourages the practice that commercial contracts and financial arrangements be reduced to writing.¹²⁵ Since it also allows the marriage gift or dower (mahr) to be of considerable value,¹²⁶ it can be argued that a contract of marriage, although normally deemed to be an oral arrangement, should also be reduced to writing.¹²⁷ However, although alluded to in hadith,¹²⁸ this has not been required by the Qur'an and therefore it is not surprising that jurists of the Hanafi and Shafi'i schools of law deem a witnessed oral agreement of marriage as sufficient proof of its validity. However, this has not precluded the marriage contract from being formalised in writing and subsequently registered, as is currently the case in many Muslim countries. Reducing the contract to writing would also have greater evidentiary value if witnesses are no longer alive.

While a marriage officer is needed for a civil marriage, since in Islam there is strictly speaking no concept of clergy, the presence of, or officiation by, an imam is not required. While the Qur'an does not prescribe any particular religious ceremony to be followed for the solemnisation of a Muslim marriage, we are guided by the Sunna of the Prophet Muhammad. Although the contract of marriage is usually an oral agreement, it does not require that there be a fixed formula or set of words or even that Arabic (the language of the Qur'an) be used to convey or express the 'offer' ('ijab') of marriage and its 'acceptance' ('qubul') that are necessary for the validity of a Muslim marriage. Any language, including English, may therefore be used. Thus, strictly speaking,

¹²⁰ N Moosa 'A comparative study of the South African and Islamic law of succession and matrimonial property with special attention to the implications for the Muslim woman' (1990) at p 25.

¹²¹ (7/63).

¹²² Section 29(2).

¹²³ Section 23.

¹²⁴ Q.4:21.

¹²⁵ Q.2:282.

¹²⁶ Q.2:236.

¹²⁷ Because it also involves assets, the same argument can be made with regard to bequests. See Q.5:106.

¹²⁸ (7/57).

because Islam requires very little by way of religious formalities or even that the contract of marriage be in writing, assuming the necessary capacity to do so and compliance with the essential requirements, it is possible, from a purely contractual point of view, for parties to personally and by themselves, or through someone else, legally contract a valid marriage with each other¹²⁹ and to do so orally and/or in writing.

Since there is, strictly speaking, no concept of clergy, a Muslim father is also empowered in Islam to marry off his own daughter (and son). However, it is an entrenched practice locally, and therefore customary, for a religiously qualified imam to officiate at the actual marriage ceremony (nikah) in a mosque. There is still much more emphasis on marriage as ritual and sacrament than contract in the Muslim community. The roles of both the imam and the wali are therefore recognised by the community as essential to the nikah ceremony which usually occurs in a mosque.

There is usually a request for marriage made by the prospective groom and acceptance by the prospective bride. However, nothing precludes the request coming from a woman¹³⁰ as was the case with the Prophet's marriage (to Khadija). In the case of a Shafi'i bride (whether she is a minor or an adult), her male guardian (wali) (usually her father or brother) indicates, in the presence of the congregation in attendance and the witnesses that he has brought who can confirm the same, that his daughter, who is usually an absentee 'contracting' party (although she may be present if separate facilities are available for women and she does not participate in the actual ceremony) has indicated her wish to be married to the groom and has consented to the marriage and that he as her guardian (and therefore the real contracting 'party') approves of the marriage and has appointed the nominated imam as his wakil (first agent or representative) to conduct the proceedings and perform the nikah ceremony. The imam, duly authorised, then conducts a sermon in Arabic which invariably he translates into English for the benefit of the assembled congregation, the majority of whom, although they may be able to rote read and recite Arabic, do not understand its meaning.¹³¹ Thereafter he conducts the nikah with the formula in Arabic (Hanafis, unlike the Shafi'is, allow any language to be used). The imam conveys the offer (on behalf of the father) to the groom and the groom accepts it in Arabic. The imam asks the groom a question along the following lines: 'do you take so and so to be your lawful wife for such and such a dower', to which he then responds in the affirmative: 'I accept so and so to be

¹²⁹ According to TU Rahman *A Code of Muslim Personal Law* Volume 1 (Hamdard Academy, Pakistan, 1978) p 61 nothing precludes the words of consent from being addressed to each other.

