



# Divorce of Intoxicated Persons in the Islamic Jurisprudence and Afghan Civil Law: an Inductive and Analytical Juridical Study

Amunullah Poya<sup>1</sup>, Bouhedda Ghaliya<sup>1</sup>, Mohd Afandi Bin Awang Hamat<sup>1</sup>

<sup>1</sup>Department of Fiqh and Usul al-Fiqh Faculty of Islamic Revealed Knowledge and Human Science International Islamic University Malaysia, Malaysia

✉ [Aminullah.Poya786@gmail.com](mailto:Aminullah.Poya786@gmail.com) \*

## Abstract

The phenomenon of divorce in the context of intoxication has drawn limited scholarly attention, necessitating an exploration of its legal implications and theoretical underpinnings. This study employs an inductive and analytical approach, structured into an introduction, three main sections, and a conclusion that encompasses the research findings. The study synthesizes primary legal sources from Islamic jurisprudence, including the Quran and Hadith, alongside relevant provisions of the Afghan Civil Code and pertinent case law. Through a comprehensive examination of Islamic principles and legal precedents, the research delves into the multifaceted issue of divorce within the context of intoxication, addressing pertinent questions regarding the legal capacity and consent of an intoxicated individual to initiate or accept divorce. The analysis also investigates the rights and protections afforded to both parties in such circumstances, considering the overarching objectives of Islamic family law. The study highlights the varying approaches between Islamic jurisprudence and Afghan civil law, identifying potential areas of harmonization or conflict. Drawing on case examples and hypothetical scenarios, the paper further contextualizes the theoretical findings and proposes possible legal reforms to address the complexities arising from the divorce of intoxicated individuals. Ultimately, this research contributes to a deeper understanding of Islamic family law and its application in Afghanistan, while shedding light on the challenges posed by intoxication in the divorce context. The findings of this study may inform legal practitioners, policymakers, and scholars seeking to promote justice, equity, and protection within the realm of family law in both Islamic and Afghan legal systems.

## Article Information:

Received January 22, 2023

Revised February 10, 2023

Accepted March 18, 2023

**Keywords:** *Divorce of intoxicated persons, Islamic jurisprudence, Afghan civil law, analytical juridical study*

## How to cite:

Poya, A., Ghaliya, B., Hamat, M.A.B.A. (2023). Divorce of Intoxicated Persons in the Islamic Jurisprudence and Afghan Civil Law: an Inductive and Analytical Juridical Study. *International Journal of Islamic Studies Higher Education*, 2(1), 41-62.

## E-ISSN:

2964-1861

## Published by:

Islamic Studies and Development Center Universitas Negeri Padang

## INTRODUCTION

It is well known that the family unit plays a crucial role in building a cohesive and prosperous society (Herawati et al., 2020). A harmonious and functional family contributes positively to the well-being of the entire community. Conversely, divorce is recognized as a disruptive and harmful phenomenon that can lead to the breakdown of the family and marital life. Divorce becomes the only viable option when the possibility to sustain a life together between spouses becomes unattainable. It serves as a remedy when an agreement between the couple becomes difficult while reconciliation seems improbable due to differences in character, conflicting perspectives, divergent values, severe disagreements, and unresolved conflicts. In such cases, divorce is the necessary solution to address the harmful effects of the situation, as well as the animosity and resentment that may arise, and it becomes inevitable for those who genuinely seek a remedy in such challenging circumstances (Haeraton & Fatahullah, 2022).

Divorce in Islam marks a significant departure in the history of legislation, as introduced by Prophet Mohammad. Islamic law views marriage as a civil contract, endowing both parties with the power to dissolve the relationship under specific circumstances (Adiasih, 2017; Schulenberg, 2016). However, the reforms-imposed restrictions on the husband's ability to divorce his wife unilaterally. The process of divorce is discouraged and permitted only in exceptional cases, emphasizing reconciliation and arbitration before taking such a step (Sumanto et al., 2021). The Quran encourages spouses to be mindful of their responsibilities and to seek harmony in their relationship (Rahmah, 2021; Rosmita et al., 2022). Unilateral divorce is considered an exceptional measure, not in line with the real spirit of Islamic marriage and divorce (Ahmad, 2003).

Scholars have elucidated the concept of divorce for intoxicated individuals, specifically addressing prohibited substances such as alcohol, within the framework of Islamic jurisprudence and their legal evidence. The disagreement arises from the question of whether the ruling on an intoxicated person is the same as that of a mentally unstable person, or if there is a distinction between them. Those who hold that the two are equivalent argue that both lack soundness of mind and since soundness of mind is a condition for legal responsibility, the divorce is not valid. However, those who differentiate between the two argue that while an intoxicated person willingly impairs his intellect, a mentally unstable person does not, leading them to conclude that the intoxicated individual is held accountable that the divorce is considered valid as a measure of seriousness and strictness towards his actions. In conclusion, the scholarly discussions on the concept of divorce for intoxicated individuals offer diverse perspectives, with each school of thought presenting unique criteria for defining intoxication.

By delving into these perspectives, this study aims to provide a comprehensive understanding of the issue, considering both religious and legal implications. This study is divided into four main objectives: first, to present the concept of divorce in terms of the terminology and legal evidence used by jurists; second, to explore the concept of intoxication from the perspective of jurists and their legal evidence; and third, to examine the concept of divorce for intoxicated individuals based on the accounts provided by jurists in their works and finally the concept of the divorce for an intoxicated person based on Afghan Civil.

## LITERATURE REVIEW

In the context of Islam, divorce has a historical presence predating the advent of the religion. However, the arrival of Islam significantly improved the divorce process, particularly favoring women's rights and property. In an Islamic divorce, women's property remains intact and is not divided, including what they earned or received before or during the marriage. This safeguards women from potential exploitation of their wealth by men through marriage. Conversely, the man's property is divided according to the marriage contract if a divorce occurs. Additionally, a divorced woman is entitled to support and maintenance from her former husband if needed. Islam also introduced the practice of *Iddah*, a three-month waiting period for women after divorce, during which they cannot remarry. This period serves to determine if the woman is pregnant and to ascertain the child's rightful father, thereby safeguarding the child's identity and lineage. During *Iddah*, reconciliation between the husband and wife is allowed, with the caveat that men are specifically instructed not to harm or take undue advantage of their former spouses (Bani & Pate, 2015). The proper procedure for divorce in Islam varies depending on factors such as the timing of the divorce, reasons for divorce, Islamic School of Thought, Sunni or Shiite affiliation, and surrounding circumstances. While this paragraph provides a brief overview, it is essential to acknowledge that different schools of thought may introduce some variations in the divorce process described above (Jafar & Ardha, 2022).

In Islamic family law, the right to divorce is traditionally granted to the husband (Daud & Syarif, 2021; Hifni & Banten, 2016; Imron, 2016). However, there exists a provision known as "*khulu*," which grants women the right to seek separation from their husbands if they find their lives together unbearable for any valid reason. *Khulu* is a significant step towards recognizing women's agency and autonomy within the context of divorce. When a woman requests *khulu*, she initiates the process by expressing her desire to be divorced from her husband. Subsequently, the husband's consent is sought, or the case may be brought before a court for a verdict. If the husband agrees to the *khulu*, or if the court deems the reason valid, the marriage is dissolved, and the couple is separated. This practice acknowledges the importance of considering the well-being and happiness of both spouses, recognizing that a harmonious and mutually fulfilling marriage is essential for the individuals involved. The concept of *khulu* provides an avenue for women to seek divorce in situations where they feel their marital life cannot be continued, granting them a measure of autonomy in shaping their destinies within the framework of Islamic family law (Hasbi, 2016).

