I. ABSTRACT

Shariah law or Islamic law has become a national issue. Michigan has joined a number of other states considering a law banning Shariah law. It has become a national issue due to the unfounded fear that the

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1. I wish to thank my friend Imad Hamad for informing me of the opportunity to write this article. Thanks are also due to Professor Abed Awad of Rutgers for reading this article and for his insightful comments. Last but not least, I am grateful to the editorial staff of The Journal of Law in Society for the opportunity to write this article and their assistance in reviewing and editing this article.

2. Ihsan Ali Alkhatib is an assistant professor in the Political Science and Sociology departments at Murray State University. Dr. Alkhatib received his law degree from the University of Toledo and his PhD in Political Science from Wayne State University. Before becoming a full-time professor Dr. Alkhatib practiced family law and immigration law for ten years in Dearborn, Michigan. He is a former board chair of the American-Arab anti-Discrimination Committee (ADC) Detroit Chapter, former Chair of the ADC Michigan advisory board and currently serves as a member of the ADC Michigan advisory board.

3. The proposed legislation is written to ban “foreign law.” However, discussions of the law and statement to the media of the proponents of the law reveal that the target is
“backward” and “primitive” Islamic law is invading American courts and displacing secular/American civil law. This is what some anti-Muslim activists have called the “stealth Islamization” of America. There is no empirical evidence to support the fear that Islamic law is supplanting American civil law. Studies of appellate court dockets reveal that Islamic law issues do come up in the context of civil litigation, especially in the area of family law. There has not been a study focusing on the cases and practices at the trial level. This Article examines the workings of the Wayne County Family Court Division in Michigan. It does this to determine which Islamic law issues are coming up and how they are brought up and dealt with by American trial judges. Wayne County is chosen due to the existence of a large Muslim population. Interviews with attorneys who represent Muslim litigants reveal that Islamic law issues frequently come up in family law cases with Muslim litigants but the results contradict the manufactured fear of Islamic law. The practice of the judges of the family law division reveal that instead of Islamic law crossing the boundary separating church and state and imposing itself on the Court, it is the secular law that is imposing itself on religion. This is occurring with family law judges who use various tools to pressure the Muslim husband to grant his wife the Islamic divorce or “talaq.” This reality runs counter to the common perceptions of an aggressive Islamic law overtaking our civil courts. The other Islamic law issue that the courts confront is the mahr (marriage) consideration, with judges reluctant to deal with it due to its religious dimension or their lack of understanding of it. One can conclude that the judges have a contradictory attitude to religion and state. On one hand, they are injecting themselves in the talaq matter even though their intervention is clearly unconstitutional. On the other hand, the judges are frequently acting unduly constitutionally coy by avoiding adjudicating the mahr issue even though such intervention is arguably on solid secular-law grounds. Overall, this Article offers empirical evidence that the fear of Shariah invading American civil courts is disconnected from judicial reality and motivated more by bias, prejudice and paranoia than by reality.


Shariah or Islamic law has become a salient issue in American politics. A presidential candidate and a former House Speaker, Newt Gingrich, identified it as “a mortal threat to the survival of freedom in the United States and in the world as we know it.” 5 A number of states introduced legislation to bar Shariah law from American courts. The rationale behind the ban is that Shariah law is foreign and backward and that using it in American courts means that Islamic law is invading America in nonviolent ways. 6 The subtext of the argument is that Islamic law is backward, barbaric and oppressive to women. In addition, using it is against fundamental American values. To examine the reality in American courts I chose to focus on family law cases in Wayne County, Michigan. Wayne County is one of the nation’s counties with the most visible concentration of Muslim Americans. 7 It includes the cities of Dearborn, Dearborn Heights and Hamtramck, which have a significant population of Muslim Americans. 8 Howell and Jamal who have studied the Detroit area Arab Americans note that, “Arab Detroit contains America’s best-known Arab immigrant enclave, Dearborn, where a large number of mostly Muslim Arabs live in very high concentration. No other America city includes such a highly visible and large Arab enclave.” 9 This concentration and visibility of the Detroit area Muslim Americans attracts negative attention; Dearborn was even described as the place “[w]here Americans come to hate Muslims.” 10 This Muslim visibility fed the wild allegations that the city of Dearborn is ruled by Shariah law and made the mayor of Dearborn John O’Reilly write an

7. This is a blessing and a curse. A blessing since it increases the profile of the area and attracts visitors and immigrants. A curse since it attracts anti-Muslim zealots such as the missionaries who aggravate and mock Arabs and Muslims during the yearly Arab American festival. See, e.g., Niraj Warikoo, Christian Missionary Group with Pig’s Head Taunt Arab-Americans at Dearborn Festival, DETROIT FREE PRESS, June 16, 2012.
8. There are no reliable estimates of the number of Muslims in America. The reason is that the American census does not gather information on religion. See Religion Statistics and Publications, CENSUS, available at http://www.census.gov/prod/www/religion.htm.
open letter to the Koran-burning pastor Terry Jones telling him that Dearborn is not ruled by Shariah law.\textsuperscript{11}

No reasonable person would think that Shariah law rules an area of the country. This, however, does not mean that Islamic law issues do not come up in American courts. With this demographic concentration Islamic law issues are being brought up in American courts primarily and almost exclusively in family law litigation. This is not surprising since Islamic law “covers all aspects of life and every field of law-constitutional, international, criminal, civil, and commercial- but at its very heart lies the law of the family.”\textsuperscript{12} Even those Americans who are nominally Muslim marry and divorce according to Islamic law since the religious practices are ingrained in cultural practices and family traditions.

