

Legal Scholarship and the Ukrainian Higher Certification Commission (the VAK)



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The state of Ukrainian scholarship is becoming a favorite subject for journalists. Sometimes the issue is discussed in its full context, but in most cases we'll see a brief commentary about an aspect of this or that research area. Another popular theme closely relates two separate issues: scholarship and the Higher Certification Commission, the VAK¹. Judging by recent popular articles, using these two expressions in the same sentence is highly problematic — some even consider them opposites. The most extreme critics insist that the VAK is not only a useless bureaucratic structure but that it opposes scholarship itself.

This article is an attempt to look at the condition of legal scholarship in Ukraine and to see if there is any substance to the criticism levied at the VAK in so far as legal studies are concerned.

There are enough problems with legal studies in Ukraine without the VAK. In spite of what official notices proclaim, the intellectual ruin of political reform, which should really be called "legal reform," says a lot. The nation's top leadership has openly admitted that it can't live with the present Constitution. After the Constitution was amended in 1996, the problem of constitutional revisions quickly

plished. Ukrainian legal scholars learned to think assertively, but not yet to express these thoughts. At least this is the case with issues closely related to constitutional policy. Scholarship in constitutional law has achieved freedom of thought, but not freedom of speech.

Bertrand Russell wrote in his time that intellectual honesty in civilization is the basis of value. This is nothing new, but in Ukrainian humanities this maxim remains an unrealized ideal. Suddenly, somebody realized that the hardest thing is to break free of self-censorship.

At first it seemed that the VAK exists in order to secure fairness, honesty, freedom from bias and, finally, freedom in Ukrainian humanities studies. This structure was created especially to guard against intellectual counterfeits and, according to its architects, was supposed to become the undisputed judge in the search for new scholarly directions. In other words, the VAK's goal is to provide expert guarantee for that which makes up the main value and essence of scholarship. Fakes and pretenders were supposed to be shamed and selected out of the process while talent was supposed to be introduced to the club of intellectual achievers.

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grew into a problem of their legitimacy. In spite of the official support which academic hierarchies announced for the reform it's talked about with sarcasm in academic circles. I personally accept full responsibility for saying that, without a doubt, real expert support by authorities regarding the constitution has a long way to go.

Ukrainian legal experts officially say one thing and something else off the record. In post-totalitarian countries this is generally the rule. After some 10 years of the development of contemporary Ukrainian legal studies we must sadly note that not much was accom-

plished. But that's not how it turned out. It's hard to tell exactly where the VAK got off the track. Somewhere along the road lined with the VAK's wordy, literal and boring instructions the signals got crossed. Instead of focusing on scholastic content the VAK began to point towards problems in scholastic form and packaging. An example is Ukrainian VAK Decree #7-05/1 of January 15, 2004 "Raising the Requirements for Specialty Publications on Ukraine's VAK List" and Ukrainian VAK Decree #7-02/2 of February 9, 2000 "Publications Based on the Dissertation». Today everybody knows where this led. All of a sudden doctors of philosophy and sci-

ence materialized out of nowhere, publishing books and 20 articles that lacked substance.

VAK's biggest mistake was to switch from content quality criteria to formal and quantity criteria. Obviously problems of form are more easily resolved than weaknesses in content. The VAK's instructions didn't so much feed greedy quasi-scholarly ambitions as much as stimulate them. Paradoxically, neither Socrates nor Merab Mamardashvili, philosophers who didn't like to write, would have been able to make the list of Ukrainian doctoral candidates.

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According to this system, many others would never have been able to join the ranks of Ph.Ds including founders of modern humanities scholarship such as Gilles Lipovetsky, Jean Bodriar, Jaques Lacan, Jean-Francois Lyotard and Walter Benjamin. According to VAK criteria, all of them are just odd writers on the edge, albeit on the European periphery. It's interesting that official VAK standards for scholarly works systemically contradict the style and content of nearly all major legal works of the 20th Century. According to VAK requirements, Paul Ricœur's "The Law and Justice," Lon L. Fuller's "The Morality of Law," and H. L. A. Hart's "The Concept of Law" were all improperly written. Sadly, Friedrich A. Hayek's classic trilogy "Law, Legislation and Liberty" would not have fit into the VAK's depressing regulatory straightjacket. It's hard to believe that Hayek would not have been allowed to defend as a dissertation his famous "Constitution of ." Lucky for him, the author has been a Nobel Laureate already for some time.