¹³⁰ See 7/45 and 7/65.

¹³¹ It was a tradition (Sunnah) of the Prophet to deliver a sermon (khutbah) before the actual solemnisation of the nikah during which he imparted advice (naseegha) on the role of marriage and the rights and responsibilities of the parties to it. See (7/63 and 7/67). The nikah is usually followed by a prayer (dua), tantamount to a blessing, asking God to shower his blessing on the marriage and the couple and unite the two of them in goodness. Both his khutbah and dua make reference to the couple. The Prophet also encouraged the groom to hold a wedding feast, known as a walima, after the nikah ceremony (7/74).

my wife for such and such a dower'. The dower or marriage gift (mahr) and its type (prompt or deferred payment) that has been agreed upon, to be provided by the husband to the wife¹³² to ensure the validity of the marriage, is confirmed. After the payment of the mahr, there is a closing prayer (dua) or blessing. The Marriage Act makes it possible for an MMO who leads the couple during the solemnisation process to utter a sui generis (but pre-approved) marriage formula¹³³ and thereafter to bless¹³⁴ the marriage with a dua for the couple. The MJC has confirmed that the current¹³⁵ nikah formula used by imams to conclude marriages is still not legally recognised.¹³⁶ Whether ulama will be able to reach consensus on a national nikah formula remains to be seen. Given that there is no concept of clergy, a nikah does not require the religious benediction of an imam for its legal validity.¹³⁷ By solemnising and registering civil marriages, s 3 MMOs are performing administrative functions for the DHA without remuneration and may not demand any fee¹³⁸ for doing so. However, the same fee section of the Marriage Act may be used to motivate that there may be nothing precluding MMOs from accepting a fee for blessing the civil marriage since a gratuity (known as a 'slawat'),¹³⁹ associated with the granting of such religious benediction, has been a long-standing practice in the case of the purely religious nikahs.

¹³² See Q.4:4 and 4:20.

¹³³ In terms of s 30(1) of the Marriage Act.

¹³⁴ Section 33 of the Marriage Act provides: 'After a marriage has been solemnized by a marriage officer, a minister of religion or a person holding a responsible position in a religious denomination or organization may bless such marriage according to the rites of his religious denomination or organization.'

¹³⁵ The following is a literal English translation, from Arabic, of a typical nikah formula used by Shafi'is locally: 'I Am Performing This Marriage In Accordance With The Command Of Allah ... Dear [prospective groom] I Am Giving Unto You In Marriage Your ... [prospective bride] Daughter Of Mr [father of bride] My Principle For The Dowry Of [amount in ZAR] Cash Of Which Both Of You Have Agreed Upon. The groom will then reply immediately in Arabic in the following manner ... I Accepted To Marry Her For Myself And For That Dowry.' Sheikh MA Fakier *Ar-Risaalah Al-Mufeedah A Book on General Islamic Knowledge* (Lansdowne, 1995) p 268.

¹³⁶ See 'MJC Muslim Marriage Officers statement' available on the official website of the MJC at www.mjc.org.za/index.php?option=com_content&view=article&id=553:mjc-marriage-officers-statement&catid=15:press-releases&Itemid=13 (last accessed 22 May 2014).

¹³⁷ See N Moosa 'A comparative study of the South African and Islamic law of succession and matrimonial property with special attention to the implications for the Muslim woman' (1990) at p 25 n 12.

¹³⁸ Section 32 of the Marriage Act dealing with fees payable to marriage officers states clearly: '(1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him as marriage officer in terms of this Act: Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him, receive (a) such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his religious denomination or organization, for or by reason of any such thing done by him in terms of a prior law; or (b) such fee as may be prescribed.'