Etymologically, divorce refers to the act of releasing and discharging. Linguistically, "طَلَّقَهُ إِطْلَاقًا" means to completely release something (Ibn Faris, vol, 3, p. 420), Legally, it signifies the lawful dissolution of marriage. The Hanafis define divorce as the termination of the marital bond, either immediately or eventually, through specific wording. The Maliki definition describes it as a legal attribute that releases the husband from the enjoyable aspect of marriage with his wife, entailing repetition for free men and once for slaves, making it prohibited for them to remarry before the consummation of the previous marriage. According to the Shafi'is, divorce is an act performed by the husband without any reason, leading to the termination of the marital bond. The Hanbalis define it as the release of the marital bond (Al-Ansari, vol, 2, p. 30).

On the other hand, the term "سُكْر" (*sukr*) linguistically denotes confusion or

perplexity, and "السكران" (sakran) experiences intoxication (Ibn Farris, vol, 3, p. 89). Intoxication may result from consuming alcoholic beverages or other substances and can manifest as a state of mental confusion, loss of self-control, or exhilaration. However, not every person who consumes alcohol may be affected by it Al-Zaiyat, vol, 1, P. 438.

Jurists, including most Hanafi, (Ibn Abidin, vol, 8, p. 196) Maliki, (Al-Qarafi, vol, 4, p. 303), and some Shafi'i (Al-Nawawi, vol, 8, p.62), and Hanbali (Al-Mawardi, vol, 8, p. 435) scholars, assert that the intoxicated individual is one whose speech is incoherent. In a societal context, intoxication implies a lack of focus or stability in one's thoughts. In contrast, Abu Hanifa identifies the intoxicated person as one who cannot distinguish between heaven and earth or between genders.

Among the Shafi'i scholars, there is a difference of opinion regarding the definition of intoxication, with some stating that it depends on societal norms. If a person's appearance conforms to the customary signs of intoxication, then they are considered intoxicated. Ibn 'Abidin, a Hanafi jurist, describes intoxication as a state where an individual's brain is overwhelmed by the vapors emanating from alcohol or similar substances, resulting in the impairment of reasoning, causing them to lose the ability to distinguish between good and evil. Furthermore, Al-Haytami, a Shafi'i jurist, classifies intoxication caused by wine as leading to joy, exhilaration, dancing, anger, desire, and neglect of responsibilities. Intoxication caused by hashish, on the other hand, results in physical lethargy, decreased vitality, prolonged silence, and apathy. The Hanbali jurist al-Nakri links intoxication to a psychological condition that leads to the expansion of the soul, sometimes affecting sensory perceptions and voluntary movements.

In Islamic jurisprudence, there is a difference of opinion among scholars regarding the divorce of an intoxicated person. When an intoxicated individual divorces his wife, the debate centers around two main opinions: The first opinion, followed by scholars such as Sa'id bin al-Musayyib, 'Ata, Mujahid, Al-Hasan, Ibn Sireen, Al-Sha'bi, Al-Nakh'i, Abu Hanifa, and his companions, Malik, Al-Thawri, Al-Awza'i, and Al-Shafi'i in one of his opinions, as well as Ibn Shubruma and other scholars and companions, suggests that the divorce is valid and takes effect. The second opinion, adopted by Uthman, Omar bin Abdulaziz, Al-Muzani, Al-Laith, Al-Anbari, Mujahid, Abu Thawr, Ishaq, Dawud, Al-Karkhi, and one of the opinions of Al-Shafi'i in the past, argues that the divorce does not take effect.

## METHODS

The present article adopts an inductive and analytical research methodology to explore the divorce of intoxicated persons in Islamic jurisprudence and Afghan civil law. The inductive approach is employed to ascend from specific cases to general rules and principles (Azzahra et al., 2021; Fernando et al., 2022). In this context, the researcher reviews various legal opinions in defining the concepts of divorce and intoxication, as well as related issues. Moreover, the study analyzes the divergent views of jurists regarding the legal implications of divorce initiated by an intoxicated individual. A detailed examination of these viewpoints is conducted, aiming to determine the prevailing opinion and the reasons behind its prevalence. This process involves a thorough investigation of the writings of

different schools of thought to discern their specific positions on divorce involving intoxication.

The analytical method is utilized to dissect and compartmentalize research phenomena or issues into primary elements, facilitating the study process and uncovering the underlying causes that gave rise to these phenomena (Novebri & Pratiwi, 2021; Rahawarin et al., 2021). This method is complemented by other practical approaches. In this context, the legal evidence of each perspective is compiled, discussed, and evaluated, leading to the selection of the most persuasive opinion based on sound evidence and reasoning. Subsequently, the study derives legal and jurisprudential rulings from the works of Islamic jurists and relevant legal materials. These findings are then analyzed to extract possible opinions and judgments, which are connected to contemporary life to achieve familial and societal benefits and avert harm.

The simultaneous utilization of the inductive and analytical methods ensures a comprehensive exploration of the topic, considering both the theoretical foundations and practical applications in the realm of Islamic family law and the Afghan civil legal system. By employing this rigorous research methodology, the study seeks to provide valuable insights into the intricate issues surrounding divorce and intoxication, contributing to legal scholarship and informing potential reforms in the area of family law.

## RESULT AND DISCUSSION

### Concept of Divorce under the Influence of Intoxication:

The dissolution of the marriage contract through the utterance of divorce by the husband while under the influence of intoxication is subject to his mind and will be genuinely affected by the intoxication. To understand the concept of divorce as described, it is essential to acknowledge that intoxication primarily and ultimately affects the mind. Intoxicating substances can completely or partially cloud, impair, or incapacitate the mind, resulting in disturbances in the will and mental state of the intoxicated person. However, it is crucial to emphasize that the focal point under the influence of intoxication is the mind, which jurists consider to be the locus of responsibility and capacity. Thus, when a disruption in the mind and cognition of the intoxicated individual due to intoxicating or narcotic substances is evident, the judgment of their mental state and awareness differs from that of a sober and perceptive person.

Intoxicants, drugs, and similar substances are forms of mental disturbances that affect the mind, although they do not eliminate its essence, such as in the case of a mentally deranged individual. Nonetheless, they do influence human intention, will, and thinking. Mental disturbances, whether psychological or volitional, negatively impact the mind and reflect upon the thoughts, perceptions, and consciousness of the affected individual. Therefore, when jurists examine divorce matters, they seek to determine whether the person seeking divorce is eligible for it. If someone lacks the mental capacity, they cannot initiate divorce. Undoubtedly, a



person whose mind, will, or psyche is impaired to the extent that their mind is disabled, deficient, disturbed, or overwhelmed, and they cannot fulfill their designated role intended by God, they cannot be held accountable for their statements as if they possessed complete mental capacity and awareness.

In our discussion, "intoxication" refers to the consumption of prohibited food, beverages, or the like, such as consuming alcohol or its substitutes. However, the topic does not pertain to permissible consumption, like drinking tea, or orange juice, or being affected by pleasant fragrances, and so on, and then becoming intoxicated unintentionally. Similarly, the discussion does not encompass those who take medication with the intention of treatment and healing but experience a condition similar to that of an intoxicated person. Thus, the focus of our study is on the ruling of divorce pronounced by someone intoxicated due to the consumption of prohibited food, beverages, or the like, whether they became intoxicated intentionally or involuntarily. This is the intended scope of our research.

The scholars of the Hanafi (Ibn Mazah, vol, 3, p. 207), Maliki, (Al-Dasoqi, vol, 2, p. 196), Shafi'i (Al-Shafi'i, vol, 5, p.270), and Hanbali, (Ibn Qudamah, vol, 7, p.378) schools of thought have different views regarding the divorce issued while under the influence of intoxication. If a person drinks a permissible beverage and, while intoxicated, pronounces divorce, most scholars agree that the divorce is not effective. However, there is disagreement among scholars when it comes to someone intentionally consuming a permissible beverage for intoxication and then issuing divorce.

The first opinion, supported by the majority of scholars from some Hanafi, (Al-Samarqandi, vol, 2, p. 194,) Maliki, (Al-Dasoqi, vol, 2, p.365) some Shafi'i, (Al-Shafi'i, vol, 2, p.365) and some Hanbali (Al-Mardawi, vol, 8, p. 338) scholars, asserts that if a person intentionally consumes a permissible beverage for intoxication, and then pronounces divorce, the divorce is valid because they have impaired their intellect through sinful behavior.

