

# Abstentions Phenomenon: Is It Truly a Recognized Human Right?

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**Abstract.** The phenomenon of “abstentions” is an act of someone intentionally not voting in the General Election for certain reasons. It often becomes a problem in society. This study aims to analyze the phenomenon of abstention from the perspective of laws and human rights. It also aims to analyze the act of abstention from the perspective of crime and punishment. This research is normative juridical research using a statute and case study approaches. The results of the study show that the act of abstention is an action that is fully guaranteed by the constitution and various existing laws and regulation, such as the Election Law to the Human Rights Law. People who consciously choose to abstain cannot be subject to criminal sanctions. However, anyone who instigates other people to act abstentions can be subject to criminal sanctions. Based on the results, the act of abstention should be recognized by the General Elections Commission (KPU) as a valid non-voting ballot, and its presence can still be counted.

**Keywords:** Abstentions, Election, Human Rights, Election Crimes

## 1 Introduction

Power tends to corrupt and absolute power corrupts absolutely [1]. As an effort to minimize the concentration of power in the government system in Indonesia, the people are expected to actively participate both in the context of being people who sit in the government seats and being the ones who determine who deserve to sit in the existing government. In this regard, the existence of general elections in the government system in Indonesia is also one of the mechanisms that can be chosen and carried out by the general public in choosing people who are deemed worthy.

General election as the distribution of society's sovereignty directly (direct democracy) is defined in Law No. 7 of 2017 concerning the General Election as a means of people's sovereignty to elect members of the House of Representatives, Regional Representatives Council, President and Vice President, as well as the members of the Regional Legislative Council, which is carried in a manner that is direct, general, free, secret, honest, and fair in the Unitary State of Republic of Indonesia under Pancasila and the 1945 Constitution of Republic of Indonesia. Thus, the participation of the people in the government can be actualized through the general elections.

Unfortunately, the implementation of the general election is often faced with *golput* (white group or abstentions). Historically, the phenomenon of abstention appeared for the first time in the 1971 elections during the reign of President Soeharto [2] because some people felt that the elections at that time were not democratic [3]. The undemocratic existence was seen when the

party system at that time tended to be hegemonic so that only the Golkar Party was dominant in the government. In contrast, the other political parties seemed to be only artificial [4].

The phenomenon of abstention is an act of someone intentionally not voting in the General Election for certain reasons or making a choice by continuing to exercise their voting rights. However, they pierce the white part or other parts, which is the same as causing the loss of their voice. Therefore, abstentions can also be classified based on the form or method of doing it, such as: (a) damaging the ballots, (b) leaving the ballot empty so that the choice is not defined, and (c) not using their rights by being absent from the polling station.

In addition, the existence of abstentions can also be classified based on the spirit or initial motivation, such as: (a) unintentional methods (accidents) that can occur due to administrative-technical reasons, such as forgetting/not being registered to unwanted urgent problems; (b) apathy or political indifference that usually occurs because of the opinion that elections are not something that is directly related to their interests; and (c) intentional motive which is usually based on the principle of resistance (disobedience) either because they do not agree with the electoral system, it is not following the contestant party, or the facts that there is some manipulation in the general election process.

It is undeniable that the phenomenon of abstention still occurs today. It is supported by the results of research conducted by one of the media companies engaged in data and research journalism, Lokadata.id, which showed that the percentage of abstentions from the legislative and presidential elections keeps fluctuating yearly. In 2014, the phenomenon of abstentions in the legislative election reached 24.89%, while in the presidential election, it was 30.42% [5]. Furthermore, the number increased in the 2019 election to 29.68% in the legislative and 19.24% in the presidential election. Therefore, it can be said that the phenomenon of abstention in elections still occurs today.

The abstention phenomenon often becomes a problem in society, especially for the parties who organize the electoral processes. One of the problems is that there is an issue that perpetrators of abstentions can be subject to criminal sanctions based on the provisions of Article 515 and Article 523 section (3) of Law Number 7 of 2017 concerning General Elections. Whereas in the constitution, precisely Article 28 E section (2) of the 1945 Constitution of the Republic of Indonesia states that every person shall have the freedom to believe his/her faith and express his/her views and thoughts following his/her conscience. This provision seems to imply that if a person chooses not to vote and it is following his/her conscience, then it is a legal matter and legally protected.

Therefore, based on the descriptions above regarding the phenomenon of abstention, the researchers are interested in further discussing Abstentions Phenomenon: Is It Truly a Recognized Human Right?

## **2 Problem**

1. How is the abstentions phenomenon in terms of Legislation?
2. Is the act of abstention included as a criminal offence, and can it be subject to criminal sanctions?

### 3 Method

This research is normative juridical research. According to Soerjono Soekanto, normative juridical research is literature law research carried out by examining library materials or secondary data as the basis for research. It is carried out also by searching for regulations and literature related to the studied problem[6]. From the researchers' point of view, normative juridical research is also a type of research that uses legal case studies in the form of phenomena in society and conducts further studies regarding the events by using various existing legal products as the basis for analyzing the issues.

