

## ISLAMIC LAW CRITICISM OF MENTAL DISABILITIES MARRIAGE

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### ABSTRACT

*Marriage is the most useful and most important way in effort realize and maintain honor, because with this marriage somebody can awake from what Allah has forbidden. People with disabilities disability as normal human beings who are also blessed desire sexual naturally have desire for tie self in bond marriage . As for goals from study dissertation this is for knowing in a manner in application: Marriage Law For disabled Mental disabilities according to Law No. 8 of 2016, fulfillment obligation wife or husband disabled internal mental disability marriage, implementation marriage disabled mental disability according to the Marriage Law in Indonesia, Review of Islamic Law concerning marriage disabled mental disability. Method research used in writing dissertation this is study library (library research). technique deep data collection study this conducted through studies documentation about marriage disabled originating mental disability from books, articles, magazines, letters news, or source literature other, which later taken conclusion based on these data. kindly general religion of Islam is not once forbid the marriage that took place between disabled mentally handicapped p this remember the goal base marriage that is as means distribute desire sexual with good and true as well as as institution preventive happening wickedness and adultery. However, clan disability in Thing marriage not yet fully protected because they are very risky or susceptible to divorce.*

**KEYWORDS** *law criticism; mental disabilities marriage*



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### INTRODUCTION

According to the *number of scholars*, marriage is a recommendation (*sunnah*) for Muslims. In Law no. 1 of 1974 it is stated that: "Marriage is an inner and outer bond between a woman and a man as husband and wife with the aim of forming a happy and eternal family (household) based on the belief in God Almighty." While

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in the Compilation of Islamic Law "Marriage *mîtsâqan ghalîdzan* according to Islamic law is a marriage, namely a strong contract or *mîtsâqan ghalîdzan* to obey Allah's commands and carry it out is worship."

Marriage is one of the general *sunnatullah* that applies to all creatures of Allah, both animals and plants. Everything created by Allah is paired and matched, as is the case with the most perfect creatures, namely humans.

Marriage as a legal act between husband and wife, not only means to realize worship to Him, but also creates civil law consequences between the two. However, because the goal of marriage is to build a happy, eternal, everlasting family based on the belief in the One and Only God, it is necessary to regulate the rights and obligations of each husband and wife. (Rofiq, 2017).

Humans are not like animals who marry freely and according to their desires. For animals, marriage is merely a need for lust and lust, while for humans, marriage is governed by various ethics and other regulations that uphold civilized and moral human values. Therefore, human marriage must follow the rules that apply. Thus the relationship between a man and a woman is regulated in an honorable manner and based on mutual approval with the consent qabul ceremony attended by the bride and groom.

Humans are creatures created by Allah SWT who have the same position on earth. Every human being has dignity and *worth* attached to his humanity. As the Al-Quran explains that humans are created in the best form, this indicates that humans by nature are the best and most perfect creatures of Allah SWT compared to other creatures of Allah SWT. (Aziz, 2021). In the Al-Quran letter Al Isrâ verse 70 it is stated:

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَىٰ  
كَثِيرٍ مِّمَّنْ خَلَقْنَا تَفْضِيلًا

"And indeed We have glorified the children of Adam, We carried them on land and in the sea, We gave them sustenance from the good and We made them superior with perfect advantages over most of the creatures We have created."

This is in line with the *number* of scholars of Usul Fiqh who say that the basis for the existence of *taklîf* (legal imposition) on a *mukallaf* is reason (العقل) and understanding (الفهم). Amukallaf can be burdened by law if he is wise and can understand the *taklîf properly* addressed to him (Syafe, 2007). Therefore, people who do not or do not have intelligence are not subject to *taklîf* because they are considered unable to understand *the taklîf of al-Syâri'*.

In the rule of *taklîfi law* it is stated that the *mahkûm 'alaih* (a person who is burdened by law) has two conditions for imposition of law, namely: 1) being able to understand the imposition *books*, namely the Qur'an and as-Sunnah, either by himself or through an intermediary; and 2) have the ability to accept the burden (*ahliyah*). In this expert concept, two terms are known, namely first, *expertyah wujûb*, namely the ability to accept rights and obligations, where there is decency for all humans on a humanitarian basis; and secondly, *expert yatul ada'* (ability to

act), namely the decency of a person to be seen as legitimate in all his words and deeds ([Yahya & Rahman, 1979](#)).

By looking at the expert factors above, especially *expert al-ada'*, then people with mental retardation certainly cannot accept the imposition of *taklifi law*. This is because he does not have the appropriateness to be called a *mahkūm 'alaih* (a person who is subject to legal imposition). People with mental disabilities are classified into an *imperfect condition of al-ada' experts*. Because basically his mind is not lost, but his mind is weak and lacking, then he is punished like a *mumayyiz child* ([Khalaf, 2003](#)). A *safih* (idiot; belongs to a type of mental disability) is distinguished from a child by his maturity, and from a madman by his intelligence ([Mughniyah, 2004](#)).

The Prophet Muhammad SAW said:

رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ: عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ ، وَعَنِ الْمُبْتَلِغِ ، وَعَنِ الْوَجْدَانِ

"The legal burden was lifted from three (people); people sleep until they wake up, children until they reach puberty, and crazy people until they recover." ([Dawud, 1984](#))

Marriage is a human instinct to build a household in order to achieve peace, tranquility of life and a sense of affection, as the word of Allah SWT, QS.Ar-Rūm (30): 21.

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً  
وَرَحْمَةً ۗ إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

"And among the signs of His power is that He created for you wives of your own kind, so that you are inclined to and feel at ease with him, and He made them love and care for you."

The verse explains that the purpose of marriage is very noble, namely to create a peaceful, safe and secure family. To realize this noble goal, it must be supported by maturity and maturity, so as to create a sense of responsibility in them.

