



## Reinterpreting the Meaning of “The Appearers” Article 16 (1) M Law Number 2 Year 2014 Concerning Amendment to Law Number 30 Year 2004 Concerning Notary Position in Responsive Regulation Perspective

Ginanjjar Karta Sasmita; Sapto Hermawan; M. Hudi Asrori S

Master of Notary, Sebelas Maret University, Surakarta, Indonesia

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### **Abstract**

The world today continues to develop along with globalization, one of which is in the field of law, namely notaries. So far, in carrying out their duties, the notaries are still conducted them conventionally and have to face with each other, even though electronic media has grown advanced and is adequate to be carried out online. The purpose of this article is to analyze whether the phrase "appearing before a notary" can be re-interpreted in making an authentic deed? Can the interpretation of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary be categorized as a responsive norm that has been able to fit in the change of times? This research was conducted using a normative approach. The result of this research showed that the interpretation of “the appearers” phrase before a notary in the making of authentic official document cannot be implemented online due to its stiff and rigid nature, so that it cannot be interpreted following the responsive regulation of the current development, especially in the advancement of knowledge and technology.

**Keywords:** *Notary; Interpretation; The Appearers; Responsive Regulation*

### **1. Introduction**

Nowadays the world is changing and developing rapidly. Globalization has hit all countries in the world. Globalization has a multi-dimensional nature with a very complex process and has an influence in terms of intellectual, emotional, political, social, economic and cultural dimensions that exist throughout the world. One that is developing in the world is the advancement of information and technology.<sup>1</sup> Advances in information and technology will also have an impact on the performance of Notaries which will slowly change in the future, in accordance with the demands of modern society and the progress of the times that are developing rapidly.<sup>2</sup>

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<sup>1</sup> Agus Dedi, 'Developing Countries in the Political Vortex of World Globalization' ['Negara-negara berkembang dalam Pusaran Politik Globalisasi Dunia'] (2016) 3 (1) Journal of Dynamics: Scientific Journal of State Administration 1.

<sup>2</sup> Fahma Rahman Wijanarko, Mulyoto, and Supanto, 'Juridical Review of Notary Deeds Against Cyber Notary Enforcement in Indonesia According to Law Number 2 of 2014' (2015)2(2) Journal of the Sebelas Maret University Repertorium Surakarta 7, 8.

Notaries, according to the provisions of Article 1 point 1 of Law Number 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of a Notary, are public officials who are authorized to make authentic deeds and have other authorities as referred to in this Law or based on other laws. Thus, it can be viewed that a notary is a public official who is authorized by the government. The presence of a notary is required by the rule of law. This presence aims to assist and serve the public who requires authentic written evidence regarding legal circumstances, events or actions. On this basis, those appointed as notaries must have a passion in serving the community.<sup>3</sup>

Regarding the service for making an authentic deed as regulated in the provisions of the Civil Code Article 1868, it states: if an authentic deed is a deed in the form determined by law, it is made by or before public officials who have power for that at the place where the deed is made. Meanwhile, it is also regulated in the provisions of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of a Notary, hereinafter referred to as UUJN-P, which explains that: a notary is obliged to read the deed in the presence of 2 (two) witnesses. One that is regulated in detail and firmly in the Notary Position Act is that the making of the deed must deal directly with the notary at his domicile.

From the two articles, it shows that there is a problem regarding authentic requirements. The purpose of an authentic deed in Indonesia is the physical presence of the parties before a notary. In order for a notarial deed to be authentic, it has to meet the requirements for the physical presence of the parties at the time of signing before a notary. However, this is an obstacle for notaries or the public, especially during the Covid-19 pandemic, making access for someone to meet or deal with is very limited. Coping with this situation, it is not uncommon for someone to take advantage of technological advances and developments by utilizing electronic media.

The implementation of legal actions electronically has actually been accepted in the national legal system, especially with various regulations that have accepted electronic information as legal evidence along with the accountability of the electronic system, so that its reliability, security and legal accountability are clear. Formally, the electronic system should operate and be registered with the Ministry of Communication and Information. This refers to the relevant legislation, among others; Law of the Republic of Indonesia Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (UU ITE), Law Number 25 of 2009 concerning Public Services (UU Public Services), Law Number 43 of 2009 concerning Archives (Archives Law), Law Number 30 of 2014 concerning Government Administration (Government Administration Law) and Law Number 7 of 2014 on Trade (Trade Law).<sup>4</sup>

Despite all the advantages and disadvantages in the formulation of these laws and regulations, at least it is sufficient to become the basis for the legality of electronic transactions as a legal act, along with the legal framework that works in an electronic transaction. Furthermore, in terms of the common interest in an emergency situation, of course the main thing is the awareness and contribution of every part of the nation to continue to be able to carry out working electronically, so that it is sufficient to help the economic cycle. However, it seems that notaries in Indonesia still seem worried about transforming themselves in order to be able to provide their services electronically. Even though, The community really needs the alertness and dynamic function and role of a notary in dealing with this emergency situation to be able to provide his services online or through teleconference media. Teleconferencing or teleconferencing is an electronic-based meeting directly (live) between two or more human or machine

<sup>3</sup> RA Emma Nurita, *Cyber Notary (Early Understanding in Thought Concept)* (First Edition, Refika Aditama 2012) 15.