The legal materials used in this research were sourced from primary legal materials in the form of laws and regulations as well as various literature, such as legal books and journals, related to the issues discussed in this research. This study used a statute approach, which means examining existing legal issues using all laws and regulations directly related to the issue [7].

### 4 Discussion

#### 4.1 The Abstentions Phenomenon in terms of Legislation

As stated in the constitution, precisely in Article 28 of the 1945 Constitution of the Republic of Indonesia, the State fully guarantees that every citizen has the freedom to associate and to assemble, to express written and oral opinions etc., shall be regulated by law. As for one of the derivative forms of the existence of the right, it is the right of every citizen to state his/her political choice in the General Election for citizens designated as a category of voters in the general Election or voters in the final voter list.

Thus, the right to state political choices is a right that may or may not be exercised. In other words, the existence of abstention is also a form of choice for every citizen not to exercise their right. Furthermore, regarding the right to vote in elections, there are two points of view regarding abstention. *First*, if the right to vote is essentially a right that may or may not be used by a person, then abstention can be interpreted as the person concerned has chosen not to exercise his/her rights. *Second*, the act of not voting or abstaining can be interpreted as part of the right of citizens to express their thoughts which are guaranteed in Article 28 of the 1945 Constitution of the Republic of Indonesia [8]. In addition, it should be noted that a person's choice not to vote is included in the human rights possessed by every citizen and is not a violation of the law because there is no single rule of law that contains it as a form of violation of the law.

The ideas supporting the abstentions phenomenon argued that not voting is an option that must also be respected because it is part of democracy. Therefore, the groups that support the abstentions movement stated that there is a need for mandatory human rights protection for citizens who choose abstention. In addition, the citizens who exercise their rights to vote must respect other citizens who decide not to vote as part of the people's political rights, which have been recognized since the early period of the introduction of the term human rights.

Unfortunately, abstentions that often occur during elections are often considered as something wrong and are considered the same as broken ballots by the election organizers such as the General Election Commission (KPU). Whereas as described above, abstention is

an act that is fully guaranteed by the constitution, so it should be recognized by the General Election Commission (KPU) as a valid form of not voting and should be counted because it is still included in the final voter list (DPT). It becomes logical to implement considering that the final voter list is every citizen who has the right to vote in the Election as previously determined by the KPU, even though some parties still choose not to exercise their votes in the practice.

The existence of abstention is also accommodated in various existing legal rules, such as Law Number 7 of 2017 concerning General Elections, which will be further explained in the next section, as well as Law Number 39 of 1999 concerning Human Rights. It is contained in Article 23, section 1 of the Human Rights Law, which states that "Everyone has the freedom to choose and hold his/her political beliefs." Therefore, if the abstention is believed by the person concerned as a political belief, then the legality of the action needs to be recognized, and it should not be considered a violation of the law that deserves to be punished.

The protection of human rights for people who decide not to vote or abstain must be given by the State in the life of a democratic nation and State, as we all know that citizens as a community are built based on mutual need and trust. In creating security and order in society, the proponents of abstention must be respected as a matter of choice; The State and society must respect their choice even if they do not concur with it.

Based on the explanation above, the exercise of the right to not vote or make no good decision or white group (abstentions) is a person's political right and basic freedom, and it is included in human rights. The guarantee for this group as part of everyone's political rights is regulated in Article 28D section (3), Article 28I section (1), and Article 28C section (2) of the 1945 Constitution of the Republic of Indonesia; Article 23 section (1), Article 23 section (2), Article 43 section (1), and Article 43 section (2) of Law Number 39 of 1999 concerning Human Rights; and Article 18, Article 19, and Article 25 of Law Number 12 of 2005 concerning the Ratification of the International Convention for Civil and Political Rights

#### **4.2 The Phenomenon of Abstention is not Included on a Crime**

A researcher at the Institute for Criminal Justice Reform (ICJR), Sustira Dirga, stated that abstentions are not included in the form of an election crime, even though the act was often linked to Article 515 of the Election Law. The article states that a person who, during voting, deliberately promises to give a voter money, gifts, or another incentive to not vote or to vote a certain way or to cast an invalid vote is criminally punishable with maximum imprisonment of 3 (three) years and a maximum fine of Rp. 36,000,000,000.00 (thirty-six million rupiahs). Therefore, without a promise or giving a sum of money or material, the act of simply mobilizing people to abstain is not criminalized. People who choose to abstain or declare themselves abstentions cannot be punished [9].

Concerning the abstention as regulated in the Election Law, which is classified as a criminal act, only those regulated in Article 515 and Article 523 section (3) of the law thereof. As for the two articles above, a person who, on Voting Day, deliberately promises to give a voter money, gifts, or other incentives to not vote. In other words, a person subject to criminal sanctions is not someone who chooses to abstain based on his own will because it is recognized by the constitution as a human right not to exercise his right to vote.