¹³⁹ 'Slawat' is 'a colloquial term referring to a small stipend paid to an Imam for services he renders to members of his congregation' (F Gamielien *The History of the Claremont Main Road Mosque, its People and their Contribution to Islam in South Africa* (Claremont: Claremont Main Road Mosque, 2004) at p 132). The sum of money paid to an imam usually varies according the means of whoever of the bridal party (bride or groom) or his or her family

The Hanafi bride who is a minor is also given into marriage by her guardian (wali) who is usually her father. Although a Hanafi bride of marriageable age is able to contract herself into marriage, because she is also traditionally an absentee contracting party, her father or someone appointed by her usually assumes the role of her wakil (first agent) and he in turn delegates the task to the imam who becomes the second agent in the process. While both Hanafi and Shafi'i grooms who are minors¹⁴⁰ will also be contracted into marriage through a wali (guardian), they will be present at the nikah.¹⁴¹

As the process currently stands, in the case of Shafi'is, the bridegroom technically 'concludes' the contract with the legal guardian (wali) of the bride, and in the case of Hanafis, even though the guardian's consent does not substitute for the bride's consent, the bridegroom concludes the contract with the imam! Nonetheless, the permission (consent) of the guardian is deemed commendable and honours the parent (or relative) who was responsible for the upbringing and best interests of the bride up to that point. While respect for and the blessing of parents are highly valued, this does not imply the substitution of the bride's own consent and participation without both of which the marriage is void. Both parties to the marriage must freely consent to the marriage. Forced marriages are not permitted in Islam.

IX DIFFERENCES BETWEEN THE PROPRIETARY CONSEQUENCES (EFFECTS) OF MUSLIM AND CIVIL MARRIAGES

Muslim women are regularly reminded of their marital obligations, and while there is little contention among Muslims that Islam affords women many rights upon marriage, many women are unaware of the fact that they may, at the time of marriage (when they have the maximum bargaining power) contractually safeguard, either orally or by way of express stipulation in the marriage contract itself, many of these rights. Unfortunately, many women often first become aware of these rights only when it is too late to do anything about the contract. This is usually at the time when the marriage has broken down or has terminated through death or divorce and when they then seek, and are most in need of, relief and recourse.

(usually parents), where they are still very young, who 'employs' his services and may therefore, in some cases, also be quite high. There is currently no specific legislation which regulates religions in South Africa and cases of abuse of religion through, for example, the soliciting of payments for weddings and prayers.

¹⁴⁰ While it may be deemed not to be necessary at the time of marriage, the parties must have reached marriageable age (puberty) at its consummation (7/57). The permissibility of giving one's young children in marriage on the basis of this hadith remains a controversial issue. Various scholars question the authenticity of this hadith. For detail on a minor's legal capacity and awareness of being able to rescind a marriage on reaching puberty in terms of Islamic law see J Nasir 'The Status of Women under Islamic Law and Modern Islamic Legislation' in Vol I: Arab and Islamic Laws Series (3rd edn, Brill NV, 2009) at p 32.

¹⁴¹ Nasir 'The Status of Women under Islamic Law and Modern Islamic Legislation' at p 32.

In South Africa a nikah contract is typically little more than a one-page certificate. While it contains details of the dower and the type (prompt or deferred) of dower that the husband is obligated to provide, it seldom includes other permissible written provisions or stipulations¹⁴² which may give effect to a woman's personal and financial rights in marriage. This is not surprising because little attention is given to the marriage contract by imams.

Muslim marriages, because they are based on consensus and give rise to obligations, are referred to as contracts. In South Africa, civil marriages are for the same, though secular, reasons also referred to as contracts although such a description has been deemed undesirable.¹⁴³ In the case of both types of marriages, proprietary consequences may be contractually regulated, although failing to do so prior to the marriage will have different (opposite) default proprietary consequences.

The Marriage Act does not deal with matrimonial property regimes and the financial consequences of civil marriages. These are governed by the Matrimonial Property Act of 1984.¹⁴⁴ In terms of the Matrimonial Property Act there are three marital property regimes which can apply to a civil marriage in South Africa. First, a couple will be married in community of property by default if they do not sign an antenuptial contract before the marriage. In so doing, their combined assets and liabilities are merged into one estate, in respect of which each spouse has an undivided half-share. Secondly, by executing an antenuptial contract before a notary public, spouses may exclude community of property so that each spouse maintains a separate estate with separate assets and liabilities. In order to be effective against third parties, the antenuptial contract must also be registered in a deeds registry. The antenuptial contract can also include specific provisions with regard to how the property must be handled and distributed after death or divorce. As regards marriages contracted with an antenuptial contract since the passing of the Matrimonial Property Act in 1984, s 2 of the Matrimonial Property Act provides that the accrual system will automatically apply to the marriage unless it is specifically excluded in the antenuptial contract. Under the accrual system, the spouses' property remains separate during the marriage, but at the time of death or divorce their estates will be adjusted so that the difference in accrual (the increase of the net value of the estate from the marriage's commencement to its dissolution with the exclusion of inheritances, legacies and donations) between their two estates is divided equally.