III. FAMILY LAW

Family law is state law and the state courts hear family law cases with jurisdiction over family law matters. In Michigan, the Circuit Court Family Law division has jurisdiction over family law issues that include marriage, divorce, child custody, child support, and so on in Wayne County. Twelve judges serve in the family law division. One of these judges, Charlene Makled Elder, is an Arab American and a practicing Muslim who wears the hijab/Muslim headscarf\textsuperscript{13}

IV. MARRIAGE IN ISLAM

Islam is a faith that strongly encourages, and even mandates, that those able to marry do so.\textsuperscript{14} Marriage is commonly referred to as “half the religion”; the Hadith says “[w]hoever has married has completed half of his religion; therefore let him fear Allah in the other half.”\textsuperscript{15} As to the

\begin{itemize}
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} DAWOUD EL ALAMI & DOREEN HINCHCLIFFE, ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD 3 (1996).
  \item \textsuperscript{13} Many of the Arab attorneys interviewed consider the presence of Judge Elder of critical significance. This significance according to them is two-fold: Muslim American attorneys feel empowered by her presence on the bench, a presence that signals integration in the judicial system. Second, Judge Elder acts as a resource for the other judges in the Family Division on religious and cultural practices of the Muslim community.
  \item \textsuperscript{14} This is supported by the Hadith/saying of Prophet Mohammed: “O you young men! Whoever is able to marry should marry, for that will help him to lower his gaze and guard his modesty.” See AL-BUKHARI, HADITH, North Austin Community Center, available at http://www.namcc.org/otherservices/matrimonial.php.
  \item \textsuperscript{15} Id.
\end{itemize}
marital relationship, Islam considers marriage a contractual relationship with high religious significance—"a contract lawfully concluded between a man and a woman, the ends of which are, inter alia, the formation of a family based on love, compassion, co-operation, chastity of the two spouses and the preservation of legitimate lineage." As any other contract, the marriage contract has the offer, acceptance and consideration. Contrary to popular belief, in the marriage contract, the woman is the offeror and the man is the offeree. The woman makes the offer to marry the man for a specific consideration and with specific conditions, if any. For example, she will state that she will marry the prospective husband for the consideration of $10,000 and on condition that he does not take another wife while married to her. The man accepts or rejects the offer the woman makes. The consideration is called the mahr. The Imam solemnizing the marriage usually drafts the Islamic marriage contract and two witnesses attest to it.

V. THE MAHR

American courts struggle with the mahr provision that is part of all Islamic marriage contracts. To be valid, an Islamic marriage has to have a mahr provision. It is possible to encounter a marriage contract that does not have a mahr requirement. In that rare situation, to avoid the harsh possibility of finding no Islamic marriage and therefore deem the relationship illicit, an Islamic judge would impute a mahr amount equal to that of a comparable bride of the same geographic, personal, and socio-economic background. However, in most cases, there is a mahr amount stated and is usually the result of negotiation as to its value with offers and counter offers but ultimately for the contract itself the woman ordinarily makes the offer and the man accepts:

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17. Professor Abed Awad disagrees with this approach to Islamic marriage. He considers the contract approach akin to a sale of property. However, in Arabic the marriage agreement is called ‘Akid al Nikah, the marriage contract. In Islam marriage is both contractual and a religious/spiritual relationship. Interview on file with the author.
“The contract, for instance, requires a specific oral phrase. It cannot be made valid by merely saying: ‘I want you to be my wife [or husband]’, or if it is accomplished so as to show acceptance of the two parties. Rather, the marriage is founded on the wife’s positive answer with those particular words: ‘I marry you upon a dower worth…’; the man should accept by saying: ‘I accept.”

The mahr can be anything of value from a book to a diamond ring or a certain amount of money. It is something of value that the man gives to the woman in return for her marrying him. If there is no mahr specified in the marriage contract, the mahr is imputed in order to find that an Islamic marriage exists. American courts have been inconsistent in dealing with the mahr issue with “no standardized treatment of the mahr provision.” Regarding mahr, the questions frequently asked are: Is it a pre-nuptial agreement? Is it a dowry? Is it bride price or dower rights? It is none of the above. It is not a pre-nuptial agreement since it is not designed to deal with property rights in the event the marriage ends. A number of American courts who have dealt with the mahr issue have mischaracterized it as a premarital agreement.

In Dajani v. Dajani, the court referred to California law on premarital agreement and found the agreement “void as against public policy” seeing the delayed payment of the mahr as facilitating divorce. In Shaban v. Shaban, the court also characterized the mahr agreement as a prenuptial agreement and refused to enforce it on the grounds of uncertainty of key terms of the contract. The wife in Dajani would have likely prevailed had the court approached the mahr agreement as a contract issue. The wife in Shaban would not have prevailed even if the court considered the mahr agreement a

20. NAIM OASSEM, HIZBULLAH: THE STORY FROM WITHIN, Translated by Dalia Khalil
24. Dajani, supra note 20, at 1389.
25. Shaban, supra note 20, at 869.
contract and not a premarital contract since the court ended up invalidating the agreement based on contract law principles.\(^{27}\)