In addition, based on the 2020 Bill of Commission II of the DPR RI, to be precise, Article 698 and Article 699 of the Election Bill, in fact, also regulate criminal sanctions related to abstention. Article 698 of the bill thereof states that "Everyone, who promises and/or gives money and/or other materials as a reward to everyone who has the right to vote, either directly

or indirectly, not to exercise their right to vote, to exercise their right to vote the election contestants in a certain way so that their ballots are invalid, elect certain Election Contesting Political Parties, elect candidates for DPR, Provincial DPRD, Regency/Municipal DPRD, elect certain candidates for DPD, elect certain pairs of candidates for President and Vice President or elect certain pair of candidates for Governor and Deputy Governor, Regent and Deputy Regent/Mayor and Deputy Mayor, shall be punished with imprisonment for a maximum of 3 (three) years, an additional penalty in the form of revocation of their his/her to vote and be elected in the next election, and a fine of a maximum of Rp.36,000,000.00 (thirty-six million rupiahs)."

Meanwhile, Article 699 of the bill thereof states that "Everyone who has the right to vote actively asks for money and/or other materials as a reward, either directly or indirectly, for not using his/her right to vote or using his/her right to vote by choosing Election Contestants in a certain way that makes the ballots are invalid, electing a certain Pair of Candidates for President and Vice President, Election Contesting Political Parties, candidates for Members of DPR, candidates for DPD, candidates for Members of Provincial DPRD, candidates for Regency/Municipal DPRD, or electing a certain pair of candidates for Governor and Deputy Governor, Regent and Deputy Regents/Mayor and Deputy Mayor, shall be sentenced to a maximum imprisonment of 1 (one) year and an additional penalty in the form of revocation of his/her right to vote and be elected in the next general election."

In short, Article 515 and Article 523 of the Election Law have the same regulatory content as Article 698 of the Election Bill, which then becomes the difference in the regulatory content contained in Article 699 of the Election Bill because the article regulates if someone who "actively" asks for rewards directly or indirectly not to exercise their right to vote will be subject to criminal sanctions. Hence, even in the latest bill, the act of abstaining from purely one's conscience is not considered a crime, so it cannot be punished unless the act is committed. "influenced" by others for "reward" either in the form of money or other material.

Unfortunately, the Election Bill, which is an idea of simplification and unification of various regulations governing elections such as Law Number 1 of 2015 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2014 concerning Elections of Governor, Regent, and Mayor into Law, Law Number 8 of 2015 concerning Amendments to Law Number 1 of 2015 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governor, Regent, and Mayor into Law, Law Number 10 of 2016 concerning Second Amendments to Law Number 1 of 2015 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governor, Regent, and Mayor into Law, until Law Number 7 of 2017 concerning General Election is not included in the list of 37 Bills in the 2021 Priority National Legislation Program [10].

Here is a further analysis of the existence of abstention in elections using existing legal theories, such as a theory of justice as expressed by John Rawls. The theory of justice states that "First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all [11]." Therefore, to realize justice as fairness, regarding the distinction and restriction of freedom, John Rawls emphasized that restriction can indeed result in inequality in political freedom; however, it is allowed if it is important to ensure the freedom of disadvantaged groups [12]. In the context of its relation to the abstention, the restrictions imposed by the law on several actions in the

implementation of elections can be justified as long as it aims to guarantee the right to equal political participation for all citizens.

## 5 Conclusion

The phenomenon of abstention in implementing elections in Indonesia from year to year always occurs in the community. Unfortunately, the action is often considered wrong and the same as "broken ballots" by election organizers such as the General Election Commission (KPU). The act of abstaining is an action that is fully guaranteed by the constitution and various existing laws and regulations, such as the Election Law to the Human Rights Law. Article 23, section 1 of the Human Rights Law states, "Everyone has the freedom to choose and hold his political beliefs." Therefore, if the abstention is believed by the party concerned as a political belief, then the legality of the action needs to be recognized as a human right and is not blamed or even considered a violation of the law that deserves to be punished.

Concerning the Election Law, the abstention is classified as a criminal act only on those regulated in Article 515 and Article 523 section (3) of the law thereof. As for the two articles above, a person who will be subject to criminal sanctions is someone who intentionally promises or gives money or other material to voters during the voting period, so they do not exercise their voting rights. In other words, someone subject to criminal sanctions is not someone who chooses to abstain from his/her own will because it is recognized by the constitution as a human right not to exercise his right to vote. Therefore, abstention should still be recognized by the General Election Commission (KPU) as a valid form of voting for not voting. It will still be counted because they are still included in the final voter list (DPT). It is logical to implement considering that the final voter list is every citizen who has the right to vote in the Election as previously determined by the KPU, even though some people still choose not to exercise their votes.

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