The second opinion, held by some Hanafi (Al-Samarqandi, vol, 2 p. 194) and some Shafi'i (Al-Ghazali, vol, 5, p. 391) scholars, argues that the divorce is valid regardless of whether the person intended to become intoxicated or not. They compare such a person to someone intoxicated by a prohibited substance, as they intend both pleasure and prohibition while drinking.

The third opinion, advocated by some Hanbali (Al-Mardawi, vol, 8, p. 338) scholars, suggests that divorce does not occur at all in this scenario. Ibn Rushd mentioned the consensus among scholars regarding the non-occurrence of divorce while someone is involuntarily intoxicated. (Ibn Rushd, vol, 3, p. 102). However, there is disagreement among scholars when it comes to someone intentionally consuming a prohibited substance, leading to intoxication while having a sound mind. The difference in opinion is whether the ruling on divorcing an intoxicated person is analogous to divorcing a mentally deranged person. Those who equate the two argue that divorce does not occur in the case of an intoxicated person, while those who distinguish between them pronounce divorce as a punishment for

intentional intoxication.

### Jurists' Opinions on Divorce of an Intoxicated Person

Scholars have differed in their opinions concerning the issue of divorce of an intoxicated individual who consumes prohibited substances such as alcohol. There are two main views on this matter, and we shall explore it in three aspects. Firstly, we will present the arguments of those who believe in the occurrence of divorce in such cases and discuss their evidence. Secondly, we will present the arguments of those who hold that divorce does not occur under these circumstances and discuss their evidence. Finally, the third aspect will focus on the preponderant opinion between the two viewpoints (Arrashid, 2022).

The majority of jurists, including most Hanafis (Al-Zayla', vol, 2, p. 193) like Abu Hanifa, Muhammad, and Abu Yusuf, (Al-Baburti, vol, 3, p. 389) and most Malikis, (Ibn Abdulbar, vol, 2, p. 571) support the occurrence of divorce in such situations. It is also held by Imam Shafi'i, (Al-Mawardi, vol, 10, p.236), which is the prevailing view among Shafi'is, and the second narration from Imam Ahmad, which is the dominant opinion among Hanbalis (Ibn Qudama, vol, 7, p. 379). This view is also attributed to Umar, Ali, Mu'awiyah, (Ibn Qudama, vol, 7, p. 379) and many of the tabi'een (Al-Khurasani, vol, 1, p. 308). These scholars base their stance on different evidence, such as this verse of the Quran which says:

الطَّلَاقُ مَرَّتَيْنِ ۖ فَاِمْسَاكُ بِمَعْرُوفٍ اَوْ تَسْرِيْحٌ بِاِحْسَانٍ ۗ وَلَا يَحِلُّ لَكُمْ اَنْ  
تَاْخُذُوْا مِمَّا اٰتَيْتُمُوْهُنَّ شَيْئًا اِلَّا اَنْ يَّخَافَا اَلَّا يُقِيْمَا حُدُوْدَ اللّٰهِ ۗ فَاِنْ خِفْتُمْ  
اَلَّا يُقِيْمَا حُدُوْدَ اللّٰهِ ۗ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهٖ ۗ تِلْكَ حُدُوْدُ اللّٰهِ  
فَلَا تَعْتَدُوْهَا ۗ وَمَنْ يَتَعَدَّ حُدُوْدَ اللّٰهِ فَاُولٰٓئِكَ هُمُ الظّٰلِمُوْنَ ۗ فَاِنْ طَلَّقَهَا فَلَا  
تَحِلُّ لَهٗ مِنْۢ بَعْدِ حَتٰى تَنْكِحَ زَوْجًا غَيْرَهٗ ۗ فَاِنْ طَلَّقَهَا فَلَا جُنَاحَ عَلَيْهِمَا اَنْ  
يَتَرَاجَعَا اِنْ ظَنَّا اَنْ يُقِيْمَا حُدُوْدَ اللّٰهِ ۗ وَتِلْكَ حُدُوْدُ اللّٰهِ يُبَيِّنُهَا لِقَوْمٍ  
يَعْلَمُوْنَ

Meaning: "Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers and if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other

*than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah. These are the limits of Allah, which He makes clear to a people who know” (Al-Baqarah: 229-230).*

The general indication of the verses is that divorce can occur without differentiating between a drunk person and others, except for specific evidence (Al-Kasani, vol, 3, p. 99). The subject matter of the verses in Surah Al-Baqarah is to specify the number of divorces, which is three. The verses also address the related rulings and directives, without discussing the eligibility of the divorce or any other matter. The focus is on explaining the first and second divorces and their associated rules, then addressing the third divorce, which has its distinct rulings different from the first and second divorces. On the other hand, the subject matter of the verses in Surah At-Talaq is to specify the time of divorce, so that the divorce occurs during the waiting period of the women (Al-Mashhrawi, 2018). The verse:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَقْرَبُوا الصَّلَاةَ وَأَنْتُمْ سُكَرَىٰ حَتَّىٰ تَعْلَمُوا مَا تَقُولُونَ  
وَلَا جُنُبًا إِلَّا عَابِرِي سَبِيلٍ حَتَّىٰ تَغْتَسِلُوا وَإِنْ كُنْتُمْ مَرْضَىٰ أَوْ عَلَىٰ سَفَرٍ  
أَوْ جَاءَ أَحَدٌ مِّنْكُمْ مِنَ الْغَائِطِ أَوْ لَمَسْتُمُ النِّسَاءَ فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا  
صَعِيدًا طَيِّبًا فَامْسَحُوا بِوُجُوهِكُمْ وَأَيْدِيكُمْ إِنَّ اللَّهَ كَانَ عَفُورًا غَفُورًا

Meaning: “O you who have believed, do not approach prayer while you are intoxicated until you know what you are saying or in a state of janabah, except those passing through [a place of prayer], until you have washed [your whole body]. And if you are ill or on a journey or one of you comes from the place of relieving himself or you have contacted women and find no water, then seek clean earth and wipe over your faces and your hands [with it]. Indeed, Allah is ever Pardoning and Forgiving” (An-Nisa: 43).

In this verse, Allah forbids believers from approaching prayer while intoxicated, and the reason for this prohibition is because of what the person may say during prayer. This indicates that the Sharia addresses the responsible person with commands and prohibitions, assuming that their intellect is still present. The Sharia has set rules based on this assumption and reinforced them as a precaution. Intoxication may cause one's mind to be impaired due to the forbidden substances consumed, but the person is still held accountable for their actions in most cases (Ibn Al-hamam, vol, 3, p.390).

Furthermore, the verse implies that intoxicated individuals are addressed as believers, which implies their accountability. It is argued that if the address was made during intoxication, it would still be a directive because it implies that the person is accountable while intoxicated, similar to the directive given to a sane person. Therefore, if it is established that the person is responsible, then the pronouncement of divorce is obligatory, just like in the case of a sober person (Al-



Mawardi, vol, 10, p. 236). Allah addresses people based on their ability to understand. The meaning of the verse is that the responsible person is addressed with the prohibition of approaching prayer while intoxicated, indicating that the addressee is someone with intellect. The prohibition is for those who are accountable and able to comprehend. Knowledge and understanding are conditions for responsibility, as established in the principles of Islamic jurisprudence (Ibn Al-Qayem, vol, 5, p.193). Additionally, Allah links accountability to what is earned by the hearts of people in the verse:

لَا يُؤَاخِذُكُمُ اللَّهُ بِاللَّغْوِ فِي أَيْمَانِكُمْ وَلَكِنْ يُؤَاخِذُكُمْ بِمَا كَسَبَتْ قُلُوبُكُمْ  
وَاللَّهُ غَفُورٌ حَلِيمٌ

Meaning: “Allah does not impose blame upon you for what is unintentional in your oaths, but He imposes blame upon you for what your hearts have earned. And Allah is Forgiving and Forbearing” (Al-Baqarah: 225).