In line with the verse above, the Prophet Muhammad SAW gave guidance so that in carrying out a marriage a Muslim must have preparations both physically, psychologically and economically, as in the hadith of the Prophet, which means:

يَا مَعْشَرَ الشَّبَابِ مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ فَإِنَّهُ أَغْضُ لِلْبَصَرِ وَأَخْصَنُ  
لِلْفَرْجِ وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ فَإِنَّهُ لَهُ وِجَاءٌ

"Hey young man! If one of you has the ability to marry, then marry. Verily, that lowers the gaze and guards the farji. And whoever is not able (to get married) should fast, in fact that is a guard for him." ([al-Ja'fi, 1991](#))

The capabilities desired from the hadith above are physical and non-physical abilities so that they can provide both physical and spiritual support for their wife. In living a household life, hard work and mutual understanding are absolutely necessary so that a harmonious life between husband and wife will be realized. To realize the purpose of the marriage, careful preparation is needed both morally and materially.

Article 1 of Law No. 1 of 1974 concerning Marriage (hereinafter referred to as UUP) contains the definition of marriage which reads: marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a family (household) that happy and eternal based on Belief in the One and Only God. To be able to realize the function and purpose of the marriage, the physical and mental maturity of the prospective bride and groom are important factors. Without physical and mental maturity, the rights and obligations of husband and wife in marriage will be difficult to fulfill.

In line with this, the UUP adheres to the principle that the prospective husband is required to have maturity/maturity in body and soul to be able to enter into a marriage. The goal is to be able to realize the goals of marriage properly without ending in divorce.

In reality, the demands of ideality and reality often do not go hand in hand. Persons with mental disabilities as normal human beings who are also endowed with sexual desire certainly have the desire to bind themselves in the bonds of marriage. This becomes something natural. However, with their level of intelligence that is less or below normal it is feared that people with disabilities cannot control their emotions or cannot be mature in dealing with a problem. In addition, they are also worried that they will not be able to meet the family's living needs. This in turn can cause problems in the family and a burden on the parents.

Islam does not state mental maturity as one of the conditions or pillars of marriage. Islam only argues that the institution of marriage is a sacred institution that has wisdom to save human life in this world and the hereafter. Nevertheless, the institution of marriage in fostering future generations from each family contains a recommendation that anyone who enters household life should have maturity, both physically and mentally. (Muchtar, 2016) . The UUP and KHI also do not mention ' *aqil* (reasonable) as a condition for a valid marriage. However, implicitly the existence of a minimum age limit for the two bride and groom is an answer to the importance of being *akil* as a requirement for the bride and groom.

In marriages of people with mental disabilities, marriage is not solely for the fulfillment of biological needs, but the main thing is the fulfillment of human affectional needs, namely the need to love and be loved, to feel affection, to feel safe and protected, to be appreciated, to be cared for and so on. Likewise, material needs are not the main basis for achieving happiness.

In terms of mental health, a husband/wife who is bound in a marriage will not get happiness, when the marriage is only based on meeting biological and material needs alone without meeting affective needs (love). Affective factors which are the main pillars for the stability of a marriage/household (Hawari, 1997) .

Marriage as a contract that justifies intimate relations between a man and a woman, shows the most basic function of marriage, namely as a preventive institution for the occurrence of things that are prohibited by religion, namely adultery and wickedness. It is through this marriage that it is hoped that human nature can be properly maintained, because marriage regulates sexual relations between women and men with legal ties.

Disability is a humanitarian issue in Indonesia. The negative stigma against persons with disabilities that is still attached to Indonesian society is a problem in

itself. Among the various types of disabilities, people with mental disabilities are considered as a group that is less accepted in society. This is due to the inherent assumption that they are unable to control their desires, emotions, and lack the ability to socialize with other people ([Selway & Ashman, 1998](#)). Shelway and Ashman note that the majority in the community, people with HIV/AIDS, mental disabilities, mental illness, and *cerebral palsy* are groups that are rarely accepted in society.

The data shows that the number of persons with disabilities in Indonesia is currently at 12 percent according to a survey conducted by the Central Statistics Agency (BPS). The large number of persons with disabilities certainly requires special treatment and policies from the government to fulfill their rights as citizens and protect them from all forms of discrimination.

Even though the number of people with disabilities is so large, the Indonesian public's attention to them is still relatively low. Not a few people with disabilities experience discriminatory treatment, starting from the family environment to the community. Their physical and mental limitations are often seen as a "*curse*". Even if some people start to raise awareness about the importance of paying attention to persons with disabilities, then it is nothing more than a discourse. Everywhere persons with disabilities are still considered a troublesome subject.

Regardless of the conditions experienced, basically every human being has the same right to obtain happiness in his life. Everyone has the right to grow and develop in a conducive and supportive environment, including those with mental retardation. In the Declaration on the Rights of Persons with Disabilities issued by the UN General Assembly, it is stated that playing an active role in a family is one of their rights. In Indonesia their rights are protected in Law no. 8 of 2016 concerning persons with disabilities.

Humans in carrying out social life in society cannot be separated from the existence of interdependence between humans and others. This is because in accordance with the position of humans as social beings who like to be in groups or make friends with other humans. Living together is one of the means to meet the needs of human life, both physical and spiritual needs. Likewise for a man or a woman who has reached a certain age then he will not be separated from these problems. He wants to fulfill his life's needs and go through it together with other people who can be used as an outpouring of soothing souls, a place to share joys and sorrows. Living together between a man and a woman as husband and wife and fulfilling the legal provisions is what is commonly referred to as a marriage.

Marriage is the most useful and most important way in an effort to realize and maintain honor, because with this marriage a person can be protected from what Allah SWT has forbidden. That is why Rasulullah SAW encouraged to speed up marriage, make the road easier for him and eradicate his obstacles.