Mahr is not dowry since it is not the money or property that the woman brings into the marriage.\(^{28}\) It is not bride price since the money or item of value exchanged is not meant to compensate the family of the bride for the loss of her labor contribution inside and outside the home.\(^{29}\) Also, “the amount of the dower has been viewed as contingent on the resources of the husband rather than upon any attributes of the wife or her status.”\(^{30}\) It is not dower because dower is each spouse’s interest in the property of the other.\(^{31}\) The mahr is simply the consideration for the woman agreeing to marry the man. Under established American law, since this is a situation where the promise to marry or the actual marriage is the consideration for some promise other than an exchanged promise to marry, this agreement must be in writing to be enforceable.\(^{32}\) The mahr agreement falls under the marriage provision of the Statute of Frauds. It has to be in writing. The usage of the word “mahr” makes the situation sound exotic and foreign. One scholar wrote that, as to the mahr provision in Islamic marriage contracts, “courts often make broad assumptions about the nature of the mahr and its purpose in an Islamic context. These assumptions again perpetuate stereotypes about Muslims in general, especially those from the Middle East and South Asia.”\(^{33}\)

Stereotypes will be perpetuated if the mahr is thought of as exotic and unique. In reality, the essence of the mahr is far from unique. The American Statute of Frauds covers this situation; an exchange of a

\(^{27}\) \textit{Shaban, supra} note 20.

\(^{28}\) Dowry is “[t]he money, goods, or property that a woman brings to her husband in marriage.” See \textit{Blacks Law Dictionary} (9th ed. 2009).

\(^{29}\) \textit{See Elisabeth Bumiller, May You Be the Mother of a Hundred Sons: A Journey Among the Women of West India}, 48 (1990).


\(^{31}\) “At common law, a wife’s right, upon her husband’s death, to a life estate in one-third of the land that he owned in fee. With a few exceptions, the wife could not be deprived of dower by any transfer made by her husband during his lifetime. Although most states have abolished dower, many states retaining the concept have expanded the wife’s share to a life estate in all the land that her husband owned in fee.” See \textit{Black’s Law Dictionary} (9th ed. 2009).

\(^{32}\) Michigan, like all other states, has a Statute of Frauds. M.C.L.A. 566.132, in part, reads:

“(1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise: […] (c) An agreement, promise, or undertaking made upon consideration of marriage, except mutual promise to marry.”

\(^{33}\) Koprowski, \textit{supra} note 15, at 193.
promise to marry with something other than a return promise to marry. Therefore, the idea of the mahr should not be seen as novel and alien. There is no reason, if this is the reality of the mahr that an American court of law should hesitate to enforce the promise. There is no need to read Islamic law treatises to understand this issue. It is not a religious issue. It is an agreement upon consideration of marriage. If it is in writing and meets the requirements of a valid contract under state law, a court should not hesitate to enforce it.

The mahr has been misunderstood to operate as a substitute for spousal support and equitable property division. Thompson and Yunus claim mahr is “meant to provide for the wife after divorce”. The mahr is merely consideration of the marriage; it is not designed to settle the financial claims of the wife on the husband’s estate or to preclude other relief upon divorce. If a man dies, the woman gets the delayed portion in addition to her share of the inheritance. The mahr is considered a debt attached to the estate that is satisfied before the estate is divided among the decedents. This idea becomes clear when one notes the Muslim North African practice as to the mahr issue. The North African practice is for the mahr to be paid fully upfront and is not to be divided into an upfront or “muqaddam” amount. American scholars writing about the mahr issues in American law commonly consider the practice of an upfront amount and a delayed amount as applicable across the diverse Muslim communities in the world. It remains that throughout the Muslim world, at least in theory, the whole mahr amount is the wife’s sole property that she can dispose of as she wishes.

The courts in New York and New Jersey have both examined the mahr agreement as a contract, and not as a premarital contract, and thus upheld it. Both cases were decided on the basis of contract law without considerations for the religious aspect of the contract. The Aziz court stated that “its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as a part of a religious

34. Thompson and Yunus, supra note 18, at 373.
35. The author was invited to speak on the issue of family law before a North African Muslim organization in Southfield, Michigan in 2006. When the author went into enforcement of the delayed amount in American courts he was told by the attendees, and others agreed, that there is no need to discuss that topic since the North African practice is to pay the whole amount of the mahr upfront.
36. See Blenkhorn, supra note 19, at 200-201. Blenkhorn, like many other writers on mahr, generalizes the practice of the upfront and delayed mahr to all Muslims.
37. Id.
38. Id. at 200
ceremony.\textsuperscript{40} The Odatalla court explained that it was ruling on the mahr issue on the basis of ‘‘neutral principles of law’’ and not on religious policy or theories.\textsuperscript{41}

Judges should follow the logic of the New Jersey court and the New York court.\textsuperscript{42} Judges should award the women the consideration the husband voluntarily agreed upon for the marriage, as well as their share of the marital estate. Avoiding the issue on dubious constitutional grounds of separation of church and state gives privilege to the husbands and denies the Muslim wives a material right they are entitled to pursuant to secular contract law.