This shows that accountability is tied to intentions and deliberate actions. There is no accountability for statements or actions that a person's heart does not know or intend. The concept of accountability is negated in cases of unintentional thoughtlessness, as stated in the verse:

لَا يُؤَاخِذُكُمُ اللَّهُ بِاللَّغْوِ فِي أَيْمَانِكُمْ وَلَكِنْ يُؤَاخِذُكُمْ بِمَا عَقَدْتُمُ الْاَيْمَانَ  
فَكَفَّارَتَهُ إِطْعَامُ عَشْرَةِ مَسْكِينٍ مِنْ أَوْسَطِ مَا تُطْعَمُونَ أَهْلِيكُمْ أَوْ  
كِسْوَتُهُمْ أَوْ تَحْرِيرُ رَقَبَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامُ ثَلَاثَةِ أَيَّامٍ ذَلِكَ كَفَّارَةُ اَيْمَانِكُمْ  
إِذَا حَلَفْتُمْ وَاحْفَظُوا اَيْمَانَكُمْ كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمْ آيَاتِهِ لَعَلَّكُمْ تَشْكُرُونَ

Meaning: “Allah will not call you to account for your thoughtless oaths, but He will hold you accountable for deliberate oaths. The penalty for a broken oath is to feed ten poor people from what you normally feed your own family, or to clothe them, or to free a bondsperson. But if none of this is affordable, then you must fast three days. This is the penalty for breaking your oaths. So be mindful of your oaths. This is how Allah makes things clear to you, so perhaps you will be grateful. (Al-Ma'idah: 89).

Accountability is imposed for deliberate statements and actions, no accountability is held for statements and actions that the heart is unaware of or did not intend (Ibn Taymyah, vol, 14, p. 117).

Al-Shawkani mentioned that intelligence is a condition for legal responsibility. Anyone who lacks understanding of what they say is not legally responsible. For instance, if a person is compelled to drink alcohol or is unaware that it is alcohol, divorce will not be counted against them. However, some scholars disagreed with this interpretation (Al-Shawkani, vol, 2, p. 280). Similarly, Hurairah (may Allah be

pleased with him) reported that the Messenger of Allah (peace be upon him) said: Every divorce is permissible except the divorce of the senseless and mentally incompetent (Al-Tirmidhi, vol, 3, p. 488, hadith number, 1191). The justification for this Hadith is that the word "every" encompasses the divorce of every accountable person except those excluded in the Hadith, the senseless and mentally incompetent. The intoxicated person is not considered senseless or mentally incompetent; therefore, divorce applies to them within the general meaning of the word "every."

However, some scholars criticized the authenticity of this Hadith, as it is narrated in both Marfu' and Mawquf forms, and Ata' ibn Abi Rabah, a transmitter in the chain, is considered weak in Hadith narration. Therefore, the Hadith cannot be relied upon. As Ibn Hajar Said: this hadith is very weak, (Ibn Hajar, vol, 9, p. 393), also this hadith is a Mawquf hadith by Baihaqi from Ali, and then Baihaqi said: the accuracy is that this hadith is Mawquf, and it is not Marfu, Nonetheless, if one accepts its authenticity, it serves as evidence for those who argue that the divorce of an intoxicated person is valid since the intoxicated person is similar to the mentally incompetent, who is described as having no understanding and does not know what they are saying (Ibn Qayem, vol, 5, p. 193).

The second piece of evidence is the saying of the Prophet (peace be upon him): The pen is lifted from three: the child until they reach puberty, the insane person until they regain their sanity, and the sleeper until they wake up (Al-Tirmidhi, vol, 4, p. 32, hadith number, 4403). The rationale behind this Hadith is that the legal responsibility is lifted from these three individuals, and they are not accountable during these specific conditions. The intoxicated person is included among these three, neither in the literal sense nor in the intended meaning. Therefore, divorce would apply to them (Al-Shafi'I, vol, 5, p.275). A counter-argument to this justification is that the intoxicated person falls under the intended meaning of one of these three categories. They resemble the insane person whose intellect has been impaired or lost, thus, they fall within the same category, as both experience a failure of the intellect to perform its function.

The third piece of evidence is a Hadith which narrates that: When the call for prayer was made, the Messenger of Allah (peace be upon him) used to say: Indeed, no drunkard should approach the prayer (Abu Dawod, vol, 3, p. 325, hadith number: 3670). The argument based on this Hadith is that the address is directed specifically at the intoxicated person. Since the intoxicated person is addressed, they are considered accountable. Therefore, if their accountability is established, the pronouncement of divorce would be valid (Ibn Rushd, vol, 4, p. 259).

Another Hadith which is mentioned as evidence is the hadith narrated: One should not marry nor divorce except when sober (Al-Darumi, vol, 4, p. 2077, hadith number: 3338). The argument presented is that this Hadith explicitly mentions the occurrence of divorce while being intoxicated. Therefore, "nashwān" refers to the state of intoxication, and hence, it refers to the "drunkard" (Al-Mawardi, vol, 10, p. 237) and (Al-Faumi, vol, 2, p. 606).

However, a counter-argument to this interpretation is that the Hadith is not found in this specific wording, and thorough research did not yield any authentic sources for it. Al-Mawardi mentioned a similar version in his book *A'lam al-Nubuwwah*, where the Hadith states: The marriage proposal of a drunkard is not to be presented to me (Al-Mawardi, p. 147). Similarly, Al-Darimi reported that Hamid ibn Abd al-Rahman Al-Humayri said that divorce is not permissible except when the person is mentally sound, except for the drunkard, as his divorce is valid even if he strikes his back, (Al-Darimi, vo, 4, p. 2077, hadith number: 3338). Another version also attributed to Sa'id ibn Mansur mentions that Uthman ibn Affan said: All forms of divorce are permissible, except for the divorce of the drunkard and the insane (Sa'id ibn Mansur, vol, 1, p. 310, hadith number: 1112).

Another piece of evidence that is mentioned is that the intoxication itself causes the person to lose their sense, and thus, the legal ramifications of divorce do not apply to the drunkard. Divorce should not be affected by intoxication as it is linked to the intention of pronouncing the words of divorce, not the state of intoxication (Al-Sanaani, vol, 2, p.365).

However, a counter-argument to this view is that the order of events concerning divorce and pronouncing the words of divorce is a matter of dispute among scholars. Linking the legal rulings to their causes in this matter leads to various complexities. If the cause of divorce is simply pronouncing the words, then the divorce should also occur when pronounced by a mentally ill, sleeping person, or an intoxicated individual who unintentionally utters them. Conversely, if the cause of divorce is the intention of the accountable person who understands their utterance, then the drunkard, being non-accountable and incapable of understanding, cannot be considered the cause of the divorce (Ibn Qayem, vol, 2, p. 266). Another evidence is that intoxication leads the person to lose their mental faculties and engage in sinful acts, so the prohibition and sin remain applicable to them. Thus, their accountability is considered intact as a deterrent and a rebuke for committing sins (Al-Marghinani, vol, 1, p. 224).

However, a counter-argument to this perspective is that a drunkard is not the same as a mentally insane person. Even though intoxication causes them to lose their mental faculties or leads them to engage in actions that impair their judgment, they are still different from someone else who causes themselves or others to lose their sanity intentionally. If their rulings are different based on the source of their insanity, then some insane people may be divorced (Al-Muzani, vol, 8, p. 306). Moreover, mentally insane individuals have consistent rulings regarding the effects of their insanity, regardless of the cause leading to their mental state. In this context, their legal responsibilities may fall, and their punishment for their crimes, such as murder, might be less severe (Al-Tahawi, vol. 12, p. 235).