It's enough to skim the VAK's current content and form requirements for Ukrainian dissertations, books and scholarly articles to realize that this conservative structure recognizes only formal logic, deduction and induction as legitimate research methodologies. Every other approach is false. In the meantime, according to the grandfather of political studies David Easton, formal logic and strict formulations in modern science gave way a long time ago to new theories. This is also the case in legal studies.

In the legal systems of post-totalitarian countries, there are many practices that appear spontaneously and help people deal with a new system of social coordinates. In legal studies this process of humanization is paving the way to new scholarly research, melting down rigid theoretical constructs and metaphors in the language of legal research.

In order to internalize the language of democracy, Ukraine needs to master the tools and concepts of legality that form the underpinnings of any national conception of constitutional law. Only that mastery will engender a renewed under-

standing of political philosophy. These nascent developments, however, quickly met resistance on the part of the old (actually, soviet) scholarly tradition. Democracy, the market, human rights and freedom are often written about in a repulsively condescending, vulgar and primitively pseudo-Marxist style. Unfortunately this false tradition is being supported by the national VAK.

Works of modern philosophers and the art of Jackson Pollock or Mark Rothko even today have no meaning

The VAK's literal approach and prescriptive style shows a dramatic lack of understanding on the part of Ukraine's academic administrators of the essence of change in contemporary scholarship. Figuratively speaking, VAK believes that Van Gogh's masterpieces can be mass-produced — you just need the right number of sunflowers on canvas. Sad as it is, the VAK's methodological prerequisites dismiss entire worlds and genres of modern scholarly thought.

But there's a reason for all of this. For many people who were formally educated in post-totalitarian countries, the works of modern philosophers and the art of Jackson Pollock or Mark Rothko even today have no meaning because they were created in a mental register that was practically inaccessible east of the Berlin Wall.

During a complete shift in a political paradigm, legal studies require substan-

tive revision. According to Max Weber, because social priorities are usually the results of people's preferences, research in the humanities needs to be subjectively accepted as well as objectively proven. This is true for legal studies as well, since legal concepts have never been considered to be true or false, only more or less practical. On the other hand, rather than introduce flexibility and "subjectivity" into legal studies Ukraine's VAK makes an attempt to pointlessly and crudely "objectivize" and dogmatize everything.

At the same time, the social sciences have never been very successful in formulating "managing principles and key terms." Martin Heidegger famously once said that in order for the humanities to preserve their accuracy they need to be inexact. We know that in legal research the issue of truth often remains a question of philosophical intuition. However, this thinking is completely rejected by the VAK's conservative instructions.

By all accounts, the VAK system seems to assume that scholars reach their conclusions according to the rules of linear processing. Never mind Henri Bergson's "intuitions" or the "transcences" coined by Nikolay Berdyayev. The newly updated VAK regulations concluded that any

scholarly result should be based on a history of who, where, and when tried to grapple with the same problem and how closely they came to solving it. At the same time, the VAK forces scholars working in the area of intellectual "multi-universe" to do research in hermeneutics. It appears that the VAK wants us to translate algebra problems into the language of arithmetic.

But if everything that's "scientifically correct" has to be based only on positive past developments, in other words conclusions are based on conclusions and authority is based on authority, then it's not clear how Ukrainian scholarship can ever reach principally new levels of scholarly development. Clearly, a Ph. D dissertation isn't expected to discover anything revolutionary, but the greatest scholarly achievements have in fact been based on shifts in scientific paradigms.