Article 1 of Law No. 1 of 1974 concerning Marriage (hereinafter referred to as UUP) contains the definition of marriage which reads: marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a family (household) that happy and eternal based on Belief in the One and Only God ([Bardizbah, nd](#)). Likewise in Law No. 8 of 2016 concerning persons with disabilities in article 8 part four it states that: the rights of privacy for persons

with disabilities include having the right to form a family and continue offspring through legal marriage.

To be able to realize the function and purpose of the marriage, the physical and mental maturity of the prospective bride and groom are an important factor. Without physical and mental maturity, the rights and obligations of husband and wife in marriage will be difficult to fulfill.

In line with this, the UUP adheres to the principle that the prospective husband must be mentally and physically mature to be able to enter into a marriage. The goal is to be able to realize the goals of marriage properly without ending in divorce.

In reality, the demands of ideality and reality often do not go hand in hand. Persons with disabilities as normal human beings who are also endowed with sexual desires certainly have the desire to bind themselves in marriage ties. This is something that is very reasonable. However, with their shortcomings it is feared that they will find it difficult to carry out the ark life of their household life. In addition, they are also worried that they will not be able to meet the family's living needs later. This in turn can cause problems in the family and can cause a burden on the parents.

From his description above, there are at least a number of problems that must be explored related to marriage with mental disabilities, namely:

- a. There is a desire in persons with mental disabilities to get married which is driven by mature sexual development
- b. There are problems that may arise in marriages with mental disabilities
- c. A more in-depth study needs to be carried out regarding the *benefits* and *harms* for the bride and the surrounding community, also by looking at it from the perspective of Islamic law.
- d. Seeing that people with mental disabilities themselves cannot take care of their interests and needs, and with the reasons above, of course, it is necessary to re-examine how the phenomenon of marriage for people who suffer from mental retardation.
- e. Finally, is the implementation of Law No. 8 of 2016 concerning Persons with Disabilities related to marriages of persons with mental disabilities.

Therefore, it is necessary to have a more in-depth study of marriages with mental disabilities in the perspective of Islamic law and laws regarding persons with disabilities in regulating their rights to carry out conditional marriages and after the marriage takes place, so the author is very interested in analyzing this problem and raised it in his dissertation. entitled " **Criticism of Islamic Law on the Implementation of Law No. 8 of 2016 concerning Marriage with Mental Disabilities** ”.

## **RESEARCH METHOD**

This research is a form of *field research* using a qualitative descriptive research approach. Qualitative research is research based on descriptive exposure to existing phenomena in an argumentative form. This study aims to obtain a complete picture of the research subject according to the views of the people studied ([Basuki, 2006](#)).

According to Somantri, the qualitative research method is a method that is systematically used by researchers in collecting the data needed in the process of identifying and explaining the social phenomena they are studying. ([Somantri, 2005](#)).

Based on this review, the researchers in this study explained the phenomena and findings of researchers in the field descriptively based on these findings and data .

## RESULTS AND DISCUSSION

### A. Observation Results of Marriage Practices for Persons with Mental Disabilities

The first observation was carried out at the Jamrud Biru Foundation for Mental Disability Rehabilitation, Bekasi City , located on Jl. Asemsari Jl . Asem Sari II, RT.003/RW.004, Mustikasari, Kec. Mustika Jaya, Bekasi City, West Java. The phenomenon that occurs at the Jamrud Biru Foundation for Mental Disability Rehabilitation in Bekasi City is that there are several marriage practices carried out by people with mental disabilities. In order to equalize perceptions, what is meant by mentally disabled people at the Jamrud Biru Foundation for Mental Disability Rehabilitation, Bekasi City in this study are people who are in the orphanage who are not focused on people with mental disorders (OGDJ) who only receive mental rehabilitation, but also including graduates, staff and people who are at the Jamrud Biru Foundation for Mental Disabilities Rehabilitation, Bekasi City . So that the perpetrators of marriage here are also included in it.

In general, the practice of marriages carried out by people with mental disabilities has been carried out by many graduates. However, with limited information, only 3 pairs of husband and wife expressed their willingness to be interviewed. This is because some of the other respondents are no longer in the foundation so it is difficult to find them. Some of these pairs are as follows:

1. Mr. HSN and Mrs. Is

Mr. Previously, Hsn was a person with a mental disability who attended rehabilitation at the Jamrud Biru Foundation, Bekasi City. After his condition stabilized, he was seconded as a cleaning staff at the Jamrud Biru Foundation, Bekasi City Mental Rehabilitation Center as a Cleaning Staff and Mis. Is as a Cook. They married in May 2006, have no children, and live in the Jamrud Biru Foundation's Mental Disability Rehabilitation Center.

According to Mr. Hsn and Ms. Is as follows:

*We are married to love and care for each other, we agree to be faithful and share each other's joys and sorrows. Maybe other people think we are unhappy, even though we are happy like other people in general .*

2. Mr. Fjr and Mrs. Ant

Mr. Fjr and Miss. Ant works at the Jamrud Biru Foundation for Mental Disability Rehabilitation, Bekasi City, are people with mental disabilities who have attended the stages of rehabilitation and are considered to be able to control their psyche well, so they are seconded as Cleaning Staff. They carried out their marriage in August 2003, and were blessed with 1 child who was

raised by the mother and sister of Mrs. Miss. AN. They both live in the Employee Mess of the Mental Disability Rehabilitation Center at the Jamrud Biru Foundation, Bekasi City.

Description Mr. Fjd and Ms. Ants as follows:

*Well, those whose names are husband and wife, of course there will be opposition, well one has to give in. If both of you want to win, there can't be a meeting point. We got married like people in general, so we used a qabul consent, there were witnesses, there were guardians who also used a dowry*

3. Mr. Dnl and Mrs. Adh

Mr. Dnl, who was previously a person with disabilities and was able to socialize like normal humans, was seconded to work at the Jamrud Biru Foundation Mental Disability Rehabilitation Institution, Bekasi City as Security Staff (Night Watch) and Miss. Adh is a Cleaning Staff (Launcher) and not a person with mental disorders (ODGJ). One of Mr.'s motivations. Dnl can gradually improve due to encouragement from Miss. Adh. This is what they both married in February 1994, blessed with 2 children. In 1996, they bought a modest house in the vicinity of the Jamrud Biru Foundation's Mental Disability Rehabilitation Center.