Scholars like Ibn Taymiyyah, Ibn Al-Qayyim, and Al-Sun'ani argue that increasing the punishment by pronouncing divorce does not find a precedent in Islamic law. The punishment for intoxication is what the Sharia has legislated, such as flogging, and it is not permissible to add or alter the punishments set by the

Sharia (Ibn Qayem, vol, 5, p. 193-194). Ibn Taymiyyah said: Those who based divorce on such a weak foundation did not mention any authentic evidence. They argue that a person commits a sin by losing his mind, and this is valid, leading to a punishment like the prescribed punishment for drinking alcohol. However, divorce should not be used as a punishment for someone's sin. If this were the case, then anyone who drinks alcohol or gets drunk would have divorced their wives. Those who hold this opinion say that divorce is valid when pronounced, but their opinion contradicts the concept of legal sanity. Moreover, if they repent, the prescribed punishment is lifted, and revoking the divorce would be more appropriate, as Allah loves emancipation and does not love divorce (Ibn Taymyah, vol, 33, p. 103).

Another piece of evidence is that divorce during intoxication is pronounced by the party entitled to the issue of divorce, which is the husband, addressed to the party under consideration, which is the wife. Thus, it is necessary to assert its occurrence because the husband intends to enact the divorce upon his spouse when he possesses the capacity to do so, and his case should not be dismissed (Al-Ghaznawi, vol, 1, p. 153).

A counter-argument to this reasoning is that divorce is valid when the husband is resolute in his decision and a legally valid state. However, the intoxicated person is not in a legally valid state, so it is not appropriate to consider intoxication as the reason for the divorce, thereby rendering this argument invalid (Al-Halol, 2004, p 372).

The last piece of evidence is that not implementing divorce during intoxication contradicts the objectives of Sharia. If someone commits one forbidden act, the corresponding legal ruling is applied. However, if they commit multiple sins, such as intoxication and another forbidden act, the legal ruling for the latter is no longer applicable. For instance, if a person apostatizes without being intoxicated, they would be subject to the ruling of apostasy. However, if they combine apostasy and intoxication, the ruling of apostasy is not applicable due to the intoxication (Al-Shawkani, vol, 6, p. 281).

A counter-argument to this is that we do not negate the legal ruling for the sin committed while intoxicated based on the simultaneous occurrence of another forbidden act (intoxication). The argument presented against this perspective is that an intelligent person would not accept this reasoning. Instead, the legal ruling for the sin is set aside due to the lack of accountability, which is determined by the soundness of the mind (i.e., the state of being sober). For instance, if someone drinks alcohol but remains mentally conscious, their legal ruling would be the same as that of a sober person (Al-Shawkani, vol, 6, p. 281).

### **The Proponents of the Non-occurrence of Divorce for Intoxicated Individuals and their Evidence**

A group of jurists, including Al-Karkhi, Al-Tahawi, and Muhammad bin Salam from the Hanafi school (Ibn Nujaim, vol, 3, p. 266). Muhammad bin Abdul Hakam from the Maliki school (Ibn Rushd, vol, 3, p. 258). Al-Muzani from the Shafi'i school, (Al-Muzani, vol 8, p. 306), and one of the views of Al-Shafi'i, (Ibn

Qudama, vol, 7, p. 379) which is another narration from Ahmad, and the opinion of Al-Thahiriyya, (Ibn Hazm, vol, 9, p. 471), as well as the opinions of Uthman and Ibn Abbas and some of the Tabeen, hold the view of the non-occurrence of divorce for the intoxicated individuals (Al-Bukhari, vol, 7, p. 35). They based their argument on the following:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَقْرَبُوا الصَّلَاةَ وَأَنْتُمْ سُكَرَىٰ حَتَّىٰ تَعْلَمُوا مَا تَقُولُونَ  
وَلَا جُنُبًا إِلَّا عَابِرِي سَبِيلٍ حَتَّىٰ تَغْتَسِلُوا وَإِنْ كُنْتُمْ مَرْضَىٰ أَوْ عَلَىٰ سَفَرٍ  
أَوْ جَاءَ أَحَدٌ مِّنْكُمْ مِنَ الْغَائِطِ أَوْ لَمَسْتُمُ النِّسَاءَ فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا  
صَعِيدًا طَيِّبًا فَامْسَحُوا بِوُجُوهِكُمْ وَأَيْدِيكُمْ إِنَّ اللَّهَ كَانَ عَفُورًا غَفُورًا

Meaning: “O believers! Do not approach prayer while intoxicated until you are aware of what you say, nor in a state of ‘full’ impurity unless you merely pass through ‘the mosque’ until you have bathed. But if you are ill, on a journey, or have relieved yourselves, or been intimate with your wives and cannot find water, then purify yourselves with clean earth, wiping your faces and hands. And Allah is Ever-Pardoning, All-Forgiving.” (An-Nisa: 43).

They use this verse as evidence that Allah commands not to approach prayer while intoxicated, and the reason cited in the verse is to know what one is saying. Therefore, the statement of the intoxicated individual is not considered valid because they do not know what they are saying, and the one who does not know what they are saying is not accountable, as it is a recognized consensus that sound reasoning is a condition for accountability. Thus, divorce does not occur during a state of intoxication, as the intoxicated person is not accountable at the moment of their intoxication, and they do not know or comprehend what they say (Al’aini, vol. 5. P. 300). Al-Shafi’i was reported to have used this verse as an argument that the intoxicated person does not have a valid prayer until they know and intend it, and similarly, there is no divorce for them until they know and intend it (Al-Shafii, vol, 2, p. 612).

However, some objections were raised against this argument. It was argued that Allah directed those who believe before they find themselves in a state of intoxication. Therefore, they remain accountable even while intoxicated. Intoxication does not contradict the directive to be responsible and to act on what is required, nor does it invalidate the eligibility to receive the directive in the first place based on the achievement of reason and maturity. Nonetheless, it prevents the use of reason due to the overwhelming influence of pleasure, making the obligation binding despite the inability to perform it. If the intoxicated person cannot comprehend the directive due to his disobedience, then the directive becomes a warning against him, while the obligation remains directed towards the sin, and the obligation of judgment persists, except in cases of celestial harm, such as deep sleep, where an excuse can be accepted to avoid hardship (Al-Taftazani,



vol, 2, p, 370).

The next evidence is the hadith narrated from Sulaiman bin Buraida, from his father, he said: Ma'iz bin Malik came to the Prophet (peace be upon him) and said: O Messenger of Allah, purify me. The Messenger of Allah (peace be upon him) told him: Go back and seek forgiveness from Allah and repent to Him. He returned shortly and came back again, saying: O Messenger of Allah, purify me. The Messenger of Allah (peace be upon him) gave him the same response. This happened for the third and fourth time. Finally, the Prophet (peace be upon him) asked him: What has prompted you to seek purification? Ma'iz replied, Because of adultery. He further asked the Prophet (peace be upon him) whether he was insane. It was informed to him that he was not insane. Then, the Prophet (peace be upon him) asked if he had consumed alcohol. A man stood up and testified that he could not smell any alcohol from him. At this point, the Prophet (peace be upon him) said: You have committed adultery, and he confirmed it. Consequently, the Prophet (peace be upon him) ordered his stoning (Al-Qushairi, vol, 3, p. 1321, hadith number: 1695). The prophet intended to establish the scent of alcohol as evidence of his drinking to negate his testimony and invalidate his claim of being intoxicated as a basis for non-accountability and, thus, the non-occurrence of divorce (Al-Mutī'ī, vol, 17, p. 63).

A counter-argument was presented that the Prophet (peace be upon him) intended to test Ma'iz's state by asking him repeatedly, unsure whether he was in full possession of his mental faculties. The act of questioning did not impose a legal ruling. Moreover, the ruling applicable to a divorced person differs from that applicable to an adulterer (Al-Halol, p. 373). An objection was raised to the counter-argument, stating that the actions and sayings of the Prophet (peace be upon him) are safeguarded from meaningless actions. If the prophet set aside severe punishments, such as stoning or flogging, it would be more appropriate to set aside the lighter punishment, which is the pronouncement of divorce during intoxication (Al-Samay'at, p. 52).