VI. THE ISLAMIC DIVORCE: THE “TALAQ”

In Islam, the default rule is that the husband has the ability to end the marriage for any reason.\textsuperscript{43} A woman who wants to end her Islamic marriage can seek judicial intervention by alleging abuse or lack of support, among other grounds, for a judicial termination of the marriage. A woman entering an Islamic marriage contract could theoretically have the power to end the marriage vested in her. However, it is rare that a woman would ask for and obtain such a power in the marriage contract. This is because either they are not aware that this possibility exists or because of the cultural expectation that the husband should have this power. The religious divorce is not subject to the jurisdiction of the secular courts. Once a woman gets a civil divorce, she has to seek a religious divorce or talaq. It is important for the woman, even if she is not religious, to obtain a talaq for the following reason:

In the Muslim context, without a religious divorce, a woman cannot remarry. If she does, her marriage will be void and she will be committing adultery. With a Muslim woman’s marriage still subsisting, her former husband will be considered the legally surviving husband entitled to inherit. The situation is even more complicated for Muslim women who marry abroad or continue to visit their native country. For example, several Muslim countries subject wives to travel restrictions.\textsuperscript{44}

\textsuperscript{40} Aziz, supra note 36, at 124.
\textsuperscript{41} Odatalla, supra note 36, at 95-96.
\textsuperscript{42} The author recalls that more than one of his attorney informants told him that a few of the judges in Wayne County are upholding mahr agreements as civil contracts.
\textsuperscript{43} See generally, EL ALAMI & HINCHCLIFFE, supra note 10, at 22.
\textsuperscript{44} Abed Awad & Noura Jebara, Commentary, Chipping Away at Divorce Quagmire for Muslim and Jewish Women, SHARIA IN AMERICA (Feb. 13, 2013), available at
Given the importance of the religious divorce for Muslim women, the issue is bound to come up in divorce litigation unless it has been dealt with in a different forum with the assistance of the family and an Imam.

VII. Method

The overwhelming majority of litigation begins and ends at the trial level. It is at the trial level that one can learn the issues of Islamic law that American judges and attorneys face regularly and whether the concern over Shariah law is built on myth or reality. In order to discover what is happening in Wayne County to Muslim litigants, advertisements in ethnic print media and the snowball method were used to identify attorneys who represent Muslim clients. The ethnic print media sources examined were the Arab American News/Sada al Watan published in Dearborn and the Forum and Link also published in Dearborn. The attorneys contacted were helpful in identifying other attorneys who also represented Muslim clients. The author also identified attorneys through his personal knowledge of the Wayne County bar gained from his years of practice of family law in the Dearborn area. Fifteen attorneys were interviewed by telephone with open-ended questions.

VIII. Findings

The informant attorneys identified the Islamic divorce and the mahr as two legal matters that frequently arise with Muslim family law litigants. The issue of Islamic divorce arose much more frequently than the mahr. Nearly all the interviewees indicated that in most of the cases they have handled the parties resolved Islamic divorce and mahr issues before they had even sought the services of an attorney. In a relatively small percentage of cases, these two Islamic law issues became part of the legal contention of the parties. In most cases, the attorneys indicated that parties will hold a meeting with their families and their Imam to resolve the Islamic divorce issue. Commonly, the resolution is the wife giving up her whole mahr, or part of it, in return for the husband granting her an Islamic marriage. This removes the Islamic law issue for the family court.


45. Attorneys interviewed were very concerned that their statements might be construed as a criticism of the bench. Anonymity was critical to most of them.

46. All of these findings are on file with the author.
In the cases where the parties have not seen an Imam and finalized the Islamic marriage issues, attorneys have indicated that these issues are dealt with by clients negotiating ending the marriage and preparing a consent judgment. A consent judgment is in the interest of both parties because it saves time and attorney fees. When the parties deal with the mahr and Islamic divorce, they enter into a negotiation over all the issues relevant to the marriage. In certain instances, the wife tells the husband that she is willing to give up a certain property or forsake her mahr in return for him agreeing to grant her an Islamic divorce. The husband uses the agreement of an Islamic divorce as a bargaining tool to get the wife to give up some or all of her rights to the children, have her accept a lesser share of the marital property, or have her take less or no spousal support. If the negotiation fails, the matter is brought to the attention of the judge. At the pretrial hearing or conference, the judge asks if the parties have reached an agreement on all issues. The wife’s attorney brings forth the Islamic talaq issue—and less frequently the mahr issue—to the judge’s attention if the judge does not raise this issue. The wife’s attorney tells the judge that these two matters are not resolved. There is variation in the way the judges and the attorneys deal with these matters. Some attorneys decide that it is not worth raising the mahr issue in court since judges do not understand it and believe most judges have been reluctant to consider it. However, attorneys will always raise the talaq issue and judges always try to help the wife get an Islamic divorce.

IX. WAYNE COUNTY JUDGES AND THE MAHR

Interviews with the attorneys of Muslim litigants revealed that there is not an understanding by Wayne County Judges of what mahr is. Several of the attorneys practicing family law in Wayne County are themselves Muslims, but most showed only a rudimentary knowledge of Islamic law issues. Most of the attorneys, Muslims and non-Muslims alike, admitted that neither they nor most of the judges understand mahr. Some indicated that it is a “religious issue” and they are not qualified in Islamic law to fully understand when it is owed and when it is not. Some erroneously identified it as a prenuptial agreement or an agreement in contemplation of divorce, which would not survive court scrutiny. A number of the interviewees mischaracterized the mahr as a prenuptial agreement, a dowry, or a religious agreement that a court would not enforce. One attorney said that it would not be “fair” for him to have his wife get her mahr and her share of the marital estate since that would be “double dipping.” Some attorneys indicated that they are willing to discuss mahr as an issue during mediation, but would not bring it in court since it is of a “religious nature.” However, as to the practice of the
county’s judges, one attorney noted that the trend in Wayne County is to bring the claim before the court and that more than one judge in Wayne County are — like the Courts in New York and New Jersey — enforcing the mahr provision on the grounds of contract theory. The judges are increasingly interpreting the mahr as the consideration a Muslim woman is owed as consideration for the marriage itself.