4. Mr. Dll and Miss. Ant explained to researchers:

*Marriage starts from zero, so you don't have anything, roughly speaking, only clothes are attached. But we save little by little and save money. Finally, we have our own house and savings, even though it's not much, we are grateful to be able to enjoy life and experience the ups and downs in the life of a household. Marriage is carried out in accordance with religious regulations as well as state law.*

Marriage practices carried out by people with mental disabilities here are the same as normal human beings. There is a process of introduction (dating), propose, and marriage. In the process of marriage they also make a contract, and this contract is witnessed by both parents, and includes a guardian and a registrar

They went through the marriage process after graduating from this Foundation. In the sense that their life maturity process is already a guarantee, although on the one hand they are still below normal adult humans in general. They also have an instinctive love and being loved. The foundation of their marriage is affection, love and belonging to each other.

Even though there are some who are not or have not been blessed with children, with the evidence of children, it can be concluded here that their sexual relations also proceed as normal people .

The term "mental disability" in several references is also referred to as children with subnormal mental disorders, mental retardation, weak memory, feble-minded, mentally retarded. All the meanings of these terms are the same, which refers to someone who has below normal mental intelligence. Limitations regarding children with mental disabilities or mental retardation, experts define differently in several references. The difference in ownership is closely related to its goals and interests. From these various insights, various definitions of mental retardation emerge, but substantially they do not reduce the meaning of the notion of mental retardation itself, even though in their insights they use a



different approach. A person is categorized as mentally disabled or mentally retarded, if he has such a low level of intelligence (below normal), that to carry out his developmental tasks he requires specific assistance or services, including in his education program. [\(Effendi, 2005\).](#)

The wrong interpretation often occurs in ordinary society that a state of mental disability or intellectual disability is considered as a disease so that by entering into an educational institution or special care, it is hoped that the child will return to normal. This interpretation is completely incorrect because mentally retarded children at any level have absolutely nothing to do with disease or the same as disease. Because of that, it is natural that children with mental disabilities also have the same needs as people in general, including the need to have children, get love, love each other and even get married.

Based on this, the phenomenon that occurs at the Jamrud Biru Foundation's Mental Disability Rehabilitation Center in Bekasi City is that there are several marriage practices carried out by people with mental disabilities. It is not surprising then that there is a phenomenon of marriages between men and women with mental disabilities being able to take the same path as people in general. One thing that was surprising, it turns out that in practice their household life, they can get normal offspring, and mentally disabled husband and wife can live in harmony and even be happy. This is evidenced by the narrative of several respondents who in essence they stated as follows:

*We got married like normal people, yes we used a qabul consent, there were witnesses, there were guardians who also used a dowry. We got married according to religious rules as well as laws. Administrative requirements are also met. We are also ordinary people need each other. Yes, I want to have children and it turns out that I already have children. Yes, the marriage is done in a simple way, but we obey the rules*

*Marriage starts from zero, so you don't have anything, roughly speaking, only clothes are attached. But we save little by little and save money. Finally, we have our own house and savings, even though it's not much, we are grateful to be able to enjoy life and experience the ups and downs in the life of a household. Marriage is carried out in accordance with religious regulations as well as state law.*

The statements of married couples who are mentally disabled as above, show that from the aspect of biological needs, it turns out that they are capable, that is, the husband is able to provide physical as well as spiritual support, as well as the wife is able to carry out her obligations to serve her husband well. Judging from the aspect of marriage, it turns out that they can live harmoniously and happily and can enjoy the meaning and meaning of life. Judging from their work, it turns out that they are also capable of creating and achieving. Even though what is noteworthy is that they feel they are not getting enough attention from the government (especially the social and health services) and adequate education like other normal humans, besides that their ability is below the average normal human being in capturing information coupled with the lack of instructor.

The second observation, made of the couple with the initials Mr. Sm and Mrs. Is, who is married, is both from Yogyakarta and settled to make a living in Bekasi. At first, the two were actually a non-disabled couple. But after a few years of marriage, Mrs. Ist has a disability caused by an accident. Because of this limitation, the husband divorced his wife.

"I left my wife after my wife fell from a motorcycle accident and hit her head. After the accident, the atmosphere at home became different, especially my wife, whose memory is impaired, and her ability to communicate isn't what it used to be. If you want to have sex, your wife often refuses, even though in the past she was always ready whenever I wanted, in the end, my wife and I used to make a fuss or fight because my wife was no longer able to serve me, especially in matters of bed. In the end I divorced rather than making a fuss.

This description is one of the bitter realities in household life, especially for people with disabilities who have not been fully protected. As stated in the Law. No. 1 of 1974 concerning marriage, article 39 paragraph 2 letter e, and the Compilation of Islamic Law article 116 letter (e), actually approves of divorce on the grounds that one of the parties is disabled or due to illness, which causes them to no longer be able to carry out their obligations as husband/wife.

#### **B. Review of Islamic Law on Marriage for Persons with Mental Disabilities**

Marriage is an innate need of every human being that provides many important results (Effendi, 2005). Marriage is very important in human life, both individually and in groups. Through legal marriage, the association of men and women occurs in an honorable manner according to the position of humans as creatures of honor. Association of household life is fostered in an atmosphere of peace, tranquility, and a sense of affection between husband and wife. Children from legitimate marriages adorn family life and are at the same time the continuity of human life in a clean and honorable manner (Azhar, 2004).

In Article 1 Chapter I of the Marriage Law Number 1 of 1974 dated January 2, 1974 it is stated; "Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on Belief in the One Almighty God." (Suma, 2004) In Article 2 KHI, marriage according to Islamic law is a marriage, namely a very strong contract or miitsaaqan ghalizhan to obey Allah's commands and carrying them out is worship. (Saekan & Effendi, 1997).