Greater familiarity with western scholarly communities demonstrates (and also based on my experience with scholarly and educational institutions in the UK, Canada and the USA) that in these environments the intellectual creativity of scholars is not regulated by legal, political, administrative or ideological norms and restrictions. Since the scholarly community recognizes that there are uniquely gifted individuals, the right to nonconformist behavior is rigorously practiced. At the same time, scholars can argue against any position offered by colleagues, even if their criticism initially seems to be illogical or unconstructive.

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As a rule, attitudes towards the value of ideological beliefs and the knowledge of humanities scholars are not determined by whether or not these views dominate in a particular area of scholarship. Marxists and liberals work together in peace, and the latter know how to tolerate the scholarly world views of conservatives.

Freedom of argument and scholarly interpretation are highly valued in the US. How interest is created, how criticism is expressed, how useful is skepticism, and a desire to experiment and play with ideas are all recognized as valid features of intellectual self-expression. This means also that arguments based on majority belief are not the crucial factor and that only qualitative aspects are considered to be legitimate.

Ideas that are unpopular with the political status quo or are not politically correct are considered to be pseudo-scholarly

If the work of scholars doesn't directly serve to formulate political freedom, then the main role of scholarship could be to provide analytical methods and other tools for strictly assessing and even harshly criticizing theoretical postulates, actions and modes of thought. Such approaches could undermine established rules, laws, traditions and values. Science is "a priori" made up of conflicting elements — pieces with different strategies, metaphysical principles and results. Scientists are believed to function in realms of real intellectual anomie and so how they express themselves are strategies that can't be described in any standard ways.

As a rule, different universities (Oxford, Harvard, etc.) have different traditions for officially acknowledging scholarly achievement. This doesn't in any way impact on the right of every author to insist on expressing his personality in his work.

Special attention should be given to the issue of freedom in developing scholarly strategies and methodologies. In democracies institutes, government organizations and civil servants cannot be the sole decision-makers in the "realm of scientific ideas." Consequently, no government committee formed to assess the value of scholarly projects can have exclusive status or significance. Scholars are given the benefit of the doubt regarding intellectual errors and therefore do not have political or legal responsibility for the validity of their research results. Consequently, the effectiveness of science, popularity of certain scientific areas, and the personal authority of specific scientists are really defined by the symbolic artifacts available on the market.

Furthermore, because scholarly issues and problems have their own timeframe, formal state planning or any other political intrusion into the world of fundamental scientific research is considered by the free world to threaten socio-cultural progress.

By calling the 20th Century the age of ideological "mega-death," Zbigniew Brzezinski wrote that the salvation of humanity will depend not on any particular ultimate truth but on the removal of barriers in the pursuit of that knowledge.

This suggests that modern legal studies recognize intellectual pluralism. In other words, a problem can have several solutions at the same time. In addition, identifying a legal truth is often the prerogative of individuals outside the scholarly community. At the same time this means that legal studies and politics should be separated.

In other words, all legal texts are normally evaluated according to two sets of criteria: in scholarly terms and in laymen's terms. Furthermore, we can conclude that research in constitutional law is always polarized. It is this particular fea-

ture of legal studies that is poorly received by Ukrainian scholarly publications, or not recognized at all.

According to VAK publishing requirements for scholarly work, only publications in professional journals approved by the VAK are considered to be “scholarly.” At the same time, the experience of scholarship in constitutional law demonstrates that during different periods of social development some scientific concepts, doctrines and approaches are in official favor while others are written off as anti-establishment. Because in Ukraine nearly all specialized law publications are considered to be “official,” ideas that are unpopular with the political status quo or are not politically correct are considered to be pseudo-scholarly. In most cases no professional journal will risk publishing such texts in their entirety.

Francis Bacon wrote that in scholarship there is only one system that was and remains the law of rule by the people. Although the unwritten law of academic ethics forbids appealing to people’s representatives and government leaders on issues of scientific theory, in constitutional law appealing to democratic masses and political elite remains the key criteria for survival of proposed hypotheses.

In other words, scientific advisers and government experts, including editorial boards of professional journals, are not the only ones who should exercise freedom of self-expression regarding legal theory and practice. In Ukraine’s case this means that it is absolutely essential to fully recognize the scholarly legitimacy of various views on constitutional law and legal studies.