Their next evidence is the hadith narrated from Aisha (may Allah be pleased with her), she said: I heard the Messenger of Allah (peace be upon him) saying: There is no divorce or emancipation during 'Ighlaq' (Abu Dawud, vol, 2, p. 258, hadith number: 3193). The basis of this argument is that the hadith negates the occurrence of divorce during a state of 'Ighlaq', which includes intoxication, as 'Ighlaq' encompasses any situation that obstructs the faculty of perception, intention, and consciousness, such as madness, intoxication, extreme anger, or extreme sadness (Ibn Qayem, vol, 5, p. 195).

An objection was raised to this argument, stating that the hadith is weak since it includes a narrator called Muhammad bin 'Ubaidullah Al-Makki, whom Abu Hatim has weakened (Abu Hatim, vol, 8, p. 10), However, Ibn Hibban mentioned him among the reliable narrators (Ibn Haban, vol, 8, p. 10). Also, Al-Bayhaqi recorded the hadith in his Sunan through various chains, none of which have been criticized. Additionally, scholars have differed in the interpretation of 'Ighlaq,' with Ibn Al-Qayyim interpreting it as any situation obstructing the faculty of perception, intention, and consciousness, such as madness, intoxication, extreme anger, or extreme sadness. On the other hand, Abu Dawood interpreted it as extreme anger, while Abu 'Ubaid, Al-Qataibi, Abu Bakr, and others interpreted it as coercion (Ibn Qudama, vol, 7, p. 118).

Also, these scholars say that the Prophet (peace be upon him) said to the

one who acknowledged his mistake: Are you insane? Ali described Hamza as intoxicated and referred to his condition (the whites of his eyes were red) (Shariqi, 1325h, vol, 5, p. 189). The Prophet (peace be upon him) expressed displeasure towards Hamza's state. As Hamza was visibly intoxicated, he questioned him saying: Are you all mere slaves to my father? Realizing that Hamza was drunk, the Prophet (peace be upon him) left, and we followed him (Al-Bukhari, vol, 7, p. 189). They explain the ratio of their evidence by saying that the Prophet's (peace be upon him) leaving and not reproaching Hamza for his drunkenness indicates that an intoxicated person is not held accountable for their utterances. The Prophet (peace be upon him) did not reprimand Hamza for being drunk, which implies that divorce does not occur during intoxication (Al-Shawkani, vol, 6, p. 280).

A counter-argument can be addressed based on what Ibn Hajar reported from Al-Muhallab that at that time, alcohol was permissible, so the legal implications of what was uttered in that state were not applicable. Moreover, he added that the point of reference from this story is that the intoxication itself is not accountable for what is spoken, and the legality of drinking was not a factor initially (Ibn Hajar, vol, 9, p. 391).

Another evidence of these scholars is the hadith that says: The announcer (*Al-Muazzin*) of the Messenger of Allah (peace be upon him) used to call out when the prayer was ready to commence: Surely, no intoxicated person should approach the prayer (Abu-Dawod, vol,3, p. 325, hadith number: 3670). The rationale of their argument from this narration is that some commentators mentioned this narration after the relevant Quranic verse, and the hadith supports the indication of the verse regarding the ignorance of the intoxicated person concerning prayer and intention, and likewise, no divorce occurs for them (Al-Shawkani, vol, 1, p. 255).

Similarly, they mention the narration narrated from Uthman (may Allah be pleased with him) he said: There is no divorce for the insane or the intoxicated (Al-Bukhari, vol, 7, p. 35). Ibn Abbas (may Allah be pleased with him) said, the divorce of the intoxicated and the coerced is not permissible (Al-Bukhari, vol, 7, p. 35) Also Ibn Abbas (may Allah be pleased with him) said: Divorce should be deliberate and emancipation for the sake of Allah (Al-Bukhari, vol, 7, p. 35).

This argument is based on the narrations from the Companions, may Allah be pleased with them, stating that divorce does not occur for the intoxicated, and these are explicit and clear statements in this matter. The term "intoxicated" is mentioned alongside "insane" and "coerced," and divorce does not occur for any of them (Ibn Hajar, vol, 9, p, 392).

Another piece of evidence is that psychological factors have an impact on speech, whether in exaggeration, consideration, implementation, or annulment. These factors include forgetfulness, errors, coercion, intoxication, madness, fear, sadness, absentmindedness, and bewilderment. As a result, individuals in such states may express words beyond their normal tendencies and may be excused for actions that others would not be. This is due to the absence of intention and volition, and the presence of influential factors in their speech (Ibn Qayem, vol, 5, p. 195)

Similarly, they said that the analogy is drawn between a sleeping person and an intoxicated individual, as both lack intent. The intoxicated person lacks intent similar to that of a sleeping person. Furthermore, a valid act requires rationality,

which ceases when a person is under the influence of alcohol or other permissible substances (Al-'Ayni, vol, 5, p. 301). The level of negligence of an intoxicated person exceeds that of a sleeping person, as the latter becomes alert when awakened, whereas the former does not. Since divorce and emancipation do not occur for a sleeping person, they should not occur for an intoxicated person either (Abdulazizi, vol, 4, p. 196).

A counter-argument can be raised against this analogy and rationale by suggesting that sleep prevents one from acting, and thus, actions do not occur. However, intoxication does not prevent one from acting, and therefore, divorce can happen for an intoxicated person (Al-Sarkhasi, vol, 6, p. 176).

These scholars say that: Worshiping while intoxicated, like prayer, does not have a clear scriptural or consensus-based validation. Allah has prohibited approaching prayer while intoxicated until one is aware of their speech. On the other hand, for someone who drinks but is not intoxicated, their acts of worship are valid based on their conditions. Their prayer is invalid due to the lack of consciousness, as indicated in the Quran. Therefore, the dissolution of their contracts takes precedence, much like in the case of a sleeping person or a mentally challenged individual. However, certain acts of worship may be valid for those who lack mental capacity due to immaturity or mental disability (Ibn Taymyah, 1987, vol 4, p. 203).

Another piece of evidence is the application of the jurisprudential rule that says: The consequence of contracts is based on their intents and meanings, not their expressions and structures. Hence, any utterance without proper intention due to inadvertence, haste, prior speech, or mental incapacity does not bear a legal ruling. A drunken person might utter unintended words, but their legal implication is not realized, even though they are held accountable for their intoxication (Ibn Taymyah, 1987, vol 4, p. 203).

Also, they present the analogy drawn between the divorce of a mad person and a child, both of which do not occur, as neither has a valid intent. The occurrence of divorce depends on a valid intent (Al-Mawardi, vol, 10, p. 236). Consequently, religious obligations are linked to rationality and discernment. Hence, those without rationality and discernment are not subject to religious obligations. It is evident that an intoxicated person, during their state of intoxication, lacks discernment and impaired rationality. Ibn Taymiyyah indicated that if the heart has lost its rationality, which governs speech and actions, how can it be subject to commands, prohibitions, attribution of ownership, or the annulment of ownership? This is understood rationally, and the Sharī'ah confirms it (Ibn Taymyah, 1987, vol 3, p. 203).

A counter-argument against this analogy is that if an intoxicated person repents after intoxication, his divorce is not valid according to consensus, and no separation occurs between him and his spouse. Therefore, if we consider this meaning, his divorce would be deemed valid (Al-Kasani, vol, 3, p. 99). An answer to this counter-argument is that the divorce of an intoxicated person is not valid due to his lack of sound judgment, as it requires belief, which the intoxicated person lacks. Thus, his divorce is not deemed valid because of the absence of its essential component, not for the sake of leniency (Al-Sarkhasi, vol, 6, p. 176).

After presenting the opinions of jurists and their evidence and discussing them, it becomes clear that the prevailing view in the matter is that divorce does not occur while one is intoxicated, due to the strength and clarity of the evidence

supporting this view. This is especially evident in the stories of "Ma'iz" and "Hamzah," which Ibn Hajar described as some of the strongest evidence in favor of not considering the utterances of an intoxicated person, whether related to divorce or other matters. Furthermore, there are no valid objections or sound criticisms against this view (Ibn Hajar, vol, 9, p. 391).