As-Shan'ani in his book explains that *an-nikâh* according to the meaning of language is a merger and mutual inclusion and mixing. The word "marriage" is in the sense of "intercourse" and "contract". There are people who say "marriage" is a majaz word from the general expression for the name of the cause of the cause. There are also those who say that "marriage" is the essence of meaning for both of them, and that is what is meant by those who say that the word "marriage" is *mutually exclusive* for both of them. The word marriage is often used in the contract. There are also those who say that the word marriage contains an intrinsic meaning that is syar'i. The word marriage is not meant in the Qur'an except in terms of contract (Al-San'ani, 1999).

From the various meanings above, although the editorial is different, there are similarities. Therefore, it can be concluded that marriage is a contract or

agreement to justify sexual relations between men and women in order to realize the happiness of family life filled with a sense of peace and love in a way that pleases Allah SWT. In this context the Prophet said:

Meaning: Has informed us from Abu Bakr bin Nafi 'al-'Abdiy from Bahz from Hammad bin Salamah from Thabit from Anas; In fact, some of the companions of the Prophet SAW asked the wives of the Prophet SAW about what he was doing secretly. Some of them said that he did not marry women. Some say that he never ate meat. And some say that he never sleeps with a mat on. Hearing this, the Prophet SAW praised Allah. And then he said: "What do those people want with what they said earlier? Actually, I also sleep while praying, while fasting, I also break my fast. And I also marry a woman. Whoever doesn't like my Sunnah, then he is not one of my group." (HR. Muslim) ([bin Hajjaj Alqusyairi, nd](#)).

Marriage is not just a means of justifying sexual relations, but is also oriented towards forming a family and fulfilling the inherent obligations as a consequence of the contract. One of the consequences of this obligation is the obligation to nurture, educate, both mentally and spiritually, and raise children. Article 77 paragraph 3 of the Compilation of Islamic Law states:

Husband and wife bear the obligation to care for and care for their children, both regarding physical, spiritual and intellectual growth and religious education ([Abdullah, 1994](#)).

In the rules of taklifi law it is stated that *mahkūm fih* means "the actions of a mulatto person as a place to link syara' law". For example, in verse 1 of Surat al-Maidah Allah says:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ ۖ أُحِلَّتْ لَكُمْ بَهِيمَةُ الْأَنْعَامِ إِلَّا مَا يُتْلَىٰ عَلَيْكُمْ غَيْرَ مُجْلِيَ الصَّيِّدِ وَأَنْتُمْ حُرْمٌ ۗ إِنَّ اللَّهَ يَحْكُمُ مَا يُرِيدُ

"O you who believe, fulfill the contracts. Cattle are lawful for you, except for those that will be recited to you. (That is so) by not making hunting lawful while you are performing Hajj. Verily, Allah sets laws according to what He wills.

The object of the commandment in the verse is the act of the mukallaf person, namely the act of fulfilling the promise required by the verse. The terms of *Mahkūm fih*, that there are several requirements for the validity of a legal action:

- a. The act is known perfectly and in detail by the mulatto so that an order, for example, can be carried out completely as desired by Allah or His Messenger. Therefore, as stated by Abd al-Wahhab Khallaf, the verses of the Qur'an which were revealed globally, must only be implemented after an explanation from His Messenger. For example, the verses of the Al-Qur'an which oblige prayers globally without specifying the conditions and pillars of it, are only obligatory to be implemented after a detailed explanation has been given from the Prophet. Likewise the verses that command to carry out pilgrimage, fasting, and zakat.
- b. It is known with certainty by the *mukallaf* that the order came from the party authorized to make the order, which in this case is Allah and His Messenger. That is why in every effort to find a legal solution, the first thing to do is to discuss the validity of an argument as a source of law.

- c. Actions that are ordered or prohibited must be in the form of actions that are within the limits of human ability to do or leave it. This is because the purpose of a command or prohibition is to be obeyed. Therefore, it is impossible that there is in the Al-Qur'an and Sunnah a commandment that is logically impossible for humans to carry out. For example the command to fly without using tools.

As for *mahkūm 'alaih*, it means "amukallaf person ( a person who deserves to be burdened with *taklifi law* )". A new person is considered worthy of being burdened with *taklifi law* if he has several conditions:

1. Able to understand legal arguments either independently or with the help of other people, at least to the extent that it allows him to practice the contents of the verses or hadiths of the Prophet. The existence of the ability to understand the law of *taklifi* is because a person has a perfect mind. When measured by physical growth, the limit of puberty makes sense for women with the start of menstruation and for men the first dream of sexual intercourse. However, if by the age of fifteen a woman does not menstruate and a man does not dream, then the age of fifteen is considered the minimum age of puberty.
2. Have *expertyat al-ada'*, namely the ability to act legally or carry the burden of *taklif*. With such skills a person is called amukallaf, meaning that all his actions are taken into account by Islamic law, and he is warned to carry out all orders and stay away from prohibitions. Skills like this are only possessed by a person perfectly when he reaches the age of reason and is free from all things that hinder this skill, such as being crazy, sleeping, forgetting, being forced, and so on which are explained in detail in the Usul books. Fiqh Especially with regard to property, a person's authority is only considered valid in addition to having reached puberty and having intelligence, namely the ability to control his wealth. A person who has reached the age of puberty has reason, but is unable to control his wealth, such as being redundant, is not considered capable of controlling his wealth, and therefore he needs to be guided by a person in charge. ([Zuhudi, 2019](#))

In this expert concept, two terms are known, namely; *first, expertyah wujūb*, namely the ability to accept rights and obligations, where there is decency for all human beings on a humanitarian basis; and *secondly, expert yatul ada'* (ability to act), namely the decency of a person to be seen as legitimate in all his words and deeds.