<sup>4</sup> Edmon Makarim, 'Electronic Notary Services in Public Health Emergencies' ['Layanan Notaris Secara Elektronik dalam Kedaruratan Kesehatan Masyarakat'] (Faculty of Law, University of Indonesia, April 15, 2020) <<https://law.ui.ac.id/v3/jasa-notaris-elektronik-dalam-kedaruratan-kesehatan-Masyarakat-oleh-dr-edmon-makarim-s-kom-sh-ii-m/>> accessed on August 13, 2020.

participants connected to a telecommunications system which is usually a telephone line. The use of teleconferencing has the advantages of cost and time effectiveness. Teleconferencing can take the form of audio conferencing or video conferencing. Teleconferencing or teleconferencing is an electronic-based meeting directly (live) between two or more human or machine participants connected to a telecommunications system which is usually a telephone line. The use of teleconferencing has the advantages of cost and time effectiveness. Teleconferencing can take the form of audio conferencing or video conferencing. Teleconferencing or teleconferencing is an electronic-based meeting directly (live) between two or more human or machine participants connected to a telecommunications system which is usually a telephone line. The use of teleconferencing has the advantages of cost and time effectiveness. Teleconferencing can take the form of audio conferencing or video conferencing.<sup>5</sup> Audio conferencing is one type of teleconferencing where someone can have interactive conversations within. Utilizing this audio-conferencing, one can talk to more than one person through the speakers. In video conferencing, participants can see each other's pictures (video) and listen to each other through their respective cameras, monitors, or loudspeakers. So that this teleconference service is very much needed for the community in meeting their needs, because there are many legal relationships that involve cross regions, islands and even between countries.

The classical reason that always becomes the main reason is that there is a norm of having to be physically present in making an authentic deed and it cannot be done electronically because it must be made in paper form as stated in Law Number 2 of 2014 concerning Notary Positions. Furthermore, referring to the provisions of Article 5 paragraph (4) letters a and b of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions, hereinafter referred to as UUIE, it is known that documents made in the form of notarial deed is not included in electronic information and/or electronic documents. So that the notarial deed made electronically does not have legal force as valid evidence according to the provisions of the UU ITE (Internet and Technology Law). By limiting the meaning of electronic information/electronic documents as regulated in Article 5 paragraph (4) letters a and b of the ITE Law, an authentic deed made electronically by a notary is considered not to be valid evidence. Thus, the authenticity of the deed made by the notary in this case is not fulfilled.<sup>6</sup> So that it has the potential to become a legal problem for a notary, both in the form of civil sanctions, administration and the code of ethics for the position of a notary. Then there are concerns that if it is not done physically, it will have legal consequences for the Notary, including:

- 1) the status of the authentic deed will be reduced to a private deed, which consequently will result in a lawsuit against a notary by its service users in the future.
- 2) there is no guarantee of security for electronic systems and electronic documents that are prone to being altered and have the potential to leak so that they violate confidentiality and can result in denial by the parties.
- 3) the possibility of not receiving the document by the relevant agency, so that the potential for dismissal sanctions that must be faced by the Notary for not carrying out legal compliance.

This study will examine the interpretation of the meaning of the phrase “the appearers” as regulated in Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, so that the concerns mentioned above can be answered. And the interpretation carried out is

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<sup>5</sup> Michael Mirabito and Barbara Morgenstern, *The New Communication Technology: Applications, Policy, and Impact* (Fifth Edition, Elsevier 2004) 219.

<sup>6</sup> Tiska Sundani, 'Legal Analysis of the Use and Making of Notary Deeds Electronically' [*'Analisis Hukum Atas Penggunaan dan Pembuatan Akta Notaris secara Elektronik'*] (2017) 1 *Premise Law Journal* 14.

aimed at knowing whether the making of an authentic deed can be carried out online or not, where the interpretation in the analysis uses the theory of responsive regulation.

With the existence of such unresponsive legal products, it will have an impact on a civil law affair which demands the making of an authentic deed must be done physically through face to face meeting. Therefore, there needs to be a conference in the means of seeking solution or problem solving together, where the current Covid-19 outbreak phenomenon should be a moment of new ideas for the practice of Notaries in Indonesia. So that various questions arise regarding the formal requirements in making an authentic deed that requires dealing with the parties and reading it directly, should it still be made in paper form and what is the storage protocol.

According to Prita Miranti Suyudi as a notary in Bali, so far there doesn't seem to be any option other than to go directly to a notary to make an authentic deed.<sup>7</sup> Notaries currently must remain obedient to laws that do not allow authentic deeds to be made without facing directly. So, based on the description above, it can be seen that legal products in Indonesia regarding the making of authentic deeds are still at the level of Unresponsive Regulation. Thus, it is necessary to study more deeply about the meaning before a notary, whether in this case Article 16 Paragraph (1) m of Law Number 2 of 2014 concerning the Position of a Notary needs to be reinterpreted or reinterpreted because in legal science carrying out an interpretation is allowed. This is because if the situation is allowed to continue, one day it is no longer possible for a notary to face or deal with clients who are in many countries. Based on that, when wanting the notary to develop, there needs to be a leap to the digital era, E-Contract era and Cyber Notary that need to be implemented and formed as a permanent instrument.

Based on the description on the background above, the problem is formulated as follows: Can the phrase "appearing before a notary" be reinterpreted again in making an authentic deed? Can the interpretation of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning Notary Positions be categorized as responsive norms that have been able to catch up with times?