¹⁴² (7/66). Examples of such stipulations would include the right to work outside of the home; to further her studies; and to divorce her husband in certain specific circumstances (eg his entering into a further (polygynous) marriage). A prospective bride cannot stipulate, as a condition in her Muslim marriage contract, that her husband remain monogamous. She may, however, stipulate that she be entitled to divorce him should he take a further wife; or in the event of him divorcing her, to receive the payment of a lump sum of money from him (besides any outstanding dower) etc.

¹⁴³ See Heaton and Kruger *South African Family Law* at p 15.

¹⁴⁴ Act 88 of 1984.

Because of the community of property default, the DHA therefore does not require the existence of a marriage contract to be recorded. Such a community of property default system will not only result in better protection for Muslim women, but will cost them literally nothing!

MMOs are expected to advise couples of the various options to enable them to make appropriate choices, and refer them to an attorney for the drafting of marriage contracts. Enclosed with his letter (dated 18 February 2014) sent to Emandien (of the MJC), Mowzer (from the DHA) included several sample marriage contracts, with their drafters duly acknowledged on the documents. These were later posted on the website of the MJC's mother body, the UUCSA.¹⁴⁵ The UUCSA had available on its website four sample marriage contracts, all of which include marriage conditions incorporated into the antenuptial contract, rather than regulating them through two separate documents. In August 2014, the MJC had a meeting with notaries public and a follow-up meeting with MMOs. At the meeting with the notaries, a list of attorneys who agreed to charge a flat rate of ZAR 650 for a standard antenuptial contract minus the accrual for a period of one year, was drawn up. This was much less than the cost of an antenuptial contract (ordinarily in the range of ZAR 1,500).

Given that the default position of a Muslim marriage, as it is traditionally understood, is one that is not a community of property or accrual, it appears that MMOs may 'technically insist' that parties draw up antenuptial contracts without accrual to bring them in alignment with Islamic law (Shari'a) before they will solemnise a civil marriage; failing which, they can refuse to officiate. This can be gleaned from the following statement by the MJC:

'It is of utmost importance that the couple signs an Ante-Nuptial Contract (ANC) as approved by a religious authority before having their marriage solemnised by a Marriage Officer. The role of the Marriage Officers would then be to solemnise the marriage in terms of the Marriage Act of 1961 after the Nikah. The contract must be signed before a notary public.'¹⁴⁶

MMOs reserve the right to refuse to conduct the civil ceremony if their advice on the proprietary consequences is not heeded by couples, and to do so by relying on the Marriage Act¹⁴⁷ itself! Yet, many imams also have no qualms about, and are quite happy to continue with their current practice of, conducting nikah ceremonies and issuing one-page certificates without requiring the parties to conclude any formal marriage contract.

¹⁴⁵ See www.uucsa.org.za/ (last accessed 7 June 2014).

¹⁴⁶ 'MJC Muslim Marriage Officers statement' available on the official website of the MJC at www.mjc.org.za/index.php?option=com_content&view=article&id=553:mjc-marriage-officers-statement&catid=15:press-releases&Itemid=13 (last accessed 22 May 2014). See also 'Marriage officers vital: MJC' *The Voice of the Cape*, VOC News 6 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12659-marriage-officers-vital-mjc (last accessed 22 May 2014).

¹⁴⁷ Section 31.

However, entering into an unrecognised Muslim marriage in South Africa has far-reaching material implications for many Muslim women. For example, in *Ryland v Edros*,¹⁴⁸ an early post-democracy case dealing with a Muslim divorce, the Court acknowledged the contractual nature of the Muslim marriage and treated the marriage as a contract which could be enforced between the parties. Given the default nature (separate property minus accrual) of such a marriage, the court found that the wife was not entitled to a share in the growth of her husband's estate. We contend that the antenuptial contract (with accrual) may be the better option for young couples entering a marriage, who have an occupation and are both independently employed. Ultimately, the antenuptial contract (minus accrual) option may not be the best one for the majority of Muslim women already in long-existing marriages, who are mainly homemakers.