On the other hand, the arguments supporting the occurrence of divorce while intoxicated are weakened. The general verses cited as evidence do not explicitly indicate divorce during intoxication, and several narrations are weak and lack clear indications of divorce. Moreover, the logical reasoning presented is not immune to strong counterarguments.

Inflicting divorce upon an intoxicated person as a deterrent and punishment for their transgressions means causing harm to others, such as the spouse, children, and others. However, this punishment, in the form of divorcing the intoxicated individual, does not absolve them of the sin and legal consequences of being intoxicated. Jurists have reached a consensus on not applying divorce in certain cases, such as minors, insane individuals, those with mental disabilities, and those asleep – without going into the details of their evidence. Likewise, the intoxicated person shares with them the inability to exercise reason, discernment, awareness, intention, and consciousness. Although they may differ in some aspects, just as those exempt from divorce do, the same principle applies to the intoxicated person.

### **The Afghan Civil Law's Stance on Divorce of Intoxicated Individuals**

The Afghan Civil Code, also known as the Civil Code of Afghanistan, is a crucial piece of legislation that governs civil matters within the legal framework of Afghanistan. Enacted in 1977, the code represents a comprehensive set of laws pertaining to various civil issues, including family law, property rights, contracts, and torts. The Code plays a pivotal role in shaping the legal landscape of the country and provides a foundation for resolving disputes and maintaining social order. However, it is important to note that the legal context in Afghanistan has evolved over the years due to various political and social changes, which may have implications for the interpretation and application of the Civil Code in contemporary times. As such, scholars and legal practitioners continue to engage in ongoing analysis and discussion to ensure that the Code remains relevant and effective in the ever-changing legal environment of Afghanistan.

One of the issues that this code discusses is the divorce of intoxicated persons. In the previous section, we discussed the opinions of jurists regarding the divorce of intoxicated individuals, examining their views, evidence, and the prevailing opinion among them. Now, we turn our attention to the legal perspective in the third section, where Afghan Civil Law addresses the specific provisions concerning the divorce of intoxicated individuals and establishes a criterion for intoxication.

### **The Legal Ruling on Divorce of Intoxicated Individuals in Afghan Civil Law**

The law explicitly and unequivocally states that divorce does not occur while a person is under the influence of intoxication. This is evident in Article 138, which states: Divorce does not occur while intoxicated (Afghan Civil: 138).

The same principle is reiterated in Article 141, which stipulates that divorce does not take place for the intoxicated, the coerced, the mentally disabled, the unconscious, the asleep, or anyone whose mental faculties are impaired due to age, illness, or intoxication (Afghan Civil: 141).

Furthermore, paragraph "Z" of the same article defines the mentally impaired stating that: it refers to an individual whose speech and actions are affected by anger or other factors, leading him away from his usual conduct. From this, it is apparent that the law considers divorce of an intoxicated person void when their mental faculties and consciousness are affected by intoxication. In this state, they are unable to reason, comprehend, or make informed decisions, even if they were mentally sound and conscious before the intoxication. Despite the explanation in Article 141, Article 138 unequivocally confirms the non-occurrence of divorce while intoxicated.

Examining Article 141 and its subsections "A" and "Z," six categories of individuals are listed who are exempt from divorce, including the mentally impaired (*mudhūsh*) in addition to the intoxicated. However, the article provides a definition only for the mentally impaired, without defining the other five categories or specifying intoxication. The law relies on judges' understanding of these terms, and they may seek guidance from dictionaries, linguistic references, as well as legal dictionaries, and court decisions. Nevertheless, the matter remains unclear to the public, some judges, and in certain cases.

The law has defined the mentally impaired to eliminate ambiguity and to ensure clarity in their judgment. We observe that the law renders the ruling based on the prevalence of mental disorders in an individual's speech and actions without specifying the nature or location of the disorder. The law stipulates that the mentally impaired's conduct deviates from their usual behavior. However, the definition remains broad and does not offer restrictions. Consequently, if the disorder affects an individual's mental capacity and willpower, the matter is clear in terms of mental capacity and willpower but remains ambiguous in other aspects.

Moreover, intoxication can vary in intensity and its impact on an individual's mental capacity and willpower may differ from person to person and over time. Someone who has been drinking for a long time may not be significantly affected by intoxication, while they may be considered intoxicated during that particular instance, recurrent drinking does not substantially impair their mental capacity and willpower.

The argument presented by some jurists, which forms the basis of the law's stance on the non-occurrence of divorce for intoxicated individuals, hinges on the presence of intoxication that significantly impairs an individual's mental capacity and willpower. Otherwise, someone who consumes alcohol or becomes intoxicated without substantially deviating from the norms of rational individuals should not be classified as intoxicated. The law, however, provides a lenient and broad definition of the mentally impaired. For instance, someone who is moderately angered may be considered mentally impaired if their speech and actions significantly deviate from their usual conduct. In comparison, it appears that intoxication is a more severe state than moderate anger and warrants a more lenient approach.



### The Definition of Intoxication in Afghan Civil Law

To gain a comprehensive understanding of intoxication and its true meaning, we must not hastily assume divorce based solely on mere suspicion of intoxication without delving into its actual implications. Additionally, we should not automatically consider an individual intoxicated without verifying whether they are genuinely under the influence of alcohol. Furthermore, it is imperative to examine the accurate definitions and concepts of the specific terms used in the context of intoxication, namely the mentally impaired (*mudhūsh*), the coerced, the mentally disabled, the unconscious, the asleep, and the mentally disturbed. Each category requires a thorough assessment of the impact of these conditions on an individual's mental faculties.

From the statements of jurists regarding these specific terms, as presented in article 141, it becomes essential to grasp the true essence of each designation. The Afghan Civil Law, however, only defines the mentally impaired while leaving the rest of the categories and the term intoxicated without clear explanations. The law relies on judges' interpretation of these terms, and in cases of ambiguity, they may refer to linguistic references, legal dictionaries, as well as the opinions of scholars and decisions of Islamic appellate courts. Nevertheless, this might still create uncertainty among the public and some judges.

It is evident from the legal text that the determination of whether divorce applies to these categories depends on the actual impact of the condition on an individual's mental capacity and awareness. Therefore, the intoxication must genuinely impair the person's ability to distinguish between right and wrong.

Considering the conclusions of jurists on the matter, it is noteworthy to mention the opinion of Ibn Abidin, who defines intoxication as a state where an individual's brain is filled with fumes arising from alcohol or similar substances, leading to a disruption in their ability to differentiate between good and evil (Ibn Abidin, vol, 1, p.144). The law indeed adopts this understanding in Article 138, ruling that the divorce of an intoxicated individual does not occur due to the impairment of their mental faculties, which prevents them from distinguishing between right and wrong. As a result, according to Article 138 of the Afghan Civil Law, the divorce of an intoxicated person is not valid (Afghan Civil Cod: 138).

Upon careful examination and thorough investigation, it is evident from prominent fatwas and summonses that the divorce pronounced by the plaintiff, while in a state contrary to their usual condition due to anger, astonishment, intoxication, or other factors, is not deemed valid in front of the *Mufti* or the court. In particular, this applies to a situation where the person is intoxicated since they would be acting contrary to legal principles.

Based on the content of the Afghan Civil Law, particularly Article 138, the argument against the divorce of an intoxicated person is substantiated and aligned with Islamic jurisprudence. The law takes into account the view of jurists who advocate against the occurrence of divorce for intoxicated individuals, under the condition that their intoxication significantly affects their mental capacity, awareness, intention, and perception. It is not merely a matter of being labeled as intoxicated without a genuine impairment of mental faculties; otherwise, the rulings would be superficial and nominal.

### CONCLUSION

Pursuant in the pursuit of understanding the complex issue of divorce

among intoxicated persons, this research has shed light on the divergent perspectives held by Islamic jurists. While there exists a consensus on divorce matters, the divorce of intoxicated individuals remains a subject of varying opinions and interpretations within the Islamic legal framework. As a result, it is imperative for legislative authorities to carefully consider the rulings and conclusions of Islamic jurists and incorporate their insights into the legal system. Moreover, scholars with an interest in comparative studies, particularly those related to divorce matters, are encouraged to devote greater attention to the topic of divorce among intoxicated individuals and similar cases. By delving into these intricacies, a deeper understanding of the complexities surrounding divorce can be attained.