This research is a normative legal research, namely by examining legal materials that contain normative legal rules (sociological dogmatics).<sup>8</sup> In relation to the normative research used by the author, several approaches are used, namely:<sup>9</sup> Approach to legislation (statute approach) and Conceptual approach (conceptual approach). The types and sources of data used in this study are secondary data. Secondary data is data obtained from library research consisting of primary legal materials, secondary legal materials, and tertiary legal materials.<sup>10</sup> To take an inventory of legal materials in this research, literature study is used. Data analysis used qualitative data analysis.

## 2. Discussion

### 2.1. Reinterpretation of the Phrases of Appearing before a Notary in Making an Authentic Deed

The word "interpretation" is a noun which means the activity or result of interpreting. From an etymological point of view, the word "interpretation" comes from the Latin word "*interpretatio*" which

<sup>7</sup> Norman Edwin Elnizar, 'Electronic Authentication, Lessons from Australian Notaries During the Covid-19 Outbreak' [, 'Autentikasi Elektronik, Pelajaran dari Notaris Australia Selama Wabah Covid-19'] (Law Online, 27 April 2020) <<https://www.Hukumonline.com/berita/baca/lt5ea6b458e3833/authentication-elektronik--pelajar-dari-notaris-australia-selama-wabah-covid-19>> accessed on August 14, 2020.

<sup>8</sup> Bahder Johan Nasution, *Legal Research Methods* (CV. Mandar Maju 2008) 86.

<sup>9</sup> Johnny Ibrahim, *Theory of Normative Legal Research and Methods [Teori Metode dan Penelitian Hukum Normatif]* (Bayumedia Publishing 2007) 300.

<sup>10</sup> Soerjono Soekanto and Sri Mamudji, *Normative Legal Research A Brief Overview [Penelitian Hukum Normatif Suatu Tinjauan Singkat]* (Eleventh Edition PT. Raja Grafindo Persada 2009) 52.

means explanation, exposition, translation, or interpretation itself.<sup>11</sup> The verb "to interpret" from the Latin word "*interpretari*" means to explain, expand or translate. The definition refers to finding the main meaning of a text.<sup>12</sup>

Interpretation is the process of determining what form, especially in a law or legal document, by ascertaining the meaning given by words or other manifestations of will.<sup>13</sup> In the field of law, legal interpretation is used to interpret the law. Legal interpretation is a rational activity to give meaning to legal texts.<sup>14</sup> The word "legal text" can be in the form of a general text (constitution, law, court decision, custom) or individual text (contract or will) or text in unwritten form (oral will or contract implied in facts).<sup>15</sup> Legal texts are clearly a way for lawmakers to pragmatically follow suit if they have difficulty providing explanations.<sup>16</sup>

Legal interpretation is needed to interpret the existing positive legal norms, but the formulation is not clear or formulated in the same way. Positive law is a series of abstract concepts that are often understood by legislators. But not for legal practitioners or for the community, thus its meaning must be sought in its application to real legal cases, so that it is truly in accordance with the sense of justice in society.<sup>17</sup>

Based on this, there is one reinterpretation that will be analyzed, namely regarding the meaning of the phrase facing as regulated in Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning Notary Positions. Basically the law states: "In carrying out his office, a Notary is obliged to: read the deed before an audience in the presence of at least 2 (two) witnesses, or 4 (four) witnesses specifically for the making of a private will, and signed on at that time by the appearers, witnesses and notaries."

From the sound of Article 16 paragraph (1) letter m of the UUNJ-P above, it is explained that a notary is obliged to read the deed before an appearer in the presence of 2 (two) witnesses. One that is regulated in detail and firmly in the Law on Notary Positions is that the making of an authentic deed must be done face to face with the notary at his place of domicile. Thus, the interpretation of the parties in this Law is still required or requires the parties in making an authentic deed to be before a notary. Furthermore, in the explanation of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, it explains: "that a notary must be physically present and sign the deed before an appearer and witness". This means that the notary in carrying out his position is obliged to read the deed first to the parties before the deed is signed before the appearers, witnesses, and notaries. Where the obligation to read the deed must be enforced because the reading of the deed to the parties has several philosophies, namely:<sup>18</sup>

- a) So that the notary can provide the truth of the contents of the deed to the appearers, so that the appearers know that the contents of the deed are in accordance with the agreement of the appearers.

<sup>11</sup> Lewis, CT, and Short, C, *Latin Dictionary* (The Clarendon Press 1958) 984.

<sup>12</sup> KJ Keith, *Interpreting Treaties, Statutes and Contracts* (Occasional Paper No 19, New Zealand Center for Public Law Wellington 2009) 3.

<sup>13</sup> Garner, BA, *Black's Law Dictionary* (Thomson West 2004) 837.

<sup>14</sup> Barracks, A, *Purposive Interpretation in Law* (Princeton University Press 2005) 4.

<sup>15</sup> *Ibid.*

<sup>16</sup> Anton Freddy Susanto, *Legal Semiotics: From Deconstruction of Text to Progressivity of Meaning* [*Semiotika Hukum: Dari Dekonstruksi Teks Menuju Progresivitas Makna*] (Refika Aditama 2005) 1.

<sup>17</sup> Slamet Suhartono, 'Positive Law of Problematic Application and Its Theoretical Solution' [Hukum Positif Problematik Penerapan dan Solusi Teoritiknya'] (2019) 15 (2) DIH: Kurnal of Legal Studies 201, 206.