The lack of uniformity in understanding mahr results in inconsistent treatment by both the bench and the bar. Avoidance of the mahr issue is an injustice and the result is not gender neutral. The denial of the mahr right is effectively allowing American civil courts to privilege husbands over wives. The religious nature of the ceremony is used as a basis to refuse to examine these contracts and therefore deny the wife a contractual right that is enforceable in a secular court. The following is a sample of the attorney responses to the question regarding the mahr and the court:

Attorney 1: When the mahr is an issue, I do not bring it up in court. I try to not get into the complications of whether it is religious or not and whether the court should enforce it. I faced this issue with a number of my Yemeni clients and instead of bringing it up in court. I compensated for it by getting them a more generous spousal support. 47

Attorney 2: Some judges will recognize the mahr agreement as a prenuptial agreement and enforce it. Others say [they] will not enforce it since it is a contract in anticipation of divorce. Some attorneys claim they were able to get the judge to grant [it] to their clients, but I never had to push the issue in court. 48

Attorney 3: I don’t really understand the mahr issue. My understanding is that the Imams know the criteria to when the woman gets her mahr and when she does not. If she caught him cheating does she get the mahr or not? I do not know. There are conditions to be met. But the divorce in Wayne county court is a civil divorce so it can’t force Islamic rule on the dowry. If I go to mediation I waive the right to dowry so never have to go back and revisit the issue. I don’t understand it so I don’t bring it up in court. The new trend is to deal with it as a prenuptial agreement but there is no uniformity. The judges need to develop a system to deal with it. 49

47. On file with the author.
48. On file with the author.
49. On file with the author.
Attorney 4: Lately there is a better understanding of the mahr issue. I represented the husband and the wife was raising the issue of the religious divorce and the mahr. I told the judge the court has no jurisdiction over these issues since they are religious issues. The judge said that the mahr contract is a civil contract and is under her jurisdiction. She ruled on it and gave the wife the funds from the marital funds before any division of the assets occurred. There was a motion and a separate evidentiary hearing on the matter. I was surprised. But there is no consistency. Not all the judges have the same thinking on the matter. Other judges say I have no jurisdiction and the client should go to the Imam.50

Attorney 5: The mahr has not been an issue with the cases I handled. Those married years ago the mahr was so small so it was not an issue. The issue was the Islamic divorce.51

Attorney 6: I am aware of the mahr issue but never litigated it. I am aware that sometimes you can argue it is like a prenuptial agreement. I recall dealing with it twice but it was resolved in negotiating a settlement. The issue of the mahr does not come a whole lot. The understanding is that it’s a religious issue and we do not bring it up before the judge. It is a bargaining tool in getting an Islamic divorce during negotiations.52

X. JUDGES AND THE ISLAMIC DIVORCE

Another issue that arises in Muslim family law cases is the talaq. Family courts have jurisdiction over the civil divorce but not the religious divorce. Religious divorce is instead dealt with through mediation. During mediation, the husband uses the issue of the Islamic divorce as leverage against the wife to give up property rights or her mahr in return for granting an Islamic divorce. Challenges exist if there is little to no marital assets, the mahr is too small, and/or the husband wants to punish the wife. One attorney stated that mediation of the talaq issues also fails when the wife is in dire need of the assets or both are stubborn and it is a battle of wills.

While most judges were reluctant to get involved in the mahr issue due to its “religious nature” and constitutional limitations, most if not all of the judges were willing to get involved in a matter that is clearly and undisputedly off limits- the talaq. Almost all the attorneys interviewed stated that it was common practice for judges to apply pressure on the

50. On file with the author.
51. On file with the author.
52. On file with the author.
husband to grant his wife a talaq. Sometimes the judge himself, with none of the parties raising the issue, would ask if the husband is going to give the wife a talaq. Some attorneys indicated that judges make clear during chambers meetings that they will order spousal support or give more marital assets to the wife if the husband does not grant the wife a talaq. The judges are not involving themselves in the talaq directly by ordering the husband to divorce his wife, which they cannot do constitutionally. Yet they have been achieving indirectly what they constitutionally could not achieve directly — they pressure and even punish the husband who does not grant his wife a talaq. The following is a sample of the responses of the attorneys to the question regarding the talaq and the court:

Attorney 1: In a small percentage of the cases I handled the husband did not want to give his wife a religious divorce. But typically they go to the Imam and deal with the issue of the mahr and the religious divorce and then come see me for a civil divorce. The practice of the judges was to say to the husband that you have to pay spousal support until a religious divorce was granted. The thinking was that the husband is inhibiting the wife’s ability to move on with her life and marry another man who in the culture would support her financially. However, this stopped with the appeals court decision that disallowed it. However, I have heard from a judge that if he has a case and the husband does not divorce the wife, he will not enter the judgment of divorce.53

Attorney 2: The cases where the talaq is an issue are the exception. I had a case once where the Islamic divorce was an issue and the husband was refusing to grant it. In a side bar with the judge the judge told me and the other attorney to let the husband know that if he does not grant the Islamic divorce that he will not enter the judgment of divorce.54