With Seeing the *al-ada' expert* factors above, people with mental retardation certainly cannot accept the imposition of *taklifi law*. This is because he does not have the appropriateness to be called a *mahkūm 'alaih* (a person who is subject to legal imposition).

The Prophet Muhammad SAW said:

Meaning: Has informed us from Affan from Hammad from Ibrahim from al-Aswad from 'Aisyah from the Prophet SAW said: the law cannot be imposed on three people, namely: 1). People sleep until he wakes up 2). Small child until he grows up, and 3). Mad man so he realized. (Narrated by Ahmad).

Mukhtar Yahya further wrote that there are three types of actions that must be considered in determining whether or not the actions taken by *mumayyiz are legal*, namely:

- a. In transactions that contain benefits, such as receiving grants and shadaqah, then the action is legal.
- b. In transactions that contain elements of transfer of property rights, such as giving grants, wills, and endowments, then the action is not valid.
- c. In an action in which there is an element of benefit and the transfer of rights at the same time, such as buying and selling, and leasing, then it is considered valid if there is permission from the guardian and if the guardian does not allow it, the action becomes null and void. [\(Muhtar, n.d.\)](#) .

In terms of contract, the contract in marriage is equated with the contract in buying and selling. Sheikh Abu Yahya Zakariya al-Anshori wrote that what is required in the shigat of marriage is what is required in the *shighat of* buying and selling.

وشرط فيها أي في صيغة ما شرط في صيغة النكاح

"And the conditions in the marriage contract mean what is required in the shigat nikah, what is required in the sale and purchase agreement."

Imam Shafi'i defines the idiotic safih quoted by Sheikh Abu Yahya in the chapter Al-Hijr as follows:

Peace be upon you

“Imam Syafi'i interprets the word safih as a wasteful person, a weak person (both children and adults) who (can be) deceived, and a person who is unable to focus because of his maghluban (lack of) mind.

Where in the law of buying and selling it is required for *'âqid* (a person who has a contract) to have the absoluteness to transfer assets. So that the contract is invalid for people who are carried out by children, crazy people or people who are under a ban on the use of property (*al-hijr*) in the presence of sanctity.

Regarding the legal issues of marriage carried out by people with mental disabilities, there are several differences of opinion. In the book Al-Mizan al-Kubra, it is stated:

The opinion of Imam Tsalatsah (Hanbali, Maliki, Syafi'i) and Jumhur Fuqaha: actually marriage is not valid unless it is carried out by a person who has the ability to *transfer* assets. And Abu Hanifah's opinion is that in fact marriages carried out by young children who are mumayyiz and idiots are valid but with the approval of a guardian.

In the difference above, Abil Mawahib tends to choose Hanafi's opinion. Because assuming other opinions are still weak. However, Imam Shafi'i explained further about the matter in his book Al-Umm that:

Imam Syafi'i said: in the case of adults with mental disabilities, the father is allowed to marry them off. Because there is no business for that person over him.

“And no one other than their guardian may marry someone with a mental disability then it is conveyed to the judge about the condition of the groom and the judge asks the groom (about his intention to marry). If he wants to marry, the condition of the groom is conveyed to the bride. If the bride is pleased with the condition of the groom, then we will lose. If it is seen that the groom is not ready to marry, due to paralysis and so on, the judge cannot marry him, and neither can

his father. Unless the marriage is intended to serve (take care of the husband), then the marriage is permissible.

Thus, it can be concluded that basically marriages carried out by people with mental disabilities are prohibited. If seen in the *taklifi* rules, a *safih* (idiot sufferer) does not have the appropriateness to be seen by his words and deeds. However, if there is permission from the guardian (either a *nasab* guardian or a judge's guardian) the marriage can take place. Of course this is also with the consent of the bride with the condition of her future husband.

People with mental disabilities (mental disabilities) are a real phenomenon of mental deviations that often occur in children. This makes them dependent on other people in living and fulfilling their needs. However, as has been explained, it turns out that people with disabilities are still sexual beings, who have sexual urges, and who want to express them in the form of sexual behavior. This is certainly very worthy of being questioned, especially in the matter of justifying sexual intercourse as a form of expression of sexual behavior.

In Law Number 4 of 1997 it states in article 5 that:

Every person with disabilities has the same rights and opportunities in all aspects of life and livelihood . So that as a member of the state, of course, people with mental disabilities should also pay attention.

The practice of marriages carried out by people with mental disabilities has often occurred. However, most of them do not know how the actual marriage law is in Islam. According to the research conducted by the author, several conclusions were drawn about the marriage of people with mental disabilities, namely as follows:

The first observation, research conducted on people with mental disabilities who practice marriage at a rehabilitation center are graduates of the foundation who have undergone the rehabilitation process. Thus at least they have fulfilled the basic ability to live a normal life.

In its implementation, the contract uttered by the groom in the wedding was attended by the bride and groom, two witnesses, parents (guardians) from both parties, and the marriage registrar.

In general, the contract has fulfilled the pillars of marriage. And if the perpetrators of the contract (husbands) are not equated with normal adults as in point 1, of course they also fulfill the requirements for the approval of a guardian, as required by the *taklifi* rules.

In the *taklifi* rule it is said that, in actions in which there is an element of benefit and the transfer of rights at the same time, such as buying and selling, and leasing, then it is considered valid if there is permission from the guardian and if it is not permitted by the guardian then the action becomes void.

Likewise with the opinion of the *fiqh* scholars who require permission and approval from the guardian when a *safih* is to carry out a marriage.

Regarding the provision of maintenance and maintenance of children, the authors conclude that there is no significant difference in the two issues.

This is based on the fact that the interviewee with mental disabilities in this first observation has a permanent job which is considered sufficient to provide a living. So is the case with giving spiritual sustenance. This is reflected in the

existence of several perpetrators of the marriage who have had children. So that there is no violation of article 77 paragraph 3 of the Compilation of Islamic Law:

Husband and wife bear the obligation to care for and care for their children, both regarding their physical, spiritual and intellectual growth and religious education.