<sup>18</sup> Dwi Merlyani, Annalisa Yahanana, and Agus Trisakab, 'The Obligation to Read Authentic Deeds by Notaries Before an Appealer Using Cyber Notary Concepts' ['Kewajiban Pembacaan Akta Otentik Oleh Notaris Di Hadapan Penghadap Dengan Konsep Cyber Notary'] (2020) 9 (1) Repertorium: Scientific Journal of Notary Law 36, 40.

- b) It is intended that the appearers really understand and understand the truth of the contents of the agreed deed, so that in the future the parties do not deny that they are not aware of any clauses that can harm them because they have read and understood the contents of the deed.
- c) So that there is a guarantee to the appearers that what is signed is the same as what was heard at the time of reading the deed. As contained in Article 44 paragraph (1) UUJN-P which states, that: "As soon as the deed is read, the deed is signed by every appearer, witness, and notary, unless there are appearers who do not sign by stating the reasons. The word "as soon as it is read" in this article refers that the notary is obliged to read the deed to the parties before the deed is signed.
- d) The reading of the deed by the notary in front of the audience is very important so that before the parties sign the deed they already know the clauses in the deed, besides that the clauses are in accordance with their wishes. If one of the presenters feels that the clauses listed are not in accordance with their wishes, he can ask the other appearers to change the contents of the clauses or he can ask to cancel the agreement if no agreement is reached regarding the clauses being debated. By knowing the contents of the deed, the parties can freely decide to agree or disagree with the contents of the deed.<sup>19</sup>

Based on the explanation above, it is known that there is an emphasis on the presence of a notary and the signing of the deed that must be done before the appearers and witnesses. So in this case, it is still necessary to further study the meaning of word for word in the legislation, especially Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning Notary Positions. According to the Big Indonesian Dictionary, facing comes from the word "facing" which means the side or side of the face. Meanwhile face to face means to meet face to face.<sup>20</sup> Thus from the meaning of the word facing or before it can be concluded if someone has to meet face to face. Meanwhile, the phrase present in the complete Indonesian dictionary means to come to a place.<sup>21</sup> Furthermore, the phrase place is something that is used to put, store, put and so on or it is also mentioned as a space (field, house and so on) that is available to do something.

Thus, regarding the formulation of the problem, can the phrase "appearing before a notary" be reinterpreted again in making an authentic deed? in Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, states that a notary must be physically present and read the deed before 2 (two) witnesses and an appearer. So the facing phrase must be physically present and carry out the signature. This will cause the process of making an authentic deed which is done online or through electronic media, causing problems in the physical deed signature process. This physical confronting phrase forming the concept of cyber notary or the utilization of online deed making cannot be implemented using the development of the available technology.

In relation to the reading of the deed as referred to in the provisions of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, this is confirmed in Article 16 paragraph (7) of the UUJN-P, which states: "the reading of the deed as intended in paragraph (1) letter m is not mandatory, if the appearer wants the deed not to be read out because the appearer has read it himself, knows and understands its contents, provided that this is stated in the closing of the deed and on each page of the minutes of the deed initialed by the appearers, witnesses and the notary."

<sup>19</sup> Muhammad Tiantanik Citra Mido, I Nyoman Nurjaya, and Rachmad Safa'at, 'Civil Responsibilities of Notaries for Deeds Read by Notary Staff before an Appealer' ['Tanggung Jawab Perdata Notaris terhadap Akta yang Dibacakan oleh Staf Notaris di Hadapan Penghadap'](2018) 5 (1) Legal Lantern 171, 177.

<sup>20</sup> Basic Words Face (Big Indonesian Dictionary) [Kata Dasar Hadap (Kamus Besar Bahasa Indonesia)] <<https://kbbi.web.id/hadap>> accessed May 1, 2021.

<sup>21</sup> Basic Words Present (Big Indonesian Dictionary) <<https://kbbi.web.id/hadir>> accessed May 1, 2021.

The consequences of violating this provision are regulated in Article 16 paragraph (9) of Law Number 2 of 2014 concerning the Position of a Notary, which states as follows: "If one of the conditions referring to paragraph (1) letter m and paragraph (7) is not fulfilled, the deed in question only has the power of proof as an underhand deed." So the deed under the hand does not have a perfect legal effect of proof because it lies in the signatures of all parties in the agreement.<sup>22</sup> Where it can be said that, an underhand deed only gives legal consequences of perfect proof for the benefit of the party to whom the parties signed to provide evidence.

If the above provisions are not implemented, the notary may be subject to civil sanctions and the deed which should be said to be an authentic deed but can only be used as a private deed. In addition, there are also sanctions that can be given in the form of reimbursement of costs, interest and compensation obtained if there are demands from the parties if the deed made by the notary only has the power of proof as an underhand deed or the deed can be null and void by law.<sup>23</sup> In fact, if forced to carry out a cyber notary, this becomes something that is impossible if the drafting of the deed that is drafted can be done online and practically. However, at the same time a notary is free to attend physically, which in the end in this case will eliminate the essential element of the existence of a cyber notary.