The MMB¹⁴⁹ provides that the default matrimonial property system of an Islamic marriage is complete separation of property (that is, marriage out of community of property without the accrual system), unless the parties have mutually and expressly regulated otherwise in an antenuptial contract. In Islam, an antenuptial contract that provides for the accrual system is allowed and valid.¹⁵⁰ A marriage in community of property is also possible.¹⁵¹ The authors contend that, especially given different Islamic law views in this regard, not only should parties have the freedom to choose their own marital regime but that they should be allowed to adapt their contract of choice to suit their own particular circumstances and the different ways that each partner is expected to contribute to the accumulation of wealth during the course of the marriage.

Statements like the following by the Deputy Minister of Home Affairs (Chohan) support our contention:

'What we are offering is the opportunity for people to be able to regulate the consequences of their marriage through an Islamic contract based on Shariah law *or their understanding of Shariah law through one or other form ...* and have this contract govern the consequences of such a marriage in the sad event of a death or divorce.'¹⁵²

¹⁴⁸ 1997 (2) SA 690 (C).

¹⁴⁹ Clause 8(1).

¹⁵⁰ AK Toffar *Administration of Islamic Law of Marriage and Divorce in South Africa* (1993) Masters of Arts thesis, University of Durban-Westville at p 261.

¹⁵¹ N Moosa 'A comparative study of the South African and Islamic law of succession and matrimonial property with special attention to the implications for the Muslim woman' (1990) at p 73.

¹⁵² Emphasis added. See 'Education needed on marriage officers', *The Voice of the Cape*, VOC News 24 June 2014 available at www.vocfm.co.za/education-needed-on-marriage-officers/ (accessed 10 April 2017).

X INTEGRATED MUSLIM AND CIVIL MARRIAGE CEREMONIES WITH WOMEN AS ACTIVE PARTICIPANTS: A VIABLE FUTURE OPTION?

It appears that all imams, regardless of liberal or conservative leanings, believe that the marriages will take the form of two separate ceremonies, with the nikah always preceding the civil ceremony. The former is valid in the eyes of God and the latter in terms of the law of the state. Doing so in this order will ensure that the legal requirements of the Marriage Act can easily be met. However, the idea behind having large numbers of readily accessible MMOs was to streamline the process for Muslims and to make it convenient for them to be able to enter into a civil marriage. It is unfortunate that, if there is a delay in entering into a civil marriage after a nikah and consummation of the marriage, husbands may change their minds and it may be difficult for wives to persuade them otherwise. Many husbands will deem getting married in terms of God's law as sufficient and more important than getting married in terms of South African law, and this may also be a convenient way for them to avert any legal responsibility for their wives and children. This makes a valid case for such ceremonies to be integrated, as explained below.

As indicated in Section VIII, it is the norm in the Western Cape, and probably also elsewhere in South Africa, for the actual solemnisation of the marriage (nikah) to occur in a mosque. In cases where the bride and female guests may also be present in a mosque during the nikah, they are usually seated separately from the groom and male guests and merely have spectator status. In some cases the nikah and celebratory reception may conveniently be held at the same venue with a separation occurring between the bride and female guests and the groom and male guests during the nikah, often using a makeshift screen, although the bride and female guests may hear the procedure taking place. However, in exceptional cases, forward-thinking imams are also officiating at the nikah in the presence of both the groom and the bride and with her active participation, as has been the case at a local mosque in Cape Town.¹⁵³ This mosque has been precedent setting in allowing mixed-gender congregations, women in mosque governance, and delivery of pre-prayer (khutbah) Friday sermons since 1994.¹⁵⁴ One such sermon concerned a young married woman, then aged 26, giving an account of how she wished her marriage ceremony (nikah) to be: to include her as an active participant rather than merely a spectator, attended by close female friends and family; and that this was in fact made possible by this mosque with the blessing of family and friends.¹⁵⁵

¹⁵³ The imam of the Claremont Main Road Mosque, Dr Rashied Omar, believes MMOs to be a positive development since they 'will be able to solemnize marriages according to Islamic rites as well as an agreed upon marriage contract that conforms to South African Law'. See his comments in 'Opposition to marriage officers' *The Voice of the Cape*, VOC News 2 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12629-opposition-to-marriage-officers (last accessed 26 May 2014).

