

The planned independence referendum in Eastern Ukraine is unconstitutional and anti-democratic

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By Democratic Audit UK

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*Separatists in Eastern Ukraine are planning to stage an independence referendum in Ukraine this weekend, despite criticism from the international community. With comparisons to international comparisons held in a number of other states, **Matt Qvortrup** considers the democratic credentials of the vote. He argues that holding a referendum now represents the majority attempting to impose its views on the minority, and that a vote on Eastern Ukraine's future should only take place once there has been a negotiated settlement among all parties in the region.*



US Secretary of State discusses the Ukraine crisis with international counterparts. Credit: US State Department

On Sunday 11th May, the voters in Eastern Ukraine will be [voting in an unofficial referendum](#) on independence. The vote is an act of defiance. Even Vladimir Putin – who previously was in favour of the referendum – has now urged that the referendum is ‘postponed’. But the vote now looks set to go ahead anyway.

What are the consequences of the referendum? Is it legal or is it unconstitutional? Is it prudent of Putin to suggest that the vote should be postponed as he did on Wednesday?

Categorical answers are rare in politics, law and international affairs. This brief note outlines some of the consequences and the legal situation pertaining to the referendum and provides – we hope – a dispassionate analysis of the situation.

In a statement Wednesday the 7th May US Secretary of State John Kerry, said that the US and its allies [rejected all efforts for organising the referendum](#), calling it ‘bogus’. He went on to say that the referendum ‘will create even more problems in the effort to de-escalate the situation’.

Is the referendum bogus? If by 'bogus' the Secretary of State means illegal, it is not difficult to answer the question in the affirmative. The referendum is undoubtedly unconstitutional. Article 73 of the [Ukrainian Constitution](#) of 1992 is unequivocally clear. It states that "issues of altering the territory of Ukraine are [to be] resolved exclusively by an all-Ukrainian referendum". As the vote is only being held in the Eastern Part of the country, the vote is *ipso facto* unconstitutional.

Of course, the separatists claim that they have a 'legal right' to hold a referendum. This is not a reading that can be supported by either international or national law. The right to self-determination does not give a minority a 'right' to independence in legal terms.

To be sure, occupied territories (such as [East Timor](#) and [Western Sahara](#)) won support for referendums on self-determination from the International Court of Justice (See: [Portugal v. Australia](#), International Court of Justice, 30 June 1995, ICJ Reports, 90-106, and [Re Western Sahara](#), Advisory Opinion, International Court of Justice, 16 October 1975, ICJ Report 12-68, 55).

But these advisory opinions are not legally binding in the strict sense and nor are they relevant to the present case. For unlike Western Sahara and East Timor, Eastern Ukraine is not a territory that has been invaded by a foreign state. Eastern Ukraine was already part of the country. Further, the two advisory opinions do not say anything about unilateral secession. Given the blanket-ban in the Ukrainian constitution and the lack of clear guidelines in international law, it is fair to say that the referendum in Eastern Ukraine is illegal and not consistent with the principle of *pravovoe gosudarstvo* – roughly translated 'the rule of law'. Vladimir Putin – a lawyer by training – undoubtedly knows that, though that might not be the reason for his *volte face*.

Referendums may appear democratic. But no democracy can function in the long run if it becomes a tyranny of the majority. Like First-Past-the-Post electoral systems, the winner-takes-it-all in a referendum. As we saw in referendums in Croatia in 1991 and in Bosnia in 1992 (which I analyse in my book, [Referendums and Ethnic Conflict](#)), referendums held without prior negotiations between the parties exacerbate conflicts and force the losers to embrace political violence. For example, in Bosnia the Serb minority had no other option than to resort to violence when they were defeated at the polls in a vote they could never win for demographic reasons.

Democracy and majority rule may be good guiding principles in theory; in practice they only work if there is a modicum of respect for minorities.

The referendum can be a mechanism that consolidates a peaceful settlement. A plebiscite *can* provide the seal of approval to a negotiated settlement. This was famously the case in Northern Ireland in 1998 when a massive 73 percent endorsement by the voters in the referendum on the Good Friday Agreement facilitated the end of 'the troubles'. The same was true in [Burundi](#) in 2005 where a negotiated settlement on power-sharing between Hutus and Tutsis was endorsed by a referendum.

But the referendum *must* only be held after a compromised is reached. Anything other than that is likely to result in strife and in many cases entrenched civil war. "War is the continuation of politics by other means", the German military theoretician Carl von Clausewitz famously noted. Nowhere is this truer than in the cases of referendums on ethnic issues.

Granted all-out war is less likely in Eastern Ukraine than in Croatia or in Bosnia, but a referendum is unlikely to be conducive to constructive negotiations. Mr Kerry is undoubtedly right that the referendum "will create even more problems in the effort to de-escalate the situation".

A plebiscite might– and arguably should – play a role in the future. Once a negotiated settlement is reached it makes good political sense to have this approved by the people. Putin is right to suggest that the referendum should be postponed, but it remains to be seen if he is willing to reach a negotiated compromise and settlement that can be submitted to the voters.

Note: This post represents the views of the author and does not give the position of LSE or Democratic Audit. Please read Our [comments policy](#) before responding. Shortlink for this post: buff.ly/1nliCrN

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