In essence, the presence of the presenters cannot be carried out through electronic media. Therefore, the witnesses, the appearers and the notary must be present together, because in this case it is necessary to have initials on each page of the authentic deed to ratify it as stipulated and explained that it must be physically present. On the other hand, according to the provisions of Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and Transactions has regulated the provisions for making contracts and also electronic signatures. According to the provisions of Article 47 paragraph (1) of Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and Transactions, states that electronic transactions can be carried out based on electronic contracts or other contractual forms as a form of agreement carried out by the parties. Furthermore, in Article 46 paragraph (2) of Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and Transactions, it is stated that the implementation of electronic transactions carried out by the parties must pay attention to good faith, the principle of prudence, transparency, accountability and fairness. Next, in Article 47 paragraph (2) of Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and Transactions, including an electronic contract is considered valid if:

- a) There is an agreement of the parties;
- b) It is carried out by a competent legal subject or who has the authority to represent in accordance with the provisions of the legislation;
- c) There is a certain thing;
- d) The object of the transaction must not conflict with the laws and regulations, decency and public order.

Meanwhile, an authentic deed is a deed made by or before a notary according to the form and procedure specified. A notarial deed is an authentic deed, where the word authentic is a signed deed containing the events that form the basis of a right or an agreement made since all of them intentionally to be proven.<sup>24</sup> Thus, the making of an authentic deed online can accommodate the provisions of Article 47 of Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and

<sup>22</sup> Dimas Agung Prastomo and Akhmad Khisni, 'Legal Consequences of Underhanded Deeds Legalized by Notaries' ['Akibat Hukum Akta Di Bawah Tangan Yang Dilegalisasi Oleh Notaris'] (2017) 4 (4) Journal of Deeds 727, 736.

<sup>23</sup> Hadi Nuskah Alhaqi, Ashoya Ratam and Widodo Suryandono, 'Authenticity of a Notary Deed Without Documents Supporting the Deed' (2019) 1 (3) Indonesian Notary 19.

<sup>24</sup> Sudikno Mertokusumo, *Indonesian Civil Procedure Law [Hukum Acara Perdata Indoensia]* (4<sup>th</sup> Ed., Liberty 1993) p. 121.

Transactions without violating the provisions as stipulated in Article 16 paragraph (1) letter m of Law Number 2 of 2014 regarding the position of a notary.

Furthermore, regarding signatures in Government Regulation Number 82 of 2012 concerning Electronic System and Transaction Operation as regulated in Article 53 paragraph (1) and paragraph (2), which states as follows:

- (1) Electronic Signatures used in Electronic Transactions can be generated through various signing procedures.
- (2) The Electronic Signature as referred to in paragraph (1) has legal force and legal consequences if:
  - a. Electronic signature creation data is related only to the signer.
  - b. The electronic signature creation data during the signing process is only in the power of the signer.
  - c. Any changes to the electronic signature that occur after the signing time can be noticed.
  - d. Any changes to the electronic information related to the electronic signature after the signing time can be noticed;
  - e. There are certain methods used to identify the signatories.
  - f. There are certain ways that are used to indicate if the signer has given consent to the related electronic information.

Thus, the reinterpretation of the "phrase of the appearers before a notary" Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary can be implemented by adhering to the provisions of Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and Transactions. Where the legal interpretation method is divided into 2 groups, namely the first the *textualist approach* (focus on text) and the second the *purposive approach* (focus on purpose).<sup>25</sup> In fact, what is currently available among notaries in Indonesia is still using a textualist approach (focus on text) which focuses more on grammatical interpretation, which is an interpretation carried out by looking at its lexical meaning, for example the term "coastal is defined as flat sandy land on the beach (by the sea shore)". Authentic interpretation is interpretation according to the limitations stated in the regulation itself, which is usually placed in the explanation section (*mempore van toleicthing*) in the formulation of general provisions or in one of the other article formulations. The interpretation of the "phrase before a notary" Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning Notary Positions, explaining the physical appearances of the parties.

In this discussion, the author provides ideas so that in the future the community, government, and related parties, especially notaries as executor, can use the purposive approach (focus on purpose), where in this purposive interpretation group there are several methods, namely teleological (sociological), systematic (logical), historical (subjective), comparative, featureistic (anticipatory), restrictive and extensive.<sup>26</sup> So according to the author, that Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, can be interpreted using a teleological or sociological method based on community goals to meet needs and follow developments era, then the making of an authentic deed can be carried out online or through electronic media without the need for the parties to be physically present. In addition to teleological methods, comparative methods can also be implemented, namely by making comparisons with developed countries where the implementation of making authentic deeds no longer needs to be carried out physically or conventionally. In addition, an extensive method can be used,

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<sup>25</sup> Siti Mawar, 'Method of Legal Discovery (Interpretation and Construction) in the Context of Harmonization of Law' (2016) 1 (1) Journal of Justisia 14.

<sup>26</sup> *Ibid*, 11-14.



namely by expanding the scope of a provision or statutory regulation, by linking or linking the contents of the provisions of the Information and Electronic Transaction Law in the process of making an authentic deed.

Thus, if the meaning of the audience in authentic making is reinterpreted in the sense that it can be carried out online, then it is likely to cause concern or misuse in making an authentic deed. So that in its implementation, there needs to be a mutual agreement between the Indonesian Notary Association together with the Ministry of Law and Human Rights or through the government and the House of Representatives so that bad possibilities or the occurrence of losses can be avoided with a strict, supervised and controlled implementation mechanism good. As well as comply with the provisions of the applicable laws and regulations as regulated in the Electronic Information and Transaction Law to utilize video conference technology, digital signatures and other methods that can provide convenience for deed makers, so that the desired goals and the effort to catch up with the tide of times in the law world especially on the field of notary can be accomplished safely without giving harm to any of the party, and by implementing online can be the bridge to connect the advancement of notary in giving service in International scale or go international, not limited to the domestic scale only.