¹⁵⁴ See also N Moosa *Unveiling the Mind* at p 100 and its n 66 for more information regarding the CMMR and at pp 47 and 51 regarding the role of women as imams.

¹⁵⁵ In discussing the tradition of the marriage ceremony itself she had the following to say: 'Having

However, it becomes evident from a video clip of her nikah that although she was present in the mosque when her husband made the offer of marriage to her and she accepted, that the exchange was done with a screen between them. Her father, who still acted as her wali, then continued to play his role in the actual ceremony as per the Shafi'i tradition. However, as far as the wali is concerned, there is nothing precluding a Shafi'i woman who has reached puberty to, through the practice of talfiq,¹⁵⁶ temporarily adopt the Hanafi madhhab (doctrinal teachings) and contract herself into marriage. This appears to already be the case in some instances in Malaysia.¹⁵⁷ Given local custom, the bride will more than likely be doing so in the presence of her guardian and with his consent so that he will still, figuratively speaking, be giving her 'hand' in marriage to the groom.

Based on the practice or Sunna of Prophet Muhammad, there is nothing prohibiting a woman from being present in a mosque and by implication being able to participate in her own marriage. In early Islam, women would visit the Prophet's mosque not only to perform (congregational) prayers but also to acquire knowledge through being taught by him.¹⁵⁸ It is therefore not surprising that there are authentic ahadith (by Imams Abu Dawud and Bukhari) to this effect that precluded even the ultra-strict Umar (successor-companion) of the Prophet from denying his own wife this privilege.¹⁵⁹ Commenting on the

attended a couple of Nikahs I was disheartened by the lack of female involvement in the proceedings. Ahadith describe the ceremony as a simple process. In South Africa, we have a reception in the Western sense and adopt an austere division of genders at the Nikah. I was gutted that it would be expected of me to be content to do my hair and make-up at home, while the formal pronouncement happened at the mosque. To me, this was a systematically discriminatory interpretation of a historical tradition. We wanted to have a ceremony which would include us both and start our marriage the way we planned to continue ... both families and friends ... supported our ideals. We took active steps to encourage women to attend our nikah and the turnout was amazing. We got the most amazing feedback where people, who we feared would be shocked by having an inclusive ceremony, commented that it was the best Nikah they had ever attended ... I want to urge everybody contemplating marriage to make sure that your expectations are covered in a personalised marital contract.' See 'A personal account of marriage and the marriage ceremony ("Nikah")', Pre-Khutbah Talk by Khadeeja Bassier held on 22 November 2013 at CMRM which is available at www.cmr.co.za/index.php/weekly/2013/pre-khutbah-talk-by-khadeeja-bassier-22-november-2013.html (last accessed 27 May 2014). For further detail on the cultural aspects of a local Muslim marriage see B Elion and M Strieman *Clued up on Culture. A Practical Guide for all South Africans* (Juta: South Africa, 2006) pp 114–116.

¹⁵⁶ The practice of talfiq makes it possible for Muslims to, for the sake of practical convenience, change from the school of law that they usually subscribe to one of the other four schools of law without intending that the change be permanent. When doing so there is no formal 'process' to follow.

¹⁵⁷ See Nasir 'The Status of Women under Islamic Law and Modern Islamic Legislation' at p 50.

¹⁵⁸ The following are two such examples: 'The people used to offer the Salat (prayer) with the Prophet ... and the women were ordered not to lift their heads till the men had sat straight' (2/182). It appears from this hadith that women were placed at the back of the mosque and that the men congregated in the front: '[T]he wife of ... said, 'I was in the mosque and saw the Prophet ... saying, "O women! Give alms even from your ornaments"' (2/317).