Drawing from the findings presented, several noteworthy recommendations emerge. Firstly, the need to conduct independent juridical studies for each unique divorce case cannot be overstated. By doing so, the most valid opinions can be identified and subsequently adopted. Secondly, conducting comparative legal studies on divorce matters, specifically exploring the Islamic personal status laws applied in various Islamic countries with a particular focus on Afghan law, would provide valuable insights for policymakers and researchers. Lastly, although following the opinions and interpretations of Islamic jurists has shown effectiveness in preventing the divorce of intoxicated individuals, there are proposals advocating for a broader definition of divorce. This expansion would encompass not only divorces of intoxicated persons but also cases involving duress, compulsion, unconsciousness, sleep, and mental impairment. To facilitate this, it is suggested to incorporate relevant rulings from classical Islamic texts, contemporary scholarly works, and legal codes. By adhering to these recommendations, policymakers and researchers can significantly enrich their comprehension of divorce within the realm of Islamic jurisprudence and Afghan civil law. Furthermore, such efforts contribute to the development of a more comprehensive and equitable legal framework for handling divorce cases involving intoxicated individuals and similar circumstances. It is clear that the study of Islamic jurisprudence and the engagement with the opinions of Islamic jurists continue to play a pivotal role in addressing contemporary legal challenges in family law matters. By acknowledging the nuances and complexities of divorce in different contexts, justice and fairness can be more effectively served in the realm of family law. Through these collective efforts, we pave the way for a more equitable and just society.

## REFERENCES

- Adiasih, N. (2017). Analisis Terhadap Putusan Pengadilan Dalam Perkara Perdata Yang Hukumnya Tidak Ada atau Hukumnya Tidak Jelas. *Jurnal Hukum PRIORIS*, 6(1). <https://doi.org/10.25105/prio.v6i1.1909>
- Ahmad, F. (2003). Understanding the Islamic Law of Divorce. *Journal of the Indian Law Institute*, 45(3/4), 484–508. <https://www.jstor.org/stable/43951877>
- Al-Mashhrawi, F. M. U. (2018). *Arā' al-Imām Mālik ibn Anas al-Fiqhīyyah al-Wāridah fī Kitāb al-Muwāṭṭā' Kitāb al-Nikāh wa Ba'du Masā'il min Kitāb al-Ṭalāq (al-I'lā'-al-Zihār-al-Khal')-Ṭalāq al-Sakrān): Dirāsah Fiqhīyyah Muqāranah*. <http://dspace.alazhar.edu.ps/xmlui/handle/123456789/1425>
- Arrashid. (2022). طلاق السكران وجنابته. *مجلة كلية الشريعة والقانون بتفهما الأشراف - دقهلية*, 1404–1353 ,(2)25. <https://doi.org/10.21608/jfslt.2022.276178>

- Azzahra, A., Shadrina, S., Wardana, G. A., Yandrizar, D., & Hasim, R. (2021). Islamic Education and Concept of Gender Using a Culture Approach in Minangkabau. *Khalifa: Journal of Islamic Education*, 5(2), 155. <https://doi.org/10.24036/kjie.v5i2.129>
- Bani, L. M., & Pate, H. A. (2015). Dissolution of Marriage ( Divorce ) under Islamic Law. *Journal of Law, Policy and Globalization*, 42, 138–143. <https://core.ac.uk/download/pdf/234650383.pdf>
- Daud, F. K., & Syarif, N. (2021). Hak Cerai Perempuan Dalam Hukum Keluarga Islam Maroko. *Al-Ahwal: Jurnal Hukum Keluarga Islam*, 14(2), 159. <https://doi.org/10.14421/ahwal.2021.14204>
- Fernando, R., Hasanuddin, T., Rangga, K. K., & Utama, D. D. P. (2022). Professional Mosque Management Model Based on Religious and Academic Activities in the Community. *Khalifa: Journal of Islamic Education*, 6(2), 196. <https://doi.org/10.24036/kjie.v6i2.275>
- Haeratun, H., & Fatahullah, F. (2022). Efektivitas Mediasi Sebagai Alternatif Penyelesaian Perkara Perceraian di Pengadilan Agama. *Batulis Civil Law Review*, 3(1), 29. <https://doi.org/10.47268/ballrev.v3i1.930>
- Hasbi, R., & Hasbi, S. (2016). the Legality of Divorce in the Perspective of Hadith. *Jurnal Ushuluddin*, 24(1), 51. <https://doi.org/10.24014/jush.v24i1.1526>
- Herawati, T., Pranaji, D. K., Pujihastuty, R., & Latifah, E. W. (2020). Faktor-Faktor yang Memengaruhi Pelaksanaan Fungsi Keluarga di Indonesia. *Jurnal Ilmu Keluarga Dan Konsumen*, 13(3), 213–227. <https://doi.org/10.24156/jikk.2020.13.3.213>
- Hifni, M., & Banten), (Mahasiswa Pascasarjana IAIN SMH. (2016). Hak Asuh Anak Pasca Perceraian Suami Istri dalam Perspektif Hukum Islam. *Bil Dalil*, 1(1), 1–32. <https://doi.org/10.32678/bildalil.v1i02.123>
- Imron, A. (2016). Memahami Konsep Perceraian dalam Hukum Keluarga. In *BUANA GENDER: Jurnal Studi Gender dan Anak* (Vol. 1, Issue 1, pp. 15–27). <https://doi.org/10.22515/bg.v1i1.66>
- Jafar, A., & Ardha, D. J. (2022). Sistem Pembagian Waris Menurut Adat Bugis dalam Perspektif Hukum Islam di Kecamatan Banyuasin II Kabupaten Banyuasin. *Jurnal Ilmiah Universitas Batanghari Jambi*, 22(3), 1932. <https://doi.org/10.33087/jiubj.v22i3.2815>
- Novebri, N., & Pratiwi, R. (2021). Peran Tokoh Agama Dalam Pencegahan Konflik di Tengah Masyarakat Multikultural Pada Era Digital. *Khalifa: Journal of Islamic Education*, 5(2), 198. <https://doi.org/10.24036/kjie.v5i2.185>
- Rahawarin, Y., Darakay, J., Rumlus, C., & Manuputty, F. (2021). The Role of the Latupati Institution in Overcoming Religious and Social Conflicts in Maluku in 1999. *Khalifa: Journal of Islamic Education*, 5(1), 93. <https://doi.org/10.24036/kjie.v5i1.175>
- Rahmah, S. (2021). Akhlak dalam Keluarga. *Alhadharah: Jurnal Ilmu Dakwah*, 20(2), 27. <https://doi.org/10.18592/alhadharah.v20i2.5609>
- Rosmita, R., Fatimah Sahrah, & Nasaruddin, N. (2022). Konsep Keluarga Sakinah dalam Al-Qur'an dan Implementasinya dalam Kehidupan Rumah Tangga. *BUSTANUL FUQAHA: Jurnal Bidang Hukum Islam*, 3(1), 68–80. <https://doi.org/10.36701/bustanul.v3i1.523>
- Schulenberg, J. L. (2016). Police Decision-Making in the Gray Zone: The Dynamics of Police–Citizen Encounters With Mentally Ill Persons. *Criminal*

*Justice and Behavior*, 43(4), 459–482.  
<https://doi.org/10.1177/0093854815606762>

Sumanto, D., Samsudin, T., & Amirudin, F. H. A. (2021). The Existence of the Religious Court in Handling Divorce Cases on the Reason of Domestic Violence. *Jambura Law Review*, 3(2), 214–230.  
<https://doi.org/10.33756/jlr.v3i2.11651>

**Copyright holder:**

© Poya, A., Ghalia, B., Hamat, M.A.B.A. (2023)

**First publication right:**

International Journal of Islamic Studies Higher Education

**This article is licensed under:**

**CC-BY-SA**