## **2.2. Analysis of Article 16 paragraph (1) letter m of Law Number 02 of 2014 concerning the Position of a Notary from a Responsive Regulation Perspective**

Responsive legal products are the characteristics of legal products that reflect the fulfillment of the aspirations of the community, individuals or social groups, so a relatively more effective way is able to reflect the sense of justice that exists in society. The normative process invites public participation and aspirations openly. Judicial institutions as well as legal regulations have a function as implementing instruments for the will of the people, meanwhile the formulations are usually sufficiently detailed so that they are not too open to be interpreted and interpreted based on the will and vision of the government or authorities arbitrarily.<sup>27</sup>

As mentioned above, the reinterpretation of norms in authentic making can be done online. Thus, regarding the interpretation of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, in carrying out the position of a Notary or making an authentic deed online is a legal breakthrough that can be implemented to meet legal needs in society, which means in this case it is a necessity to keep up with the times. However, the arrangement for making an authentic deed online still has a lot of shortcomings, both in the interpretation to the conceptual arrangement and in its implementation in making an authentic deed.

In a transition period like this, there will certainly be various legal problems. To compensate for changes in patterns in society, it is necessary to change the legal regulations in order to create a legal protection which can protect as well as provide clarity and guarantee legal certainty.<sup>28</sup> As in Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, there is still a void in the meaning of "appearing" and there is also a void in the guidelines for its implementation if it is carried out online. Thus, here it can be seen that there is a legal vacuum (*rechtsvacuum*) in the perspective of its meaning. In a situation where there is a legal vacuum, it will certainly have an impact on the implementation of the duties of a notary, especially in making authentic deeds, thereby causing obstacles in the implementation of making authentic deeds online.

So this is what causes the making of authentic deeds online cannot be carried out until now because it is still a taboo among notaries. However, if a notary uses other regulations, for example Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and

<sup>27</sup> Philippe Nonet and Phipip Selznick, *Law and society in transition, Toward Responsive law* (Harper & Row Publishers 2001) 104.

<sup>28</sup> Ismatul Izsubstance, 'Juridical Analysis of the Implementation of the Cyber Notary GMS (E-Rups) in the Regulation of the Financial Services Authority' (2021) 2 (2) Significant Journal of Humanities 2-3.

Transactions, then in fact the making of an authentic deed online can be carried out because in the regulation regarding the constraints on the presence of the parties can be interpreted by the notary, appearers and witnesses to can be implemented with existing online media, as well as the mechanism in the signature or initials that become obstacles can be implemented with very detailed provisions and regulated in the Government Regulation concerning the Implementation of Electronic Systems and Transactions.

The concept of an appearer who deals directly with a notary requires a real physical presence from the parties/appearers who have a direct interest or face to face with a notary. Whereas in the concept of cyber notary here, the presenter in conveying his desire not to meet directly with the notary but through online media or teleconference. According to Habib Adjie, the concept of cyber notary requires a notary in carrying out his duties or authorities based on information technology, especially in making authentic deeds. In this concept, that facing physically or directly facing each other is not necessary. However, it is possible to use visual and hearing media, without city/provincial boundaries and even without state boundaries (borderless). With this concept, no need to face directly by coming to the notary's office. In further development, the identity of the appearer does not need to be shown physically, but simply by downloading it. Likewise, the documents needed in making the deed are enough to be downloaded by a notary from certain agencies. On the other hand, for the appearers, witnesses and notaries, it is enough to use digital signatures, seals and stamps. It even requires a digital fingerprint. This is an ideal description of the concept of cyber notary. In this concept, it is not only the signature that must be done electronically, but also the documents in making the deed. Likewise, the documents required in making the deed are enough to be downloaded by a notary from a certain agency. On the other hand, for the appearers, witnesses and notaries, it is enough to use digital signatures, seals and stamps. It even requires a digital fingerprint. This is an ideal description of the concept of cyber notary. In this concept, it is not only the signature that must be done electronically, but also the documents in making the deed. Likewise, the documents needed in making the deed are enough to be downloaded by a notary from certain agencies. On the other hand, for the appearers, witnesses and notaries, it is enough to use digital signatures, seals and stamps. It even requires a digital fingerprint. This is an ideal description of the concept of cyber notary. In this concept, it is not only the signature that must be done electronically, but also the documents in making the deed.<sup>29</sup> In making an authentic deed, including signing and reading the deed using this cyber notary concept, we want to provide a legal framework so that the act of facing the parties or the appearers before a notary does not have to meet physically (face to face) in a certain place. So that it is necessary to specifically regulate the mechanism for making an authentic deed by a Notary for an electronic transaction, where technological developments are increasingly advanced, it is necessary to apply Responsive Regulation in Indonesian Legislation.