¹⁵⁹ See SHH Nadvi 'Foreword' in A Davids *Mosques of Bo-Kaap: A social history of Islam at the Cape* (Cape Town: The South African Institute of Arabic and Islamic Research, 1980) at pp xxxviii–xxxix.

local relevance to mosques in Cape Town, of the recommendations of a Mecca Mosque Conference held in 1975, it was highlighted in 1980 already that not only should mosques 'be regarded as the cultural, social and educational centres of the community [but that] ... [d]eserved attention should be paid to the womenfolk and the youth in the mosque'.¹⁶⁰ Significantly, the first (and still functional) mosque in Cape Town was not only constructed in 1795 during a socio-political period of slavery, prejudice and lack of religious freedom, but was built on land donated by a Muslim woman, Saartjie van de Kaap (slave name).¹⁶¹ Through conducting nikahs in their mosques with the participation of women and in their presence, the imams of Cape Town can continue to uphold the legacy of Saartjie and their role as forerunners on the MPL front. Given the precedent already set by some progressive imams in various mosques, this should not be too difficult to achieve.

XI CONCLUSION

An openly gay imam, an open mosque, female MMOs, and interfaith marriages – all these actions courted and survived controversy in South Africa and may yet survive constitutional challenge. Although the MJC may appear not to be supportive of women as MMOs, its own constitution has been amended to include women as members. The Marriage Act may not reflect the rich diversity that makes up the South African populace, but it allows all South Africans, of various faiths, the freedom to elect to be governed by its provisions.

Civil and Muslim marriage options are available to opposite-sex couples only. Although Islam is deemed to prohibit same-sex marriages, a further marriage option in South Africa permits it, and it does occur among local Muslims. Although a civil marriage is a protective tool that not only promotes monogamy but also ought to ensure it, because an unrecognised Muslim marriage does not preclude polygyny, there is no guarantee for a Muslim woman entering into a civil marriage that her husband will not thereafter enter into further religious marriages. Although the proposed MMB is silent on interfaith marriages and the ministerial limitations on the role of MMOs may prevent them from officiating at such marriages, Islam permits them and they do occur among locals.

The DHA regards the introduction of MMOs as the realisation of one of its 'greatest goals'.¹⁶² This chapter has unpacked several factors that may have prompted the DHA, as a supportive arm of government, to initiate this pilot project. Although there had been little prior public awareness of this training, the graduation of MMOs was widely publicised with much fanfare in the local

¹⁶⁰ Ibid, xlii.

¹⁶¹ See A Davids, *Mosques of Bo-Kaap: A social history of Islam at the Cape* (Cape Town: The South African Institute of Arabic and Islamic Research, 1980) at p 5.

¹⁶² See newspaper article by K Legg 'Historic day for Muslim marriages' Cape Argus, 30 April 2014 p 3, available at www.iol.co.za/news/south-africa/western-cape/historic-day-for-muslim-marriages-1.1681947#.U2PXmYGSySo (last accessed 10 April 2017).

media, and the accreditation of MMOs has been largely welcomed by local Muslims as a positive step. It was therefore unfortunate that the confusion and misinformation in the wide array of news reports and radio interviews was fuelled by both the MJC and the DHA since this led many to mistakenly conclude that this was not only a preparatory step in the direction of legal recognition of Muslim marriages, but that it had in fact replaced the very need for such recognition.

Although the provisions of the Marriage Act make allowances for ministers of religion to tailor a civil marriage's solemnisation (through a different formula and blessing) to allow for a religious connotation, as yet there is no approved Islamic formula attached to it and a blessing is optional. This chapter has highlighted that MMOs are now able to wear two hats to perform separate religious and civil marriages in South Africa. It has clarified some of the confusion which followed the graduation of MMOs, especially the misconception surrounding the respectively different legal statuses of religious Muslim marriages (nikahs) solemnised by imams and the civil marriages that would now be solemnised and registered by them. Muslim couples currently enter into nikah and civil marriages as two different marriages on two different occasions. Nikah ceremonies in South Africa are more focused on ritual and an entrenched understanding of marriage as being more sacrament and less contract. It may be difficult to get imams and Muslim couples to move away from such understanding, but it is not impossible. It is contended that the purpose of having a large number of MMOs (who are able to perform both marriages) accessible ought ultimately to have also been to streamline the process for couples. It would therefore be less cumbersome for couples to enter into nikahs and valid civil marriages with relative ease if these ceremonies could take place on one occasion with the nikah still preceding the civil ceremony. This will provide women with more assurance that a civil marriage will occur and the legal security that it may offer. Although there is no link between the two marriages, integrating the marriage ceremonies may justify both a secular judicial requirement that courts be provided with proof of a religious divorce in order to finalise a civil divorce, or even dispense with such requirement in the case where the right to divorce has been contractually delegated to the wife. The fact that Muslims are now encouraged to contractually regulate the consequences of their civil marriage so as to conform to Islamic law, should also be welcomed, but should not be restricted because the 'conditional' civil marriage that is envisaged provides women with little extra protection.