Attorney 3: The judges cannot force a husband to divorce his wife under Islamic principles. But there are other ways that they deal with it to achieve that result. They are sympathetic to the wife. When the husband refuses the judge imposes spousal support, a high amount, to “encourage” the husband to grant his wife a talaq.55

53. On file with the author.
54. On file with the author.
55. On file with the author.
Attorney 4: In most cases the matter is resolved through mediation or the negotiation that goes on between the attorneys and their clients. The women are trying to move on. If it is an issue and the husband is refusing to give the Islamic divorce the woman gives up certain things she is entitled to in order to be done with it. It’s a bargaining tool and sometimes results in unfairness with the woman left with too little property to survive on. In most cases this is it. In a small percentage of cases the man is not satisfied and he is adamant in refusing to grant a divorce. The judges can’t force the man to divorce his wife. But that does not mean they cannot make him pay for it. Some judges pretty much talk to attorneys in chambers indicating they will grant some larger property settlement or maybe a longer term spousal support if the husband does not grant his wife a religious divorce. They see it as an equitable issue. If the man is unwilling to let the wife move on with her life then he should pay for it. I have seen a greater share of property settlement or extra spousal support given in these situations. Also to these judges their decision states that technically the case is closed and all marriage related matters have been dealt with. In a recent case the judge from the bench and on record said in passing: he is going to give her a religious divorce, right? If there is a consent judgment then there would be a provision in the judgment that the parties shall collaborate to obtain the Islamic divorce. I have never had to go back to court to ask a judge to enforce it.56

Attorney 5: Some of the judges do not want to deal with the talaq. Others put pressure on the man to grant it. If it does not work then they make him pay spousal support. The language used is that he will “assist” in obtaining a religious divorce.57

Attorney 6: In most cases the families deal with the Islamic law issues. In the culture you see a lot of family involvement in these matters. Some families are religious and follow Shariah, others are not. But even when the people are not religious, the Shariah influences their behavior. Particularly the men. I had to go into long discussions with my male clients over the issue of the law there and the law here. It was difficult because the laws are so different. If they fail or for some reason it is not an option then it becomes an issue for the judges. Judges were at a loss how to deal with it. There is the issue of the separation of church and

56. On file with the author.
57. On file with the author.
state. That is not true in the parties’ country of origin. Judges began to tell the men if they would not grant the religious divorce then they would open up the property settlement and award alimony or spousal support as penalty for the husband. The husband is basically holding the wife as hostage, she can’t marry again. Then by Islamic law he must support her. Some of these judges knew it obviously. Not all the judges did that.58

Attorney 7: It does not come up a whole lot. They [the parties] go to the Imam for that usually before the case even starts- the marriage has broken down and the Imam is the first step toward ending the relationship or trying to fix it. My understanding is that the imam can grant a divorce without the husband’s approval if there is abuse or abandonment. When it is an issue the judge feels bad and tries to do something about it. Like give the wife alimony or more of it. But with the recent case59 with Judge Charlene Elder they can’t do that anymore.60

XI. TALAQ IS A SHIA PROBLEM

Linda S. Walbridge, in her ethnographic study of the Lebanese Shia of Dearborn, noted that the Shia imams are against granting a Shia woman a divorce from her husband regardless of the reasons.61 Walbridge states, “[a]ccording to the ‘ulama, the Shi’i ideal is that of a wife who is totally obedient to her husband, who accepts his contracting other wives, whether permanent or temporary, and who has no legal recourse to divorce if she is unhappy with the marriage for any reason.”62 Almost all the attorneys, except one, were in agreement that there is a distinction in the judicial proceedings between the Shia and the Sunnis as to the significance of the talaq. The attorneys indicated that the Sunni imams are more willing to grant an Islamic divorce to the wife even if the husband refuses. The Shia imams, almost uniformly, make it very hard, if not impossible, for the wife to get a divorce without the husband’s approval. Therefore, attorneys who have Shia women clients have to make sure there is a provision in the judgment regarding the husband granting the wife a talaq. It is the Shia women, unlike their

58. On file with the author.
60. On file with author
62. Id.
Sunni sisters in Wayne County, who are most in need of judicial intervention to secure a talaq. The following is a sample of the attorneys’ responses to the question regarding the talaq, Shia, and the court:

Attorney 1: The clients typically go to their Imam before seeing an attorney. It is much easier for the Sunni women to get a divorce, with or without the cooperation of the husband. It is much harder for the Shiite women.  

Attorney 2: The religious divorce is a huge deal with Shiite clients. The Shiite clergy make getting an Islamic divorce without the cooperation of the husband nearly impossible. They drag it out. They say we have to send the case to Iran to get a religious opinion. In some instances the husband would say give me the kids and I will give you the religious divorce or give up your mahr and I will give you the divorce. The hardest cases are where there is not much in the marriage, as to assets, for the wife to make the husband divorce her. These are the hardest cases. With the Shia when the man says no [talaq] then no [talaq].

Attorney 3: The Shia imams will not divorce a woman without the cooperation of her husband. This is not the case with the Sunni imams.

Attorney 4: The issue is a big problem with the Shia. Women find it nearly impossible to get a divorce from the Shia clergy without the husband’s approval. They could go to Sunni imams but there is a fear that it is not acceptable or won’t be seen as valid in their community.