Of course Responsive Regulation theory raises a number of interesting questions, and allows potential in the experience of regulators as so-called law-making institutions to cooperate with law enforcement, so that the reputation of the legal system and regulators for interacting will be connected internally to influence more advanced and better regulations for the future.<sup>30</sup> Responsive Regulation can be applied in legal regulations in various developing countries, one of which is Indonesia, because according to John Braithwaite in his article entitled *The Essence of Responsive Regulation*, explains that:

*“Responsive regulation is regulation that expects, encourages, and sometimes requires continuous improvement. That means continuous improvement in discovering lower-cost ways to achieve regulatory outcomes and continuous improvement in achieving better outcomes.”*<sup>31</sup>

<sup>29</sup> Habib Adjie, 'Mayantara's Notary Concept Facing Global Competition Challenges' ['Konsep Notaris Mayantara Menghadapi Tantangan Persaingan Global'] (2017) 16 (2) *Journal of Law Republica* 201, 217.

<sup>30</sup> Vibeke Lehmann Nielsen and Christine Parker, 'Testing Responsive Regulation in Regulatory Enforcement' (2009) 3 (4) *Regulation and Governance* 396.

<sup>31</sup> John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 (3) *UBC Law Review Canada* 475, 502.

Responsive regulation is a regulation that expects courage to require continuous improvement. The purpose of this continuous meaning is to find ways to make it easier to achieve statutory regulations in continuous improvement to achieve better results. So the responsive regulation theory can provide an understanding that the "appearers" in making an authentic deed if it is associated with the Electronic Information and Transaction Law as well as in Government Regulation Number 82 of 2012 concerning Electronic System and Transaction Implementation, can be done online or through electronic media because responsive regulation theory asks regulators not to be dogmatic about any theory, including responsive regulation itself.<sup>32</sup>

- 1) Regulation must be collaborative, in which the regulator assumes it has what it takes to achieve change, and the regulator draws on the regulator's values, motivations, abilities, and resources in helping to make regulation to bring about the desired change.
- 2) Regulators seek to evoke and explore the ambivalence of moving towards positive change.
- 3) Regulators should focus on the statement and emphasize the "talk about change" in the statement to strengthen and motivate change.
- 4) Regulators must voice arguments for change.
- 5) The regulator's role is to get and amplify the conversation about change.
- 6) The regulator should roll up the resistance that appears and focus on the change talk.
- 7) Developing a plan for change is the role of the regulator in deciding what is needed and when and how to proceed.
- 8) Commitment to change must come from regulators and be ready to listen in changing the change plan for the better.
- 9) To effect this change in approach, regulators must listen to empathy, minimize resistance, and nurture hope and optimism.

As regulators will always pay attention and be responsive to contextual insights flexibly, regulators must be responsive to capture or adapt to the times, as stated by Clifford D. Shearing and Richard V. Ericson in their article entitled Culture as Figurative Action, that:

*"The most important way we improve regulation, according to the responsive approach, is by conceiving of regulatory culture not as a rulebook but as a storybook and helping one another to get better at sharing instructive stories."*<sup>33</sup>

In a responsive approach, the most important way to improve regulation is to understand the development of regulatory culture not as a stagnant rulebook, but as a rulebook that has a plan for the future, and helps each other to share providing a better instructional record. So that the application of responsive legal regulations will give birth to the character of legal products that provide a reflection of fulfillment to adapt the changing times to the progress of the current digital era.

However, as stated by Edmon Makarim that the concept of a cyber notary in Indonesia is still in the debate stage, even though technology and facilities are already possible to be implemented online and electronically. But legally, it cannot be implemented, because the concept of cyber notary has not been regulated in the order of implementation and also its definition.<sup>34</sup> Thus, as described above, the interpretation of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, cannot yet be categorized as a responsive norm that is able to capture or adapt to the times, because in this case the provisions of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, there is still a legal vacuum that prevents the making of an authentic

<sup>32</sup> *Ibid*, 496-497.

<sup>33</sup> Clifford D. Shearing and Richard V. Ericson, 'Culture as Figurative Action' (1991) 42 (4) British Journal of Sociology 481.

<sup>34</sup> Edmon Makarim, 'Future Modernization of Notary Law: A Legal Study of the Possibility of Implementing Cyber Notary' ['Modernisasi Hukum Notaris Masa Depan: Kajian Hukum Terhadap Kemungkinan pelaksanaan Cyber Notary'] (2011) 41 (3) Journal of Law and Development 466, 468.

deed online. So the phrase "appearing" in the explanation section can be said that being physically present causes it cannot be reinterpreted so that the making of an authentic deed can be carried out online or through electronic media. So this provision cannot be categorized as a responsive article because in fact if the making of an authentic deed is forced to be carried out online, other laws and regulations are still needed as implementing regulations in their implementation. In the opinion of Philippe Nonet and Phipip Selznick, there are three basic legal classifications that exist in society, namely as follows:

- a) Law as a servant of repressive power
- b) Law as a separate institution that can tame repression and protect its integrity
- c) Law as a facilitator of various responses to social needs and aspirations.<sup>35</sup>

Thus, the application of responsive law will also give birth to responsive legislation. Responsive legal products are legal products that reflect the fulfillment of the aspirations of the community, individuals or social groups. So a relatively more effective way is to be able to reflect the sense of justice that exists in society, from the description above there is an analysis of if the phrase of the presenters can be seen from the perspective of responsive regulation in terms of several aspects, namely:

#### a. Legal Purpose

The objective of responsive law is competence. If it is related to the analysis of the phrases of the appearers, when viewed from the perspective of responsive regulation, in this case it aims to provide legal protection and certainty in making authentic deeds, namely the physical presence of all parties. However, if you look at the legal purpose of providing legal protection and certainty for the parties in making further deeds, it does not need to be done with a physical presence as can be implemented through the Electronic Information and Transaction Law.