Marriage with Mental Disabilities According to Islamic Law Each pillar of the contract has certain conditions. Without fulfilling the conditions, it means that the pillars do not meet the conditions as they should, so that the contract becomes invalid. The most important element for the realization of a contract is ( '*aqidâni* or the two parties who hold the contract). That is according to the view of the majority of *fuqahâ'*. However, not everyone is capable of contracting. Some are completely incapable of performing any contract, some are capable of performing some contracts, and some are capable of performing all contracts. Ability means ability, skill, or authority that exists or is recognized in a person. The ability associated with law in this case is a translation of the term *expertyah* in Arabic.

There are two kinds of abilities, namely:

Ability to accept (*ahliyat al-wujub*) ([Shah, 1992](#))

Experts al wujub, as the basis for recognition of the right to receive is humanity, whether he is an adult or still a child who is intelligent (*mumayyiz*) or not, male or female, free or slave even though ( *Ahliyat al-wujub* or entitled to receive) free people more perfect than slaves.

*Ahyat al-wujub* :

1) *Akhiryat al-wujub al-naqishah*, namely the ability to accept is not full.

The intention is not full of ability (*ahliyah*) only in terms of receiving it, not in terms of doing it. A fetus that is still in its mother's womb does not yet have its own existence, but it can receive its rights that do not require acceptance such as inheritance, wills, endowments which are its rights. Fetus and baby rights are recognized, and the second right is obliged to fulfill them. The recognition of his right to receive, but he is not obliged to do for others, is called the ability to receive not full.

2) *Akhiryat al-wujub al-kamilah*, namely the ability to fully accept. That is the right that a person has from birth into the world until death, then he has the right to inherit and inherit; and is obliged to earn a living as his property must be maintained by his guardian. This right of full ability to receive cannot be lost due to madness, even though the madness continues, it is called perfect receptive ability.

2. Ability to perform work (*ahliyat al-ada'*)

*Ahalyat al-ada'*, namely the propriety of a person to do what is considered valid by *syara'* .

*Expertise al-ada'* there are two kinds:

a. ability to act (*ahliyat al-ada' al-naqishah*), namely the propriety of acting for a person only in part, is not fully authorized to act. If he does something, he must be under the guidance of someone who has a perfect mind who can know the benefits or not of the benefits of something he does, profit or loss. Like a child who is buying and selling, this work cannot be done but under the supervision of a person whose mind is

perfect. The child's actions are training and education to face his future. The actions of the children under supervision are only muamalah maliyah acts. The end of the childhood is when they are baligh again intelligent.

- b. The ability to do full (*ahliyat al-ada' al-kamilah*), namely the propriety of a person to do an act that is considered valid by *syara'*, whether done orally or by action, whether it is related to God's rights or human rights.

The basis for determining the ability to do full is reason. If the development of a person's mind has begun to be perfect, then that person is included in the category of full-fledged ability. If his mind is not perfect, then he is included in the category of incomplete acting ability.

Scholars agree that what is the basis of the ability to act is reason. If a person's mind is still lacking, then he cannot be burdened with obligations. Conversely, if his mind is perfect then he is obliged to fulfill what is his obligation. Based on this, some of the skills to act are perfect (*ahliyah ada' wa are*) and some are imperfect (*ahliyah ada' naqisah*). Someone who already has perfect abilities (*our experts*) can experience obstacles that reduce or eliminate his abilities. The loss of this ability is called a barrier to ability (*'awaridhyahyah*), which is a condition where an adult and intelligent person gets an obstacle due to a decrease in reason or loss of reason.

Capability barriers can be divided into:

1. Natural obstacles (*'awaridh samawiyah*), obstacles that occur beyond human ability, or abilities that result in the ability to carry out the law completely will disappear completely, such as going crazy, sleeping, fainting, forgetting, convulsions, and stupidity. These people are considered to have no expertise in implementing it at all and it is not legal to manage it, nor does it have any traces of *syara'*.
2. Obstacles that are not natural (*'awaridh ghairu samawiyah*), obstacles that occur due to human actions. There are two kinds of obstacles:
  - a) from oneself, i.e. stupid, drunken, and heedless,
  - b) from others, namely forced.

Meanwhile, in marriage, the limit of puberty is not only wet dreams or menstruation, but the prospective bride and groom must also be mature and ready both physically and psychologically. However, due to the decline in morals in modern times which has led to many violations of sexuality, the provisions for coming of age and adulthood for prospective brides and grooms must be based on the benefit of the law. In this case, the qadi also plays a role in determining whether someone who wants to marry is suitable or not for marriage. Several other clerics who also allow it are the clerics of Gaza and Egypt, as quoted by Vardit Rispler in his book entitled *Disability in Islamic Law*:

*“ In a fatwa from Gaza (1998) Sheikh Muhammad Dib Qusa is asked whether retarded people may marry at all. He concludes that they may, only if they show attraction to members of the opposite sex. He explains that sanity (,aql) is not a prerequisite for marriage. In an Egyptian fatwa, the mufti distinguishes between ,atah (mental deficiency) and junun (insanity), claiming that ,atah is a quiet insanity and junun is a violent extrovert insanity. He permits the*



*marriage of a ma'tuh (one who has „atah) only as long as he or she can differentiate between good and evil, and if they have their guardian's consent to marry. "Atah contrary to junun, is believed to be less hazardous to the partner." (Rispler-Chaim, 2006)*

With some consideration that; first, mental disabilities or mental retardation have several levels based on their severity, and second, that marriages with mental disabilities are also preventive institutions for sexual exploitation or sexual acts that are clearly prohibited by religion, the researcher concludes that it is appropriate for marriage between them allowed

Based on their characteristics, people with mental disabilities in the educated type (IQ 50-70) have the ability to marry. Apart from having a strong drive for sexual rights, they can also be educated and trained in dealing with married life. The fact that people with mental disabilities are considered asexual beings causes a lack of sexual education that they receive. Even though not all people with mental disabilities are the same in their learning capacity, emotional stability, and social skills. This is what then causes many teenagers with mental retardation to look for ways to vent their sexual needs. The easiest and most common way is to masturbate or masturbate.