Attorney 5: I see three variables- nationality, age and sect- at play. It is more of an issue with the Lebanese than with other nationalities. It is also an issue with the young litigants than the older- the young women want to get remarried or hope that they will- older women do not care about the religious divorce issue. The biggest factor is sect. It is more of a problem with the Shia than with the Sunnis. Most cases I handled with the religious divorce a problem was with the Shia. The Sunni imams are willing to grant a woman a talaq even if the husband refuses. I know a number of these imams- I have offered them training on the law. All of the Sunni imams are willing to divorce the wife even when her husband refuses to cooperate. If the client is Shia

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63. On file with the author.
64. On file with the author.
65. On file with the author.
66. On file with the author.
the talaq is very important to her—she wants a provision in the judgment dealing with it. The Sunni clients do not make it an issue since they know they can get it relatively easy from their imams. With the Shia there is the issue of time and cost when the woman is trying to secure the talaq with no judicial help. There is a lot of back and forth with the Shia imams and then say we have to send the question to Najaf or Qom and wait for an answer. It is very frustrating to the women whose energy and pocketbook are drained by the undertaking.\(^\text{67}\)

Attorney 6: I did not notice a difference between the Shia and the Sunnis. Some Imams are flexible and liberal others are conservative. Flexible and liberal imams give the women the talaq even if the husband refuses to cooperate.\(^\text{68}\)

XII. IMPACT OF JUDGES’ EXPOSURE TO ISLAMIC LAW ISSUES ON PERCEIVED JUDICIAL FAIRNESS

Wayne County has a significant population of Muslim Americans. Therefore, judges of the Wayne County Family Law division see a significant volume of Muslim divorce cases and they are familiar with litigation issues regarding that community. We assume that knowledge is enlightening and improves understanding, perhaps even appreciation, of other cultures. However, a number of Arab American attorneys expressed the serious concern that the complexity of the Islamic marriages and the cultural issues involved are engendering a bias against the culture and the clients on the part of the judges of the Family Law division. More than one attorney stated that in other areas of Michigan, areas with a lesser Muslim demographic, the judges tend to be more pleasant to the clients and less biased. This finding sounds counter-intuitive. One attorney explained that his bias is due to the fact that the judges are continually confronted with the issues of divorce and a segment of the Muslim American population that is in conflict. Marriages do not bring out the best in people. If the judges have little or no other exposure to the Muslim culture other than in litigation, the judges would naturally develop biases against the culture from the few cases were the husband is very difficult but not representative of the culture. “It is the most extreme cases that stand out and are most remembered,” one Arab American attorney stated.\(^\text{69}\) A majority of the attorneys interviewed saw the strong demographic presence of Muslim

\(^{67}\) On file with the author.
\(^{68}\) On file with the author.
\(^{69}\) On file with the author.
Americans in Wayne County as working against their husband clients being treated fairly. The following is a sample of the responses of the attorneys to the question regarding Muslim husbands and the court:

Attorney 1: Judges sometimes express frustration with the [Muslim] issues before them. They struggle to understand the culture and the religion. From some of them you sense a bias against the culture and the religion. Wayne County has a Muslim Arab American woman on the bench, Charlene Elder. She helps the other judges understand Islamic issues.\(^{70}\)

Attorney 3: We are blessed to have a Muslim woman family law judge, Charlene Elder. She gives the other judges insight into Muslim law.\(^{71}\)

Attorney 4: I had a case where I felt that the judge was biased against the man because of all the cultural and religious issues that come up in the other cases before him. I was representing the man in the case. I and the other attorney were surprised by the decision of the judge. He took the side of the woman when even the woman’s attorney did not expect his client to get the judge to order the relief she wanted. I felt that had it been a man of any other faith this would not have happened. My client paid for the [bad] behavior of unfair male litigants. There is a lack of knowledge of our culture and religion. I once was asked questions by a judge about the religion and the culture that I thought were quite elementary. This lack of knowledge breeds a conscious or unconscious bias. But there are other judges who know the community and really go the extra mile to understand. One judge, Kathleen McCarthy, she understands our community more than the others. This understanding makes their job easier.\(^{72}\)

Attorney 5: There is this notion that Muslim men oppress women. This is the mindset, [and] the perception on the bench, with few exceptions. There was a Jordanian Christian couple where the wife filed for divorce. The husband told the judge that he has no jurisdiction over the marriage since he the husband married in Jordan in a church so only the church had authority to end the marriage. The judge was pleasant and courteous to the man and said on record it is a civil divorce case before him and he can deal with it and is not dealing with the religious marriage

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\(^{70}\) On file with the author.
\(^{71}\) On file with the author.
\(^{72}\) On file with the author.
over which he has no jurisdiction. When faced with a stubborn husband who would not give his wife the talaq the judges don’t seem to analogize this to other religions — the Orthodox Jews and the like, [or] the Catholic Church and the impossible religious divorce. The way they see it is this Muslim man oppressing his wife due to the “backward” culture and religion.73

Attorney 6: Being neither Arab nor Muslim I had to educate myself on these issues. Here you have a group of people whose laws are different from what we have here. I am happy that I got to learn about a different culture. The clients are confused. They need education. The judges are better about these issues now.74

XIII. HAMMOUD V. HAMMOUD

In March 2012, the Michigan Court of Appeals rendered an unpublished opinion in the prolonged litigation of Hammoud v. Hammoud.75 The husband had appealed the decision of the trial court on a number of grounds, one of which was the court’s use of spousal support as a pressure tool to have the husband grant his wife a religious divorce.76 The Court of Appeals stated:

The trial court awarded plaintiff modifiable spousal support in the amount of $602 a month for a minimum of four years, with early termination upon the death or remarriage of plaintiff. The spousal support figure was based on the imputation of annual income of $14,616 to plaintiff. The trial court imposed the continuation of modifiable spousal support, in this amount, for an indefinite period unless terminated by plaintiff’s receipt of an Islamic divorce by defendant, her death or remarriage.77

In Hammoud, the trial court did not hesitate to use state, secular power to force the husband on a religious matter, even though it admitted that it had no jurisdiction in the religious divorce.78 This action was not unusual because many of the judges of the Wayne County Family Law division, as the interviewed attorneys indicated, felt that this is the

73. On file with the author.
74. On file with the author.
75. Hammoud, Supra note 59.
76. Id. at 17-18.
77. Id.
78. Id.
equitable way of dealing with the matter. The Court of Appeals decided that such a pressure was “improper”:

In awarding spousal support, “a judge’s role is to achieve equity, not to ‘punish’ one of the parties.” Not only did the trial court exceed the recommended length of spousal support for this marriage, the implication of the trial court’s ruling is that it was indeed attempting to pressure defendant to grant plaintiff an Islamic divorce, despite the trial court’s acknowledgement that it had no authority or jurisdiction over the parties obtaining a religious divorce…. While the award is designated as modifiable in accordance with MCL 552.28, the implication the ongoing award of spousal support was for an indefinite duration and was designed by the trial court to force or pressure defendant to agree to an Islamic divorce is improper.79

Given that it was a constitutional issue, the Court of Appeals failed to highlight the importance of this case. The trial court in Hammoud, along with other trial courts in Wayne County, was routinely engaging in this unconstitutional practice. Many, if not all, of the family law judges of the Wayne County Court were, over the years, directly and indirectly, violating the free exercise clause when it came to male Muslim litigants’ rights. The Court of Appeals did not emphasize this grave constitutional matter and instead focused on the perverse incentive the sanctioned award provided to the wife.80 The Court of Appeals reasoned that creating a permanent spousal support would provide an incentive for the wife to avoid ending the religious marriage:

While there is an argument for an award of rehabilitative spousal support in this matter, an award of permanent spousal support could result in defendant’s ongoing obligation to support plaintiff for more years than the marriage lasted. As structured by the trial court, plaintiff has no incentive to become self-sufficient or to vigorously pursue an Islamic divorce as she is assured an ongoing income ad infinitum.81

Moreover, in Hammoud, the wife told the judge that she could get a religious divorce without the consent of her husband.82 Apparently, this

79. Id. (citing Sands v. Sands, 442 Mich 30, 36 (1993)).
80. Id.
81. Id. at 19.
82. Id. at 19-20.
information was irrelevant and had no effect on the trial judge’s
decision.\textsuperscript{83} The Court of Appeals noted:

The trial court also failed to address or seek further clarification
of plaintiff’s contention that she was in possession of a document
that would permit others to assist or assure her the attainment of
an Islamic divorce without defendant’s consent. Plaintiff
indicated that an agreement existed that would permit her brother
and brother-in-law to authorize the Islamic divorce, potentially
rendering it within plaintiff’s control to prolong her receipt of
spousal support.\textsuperscript{84}

The Court of Appeals informed the lower courts that it is “improper”
to use spousal support punitively or coercively.\textsuperscript{85} It remains unclear if it
is “proper”, meaning constitutional, to threaten to give the wife a larger
share of marital assets, more parenting rights, or other rights to pressure
the husband to allow a religious divorce or to punish the husband for not
submitting to judicial pressure. A number of my informant attorneys
indicated that at least one judge indicated that he will still try to help the
Muslim wife get a religious divorce. This judge suggested he would
refuse to sign the divorce judgment unless the Muslim husband granted
his wife a religious divorce.

XIV. CONCLUSION

The dominant concern of those who study religion and American
courts is that religion is invading American courts is exemplified by the
statement: “ Minority religious groups face perhaps even stronger
challenges of aligning their religious norms to those of the civil law.
Muslim groups currently face some of the greatest challenges, with
increasing political concerns about the imposition or use of “shari’a
courts”, including — and perhaps especially — family law.\textsuperscript{86} A key
finding of this article is that instead of Shariah law invading civic law,
the exact opposite has occurred. In an area of the country with a large
and visible Muslim presence, judges have been injecting the court system
into matters of religion to achieve what they see as a fair and equitable
result for the wife. They have done so in the realm of talaq. The judges in

\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 17-20.
\textsuperscript{86} Joel A. Nichols, Misunderstanding Marriage and Missing Religion, 2011 Mich.
St. L. Rev. 195, 205 (2011).
Wayne County have been achieving indirectly what they would constitutionally be unable to achieve directly. They have been forcing the husband to grant his wife a religious divorce by applying various forms of pressures one of which being the threat of a permanent spousal support and when the husband refused to respond to pressure he was hit with punitive court measures. Interviews of the attorneys and a review of divorce judgment decrees reveal that this has been a standard practice of the Court. The reality is civil law injecting itself in the realm of Shariah law and not the other way around as the activists and scare mongers want the public to believe and fear.

The Hammoud case will not put an end to this reality. Even after the Hammoud decision, at least one judge indicated that he will seek other ways to pressure the husband to grant his wife a religious divorce. A second finding of this Article is that there is reluctance on the part of many of the attorneys and judges to deal with the mahr issue, effectively denying the Muslim woman a contractual right. The treatment of the mahr is changing but the unconstitutional practices as to the talaq continue.