#### b. Legitimacy

Regarding legitimacy, the goal is to achieve substantive justice. Thus, the decision to make a law can be considered based on rationality, honesty, objectivity, impartiality, without discrimination and based on conscience. So, if it is associated with an analysis of the phrases of the presenters, when viewed from the perspective of responsive regulation, the goal is close to procedural justice, where the contents must be in accordance with the article in the legislation and cannot be interpreted by others.

#### c. Regulation

In the form of regulations, responsive law is in the form of sub-ordinates of principles and policies. If the analysis of the phrase of the presenters is seen from the perspective of responsive regulation, in this case the regulations are more broad and detailed and binding on the authorities or those who are controlled. So that the provisions of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, the regulation is very detailed and binding on notaries in Indonesia where the making of an authentic deed must be carried out physically by the parties who have an interest.

#### d. Consideration

Considerations in responsive law that are purposive are goal-oriented or cognitive competence expansion. The analysis of the phrases of the appearers when viewed from the perspective of responsive regulation is very attached to the legal authority and vulnerable to formality and legality, so that the content of the phrases of the appearers in the provisions of Article 16 paragraph (1) letter m of Law

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<sup>35</sup> *Ibid.*

Number 2 of 2014 concerning the Position of a Notary, becomes very formality and cannot be interpreted with other legal actions or actions.

e. Discretion

Discretion in responsive law is carried out widely but in accordance with the objectives to be achieved. If it is related to the analysis of the phrase of the appearers which is seen from the perspective of responsive regulation, which is carried out by being limited by very narrow regulations and delegations, such as there must be physical presence by the parties in making an authentic deed. So the arrangement can be said to be not broad in accordance with the objectives, although the goal is the same, namely to create legal protection and certainty for the parties and also the notary.

f. Morality

In responsive law, morality takes the form of civil morality as well as cooperation morality. While the analysis of the phrase of the appearers when viewed from the perspective of responsive regulation is in the form of institutional morality, namely compliance with the integrity of the legal process, so the provisions of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning Notary Positions in the implementation of legal integrity are very strong and not can be disputed.

g. Political

Political responsive law is realized by the integration of legal aspirations as well as the integration of power politics. An analysis of if the phrase of the dissidents is seen from the perspective of responsive regulation, the law is independent of political parties and separation of powers.

h. Hope for obedience

In responsive law, the expectation of obedience that is disobedient can be seen from the aspect of substantive danger, in this case it is seen as a lawsuit against legitimacy. Analysis of the phrase of the appearers when viewed from the perspective of responsive regulation who does not comply with legal regulations, then the disobedience is a form of violation of the contents of the agreement in Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning Notary Positions, so the deed Authentic documents that are not made physically are only valid as private deeds.

i. Participation

In responsive law, the aspect is magnified by the integrity of legal and social advocacy. Analysis of the phrase of the appearers when viewed from the perspective of responsive regulation in the provisions of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning Notary Positions, access is limited by standard procedures. So that there is a criticism of the law, namely where the law is very passive which cannot keep up with the times. Thus, participation is very minimal and cannot be contested even though social needs are about to develop to be carried out online.

Thus, Article 16 paragraph (1) letter m of Law Number 02 of 2014 concerning Notary Positions is more of an autonomous law when compared to responsive law, because as mentioned beforehand, if several aspects indicate that the interpretation of the phrase "appearers" is still autonomous and does not show responsiveness. Because in this case, responsive law should be able to keep up with the times and be able to respond to changes with all the basics in it, and be able to serve the community by relying on all aspects of the morality of the law enforcement human resources themselves. So that responsive law is

an institution that continuously changes and builds itself towards a better level of perfection, which is then verified into welfare factors.

### **Conclusion**

Based on the analysis and discussion above, this article concludes that reinterpretation of the phrase appearing before a notary in making an authentic deed cannot be carried out online. Because in the explanation of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, it explains the necessity of being physically present. Nevertheless, according to the provisions stipulated in Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and Transactions, it can be carried out in accordance with the times. Where the "appearers" can carry out through electronic media and also the signing is carried out with the provisions stipulated in Article 53 of Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and Transactions.

This study also concludes that the interpretation of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Notary Position can be categorized as a responsive norm that has been able to adapt to the times or not, where the results of the study show that Article 16 paragraph (1) letter m Law Number 2 of 2014 concerning Notary Positions is not a responsive norm because it cannot capture or adapt to the times. This is evidenced by the phrase "the appearers" must be physically present as stated in the explanation of Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Position of a Notary, this physical phrase that makes the parties must meet directly and indirectly. can be implemented online. So the phrase causes the implementation of a cyber notary in Indonesia cannot be implemented, because the mechanism for implementing a cyber notary must be done online and cannot meet in person but is connected via electronic media. Thus the law becomes law as process, law in the making.

The government at least need to harmonize the laws and regulations, namely the Law on Notary Positions with the Law on Information and Electronic Transactions as well as the Government Regulation on the Implementation of Electronic Systems and Transactions. So that the notary does not experience problems in the future, regarding his authority in making authentic deeds online or through electronic media and the deed made by a notary online has perfect legal force. The government should also immediately form responsive regulations or regulations that are specific to the laws and regulations governing the renewal of the legal system of evidence in Indonesia. Especially in the case of civil proceedings, to propose the electronic evidence to be the evidence that is valid by the law.

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