Although many verses of the Qur'an, which were referred to in this chapter, provide theoretical guidance on what a marriage may or may not entail, some of them are equivocal and do not prescribe a clear structure as to how a nikah should take place. Muslims therefore turn for practical guidance to the Sunna of the Prophet, which were collected and written down after he died. However, two of these ahadith, for example, that relate to the age of marriage of a minor and that marriage occurs through a guardian (wali), are controversial. The possibility of fabrication, even of authentic (sahih) hadith, and the fact that the recorded collections of ahadith are based purely on narrations (which means

that their (con)text and actual content are usually beyond scrutiny and challenge), also make them the subject of much criticism.¹⁶³ Although the Sunna by their very definition are ‘recommended’ practices of the Prophet, and by his own admission certainly not obligatory or compulsory especially if the divine Qur’an expressly dictates or intimates otherwise, many local Muslims will be loath to deviate from them. Similarly, jurists of the four main schools of Islamic law have indicated that in cases of conflict between their human interpretations of both primary sources, the latter should always be given precedence.¹⁶⁴

With a large number of MMOs being easily accessible, a unique opportunity presents itself for Muslims in the Western Cape to tap into the knowledge of these ulama to inform themselves of the well-established practice in the rest of the Muslim world of prospective couples negotiating formal written marriage contracts (rather than merely verbal marriage contracts or one page certificates). Young bridal couples should be encouraged and supported to draft such contracts and to hold the nikah, which, after all, is the actual marriage, in ways that will allow the bride to be both present and actively participating. While it may be customary and acceptable for the majority of Muslim women to remain ‘veiled’ in the presence of men, or absent from their own marriages, a new younger generation of women, who want to do things differently and participate in the process, is already beginning to change the set perception around marriage in the community. Ultimately, South African Muslims should be better able to regulate their family life on the basis of Islamic principles and to do so within the official civil marriage laws of South Africa. As the deputy Minister of Home Affairs, Chohan, has emphasised, the DHA has ‘no specific interest in the details of the marriage contract’.¹⁶⁵

The pilot MMO project is certainly ‘a good story for the country’s 20 years of democracy’, as a statement released by the DHA¹⁶⁶ has highlighted. However, it is 18 years since the process of recognition of Muslim marriages started in 1999, yet recognition continues to remain a legislative challenge, and judicial challenges therefore persist. Since there is no guarantee that Muslims, including especially older MMOs themselves who have thus far mainly entered into nikahs only, will opt for the civil option, the parallel process of recognition should remain on the legislative agenda because Muslim women and children in these marriages will ultimately be able to derive some benefit from it. However, it appears that the government may no longer remain willing to recognise Muslim marriages in terms of the MMB but may still be willing to do so along

¹⁶³ See N Moosa *Unveiling the Mind* at pp 28 and 66–67.

¹⁶⁴ See N Moosa *Unveiling the Mind* at pp 26–27.

¹⁶⁵ Y Richards ‘Chohan speaks about implications of *imams* as Muslim marriage officers’ July 2014 *Muslim Views* 28(7) at 17.

¹⁶⁶ Emphasis added. See full statement at www.home-affairs.gov.za/index.php/statements-speeches/456-deputy-president-kgalema-motlanthe-to-speak-at-the-graduation-ceremony-of-the-imams-in-cape-town-30-april-2014-at-10h00 (accessed on 10 April 2017).

with all other religious marriages in terms of the RRMB. Either way, as the Judge in the *Faro* case commented, ‘the nettle will need to be grasped sooner or later’.¹⁶⁷

¹⁶⁷ At para 43.