In a study conducted by Khusnul Khotimah at an SLB in the city of Yogyakarta, it was found that some teenagers with mental disabilities masturbate or masturbate to get sexual satisfaction. This is driven, among other things, by reasons such as the lack of intelligence abilities of people with mental disabilities, sexual tension, and the occurrence of sexual maturity due to the influence of reproductive hormones. Masturbation or masturbation is sexual abuse in the form of stimulating one's own genitals manually (by hand) or digitally with fingers or other means to obtain sexual satisfaction. (Kartono, 2009) . Another definition of masturbation or masturbation is an attempt to achieve an erection of the sexual organs and obtain an orgasm through manual stimulation or mechanical stimulation. This is clearly prohibited by the Shari'ah as the word of Allah SWT, surah al-mu'minun verses 5-7:

فَمَنْ ابْتَغَىٰ ﴿٥﴾ وَالَّذِينَ هُمْ لِأَعْيُنِهِمْ هُمْ لَفُرُوجِهِمْ حَافِظُونَ ﴿٦﴾  
وَرَاءَ ذَلِكَ قَوْلُكَ هُمْ الْعَادُونَ ﴿٧﴾

“And the people guarding his privates. Except for their wives or the slaves they own, they are not blameless in this matter. Whoever seeks behind it, they are the ones who transgress the limits.”

Uncontrolled masturbation or masturbation will have a bad effect on the formation of one's character. Therefore, more special handling and attention is needed for people with mental disabilities, especially in the field of sexual education.

The purpose of establishing Islamic law is to fulfill the needs of human life which are primary, secondary and tertiary, so the channeling of sexual desires by marriage should be allowed without being complicated.

Seeing the considerations above, this is in accordance with the ushul fiqh perspective which is reflected in the rules:

إذا تعارض ضرران دفع أخفهما

"Which means that if there are two harms, then the one with the lighter one is chosen."

The emergence of obstacles in the implementation of the rights and obligations of husband and wife, especially in terms of material, is lighter in *meaning* than when adultery arises between them. That evil must be eliminated, which in this case is the occurrence of wickedness and adultery which is forbidden.

A good marriage is a marriage that can bring benefits, not to bring harm in religion. This benefit is applied to become a law that is clean from things that violate religious rules. In this case there are five main elements that are guarded and maintained for the benefit of humans in carrying out marriages with mental disabilities. These five elements must be upheld, otherwise the marriage is considered fatal in religion.

When analyzed further, marriages with mental disabilities actually contain maintenance of the five main elements, maintenance of religion and soul for example. In the maintenance of religion, this marriage has prevented the perpetrator from a relationship outside of a legal marriage which is prohibited by religion. And in caring for the soul, this marriage makes the souls calm because the need for love and affection has been fulfilled.

In Al-Ruum verse 21 it is stated:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

“And among the signs of His power is that He has created for you wives of your own kind, so that you are inclined to and feel at ease with him, and He made them between you with love and affection. Indeed, in that there are signs for people who think.

The verse above explicitly underlines that the purpose of marriage is not merely a matter of biological needs, but there are other, more essential goals, namely love and inner peace. And these two things further guarantee the creation of human benefit which is the basic goal of Islam or maqashid al-shari'ah.

In the second observation, a case was found where a couple whose husband had a mental disability was caused by *aridhi's disability* (caused by an accident).

## CONCLUSION

Based on exposure above, then study on "Criticism of Islamic Law against Law No. 8 of 2016 concerning Disabilities about Marriage Mental Disabilities", can concluded as following: By general religion of Islam is not once forbid the marriage that took place between disabled mentally handicapped p this remember the goal base marriage that is as means distribute desire sexual with good and true as well as as institution preventive happening wickedness and adultery. Although thus, in order to achieve family sakinah, mawaddah and rahmah, Islam recommends exists mental maturity for those who want married. With exists this mental maturity expected no will arise disaster as the purpose of Allah SWT is to preach the law .

See characteristics from types disabled mentally handicapped, then that is permissible for marry just disabled type light, meanwhile disabled with IQ level below 50 preferably held prevention marriage. this remember that disabled with an IQ below 50 have big dependency to others meanwhile disabled disabled type light with an IQ between 50-70 still capable educate.

In Law No. 8 of 2106 concerning Persons Disabilities for disabled mentally disabled \_ law marriage permanent legitimate in facet legal and not must exists cancellation in facet condition marriage. Because for disabled good mentally disabled that candidate bride Men or woman no there is criteria must mentally healthy.

Fulfillment obligation wife disabled true mental disability no perfect if must be adjusted with fulfillment obligation wife normally . Because of him could called the affected person burden law and under forgiveness . But because he stay together family big and in in category mild mental disabilities that can be taught so fulfillment obligation wife by the disabled perspective mental disability law Islam no occur many to meaningful trouble, though \_ Duty house the stairs should be Becomes obligation wife no could fulfilled with good and must replaced by a guardian or another family.

In house household, husband and wife is have equal roles, mutual help help in realize house ladder sakinah who is blessed by Allah SWT. Joy and sorrow in journey wedding is part not inseparable in wade ark house stairs, so if later day occur things that don't wanted like condition husband or wife experience mentally handicapped or because other, then each partner to remember return destination marriage and no make divorce as option beginning for complete problem. because that, Islam forbids exists the deed to be threaten bond holy marriage, as well as for those who consider trivial existence. Because of deeds such (divorce) can remove goodness and benefit for husband Wife especially if conducted with arbitrary.

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