Max Born wrote that the conviction that there is only one truth and that somebody has a monopoly on it lies at the root of all human suffering. For this reason, there should not be irreconcilable disagreements in legal studies between independence and engagement, between cooperation and conflict. The VAK in Ukraine should have taken these new developments into account. However, the VAK turned into a “thought,” a quasi-scientific officer with a gun — the official monitor of political correctness among Ukrainian legal scholars.

It was difficult for the VAK to accept that legal research should not stop with discovered truths, especially if the researcher suspects that these differ from the official party line, generally accepted doctrine or

world view. But even in law a creative idea can have inspiration as its source and not some standard methods.

As Paul Feyerabend wrote in his time, when dealing with a new theory we should not limit ourselves to standard methods or procedures for determining its viability. Neither internal arguments, nor apparent weaknesses in empirical context, nor real conflict with experimental data should prevent us from entertaining a concept that is appealing for one reason or another. All of this is very far removed from the methodological principles, rules and visions laid down by the VAK.

It’s inconceivable to the VAK that a properly phrased question in legal studies could be more important than a satisfactory answer to an improperly formulated problem. Clearly, the imperative and at the same time the temptation to tell the truth in legal studies are not simple tasks since these require honesty on the part of the scholar who doesn’t feel any specific political debt or responsibility. According to the American philosopher Berrows Dunham, if the world is full of contradictions then any factual description of the world will also look highly questionable. The more honest a researcher’s intentions the easier it is to accuse him of contradicting himself. Ukraine’s VAK values do not so much reflect the polyphony, controversy, and immediate relevancy of the nation’s legal thought as rather the bare bones of professional rhetoric, complementary sweet talk and the blending of legal theory with the government’s political direction. All of this is very far removed from today’s understanding of creativity in scholarship.

Every section of a doctoral dissertation must include concrete (imperative) conclusions. Doubts are not recognized

According to the VAK, any scientific problem can be dissected into pieces and put back together again while its solution will be described as a logical set of operations that can be easily verified. Additionally, every section of a doctoral dissertation must include concrete (imperative) conclusions or recommendations. Doubts or suspicions of any kind, as useful assumptions in scholarly research, are not recognized.

As a result, thanks to administrative pressure by the VAK in Ukraine, a growing number of books now written bear a like-

ness to the history of the Communist Party of the USSR: sections, sub-sections, paragraphs, points and sub-points. Conclusions are based on other conclusions, everything agrees with everything else. Meanwhile, stars and pretenders in science, apparently differ only in nuance. For this reason, university VAK boards should focus on identifying subtle cultural differences and philosophical variations in scholarly work rather than be proofing outlines and lists of academic babble.

We should remember that legal research in contemporary Ukraine is conducted in a scholarly environment which has for a long time professed methodological monotheism. For this reason, it’s understandable that scholars would want to try less constricting, more creative research approaches. However, the VAK does not guide scholars towards exercising freedom of imagination or creative license. It appears that in our case societal effectiveness and the principle of human happiness have been associated far too long with logical and verifiable formulas and charts. To this day, unfortunately, our highest scholarly authority (the VAK) continues to guide the scholarly community with reliable and simplistic formulas, thought patterns and dogmatic cliches.

In legal studies methods can change when the subject of research changes, when it doesn’t change, and for other reasons. Methods should in fact change when the system of looking at the subject changes. Many years of enforced positivist approaches towards dealing with legal studies in the USSR solidified the already rigid methods of observation and

measurement, codified the processes for interpreting scientific results, standardized scientific terminology, and contributed many other conservative features. This is what needs to be changed first and as soon as possible.

Afraid to contradict the VAK’s administrative canons, Ukrainian legal studies continues to be uninteresting. In spite of a formal quantity of published books, in reality only the law classics are readable. Furthermore, the language of legal research has not grown significantly. Instead, it may have become even more

dry and bureaucratic. Everything is about “complexity,” “optimality,” “activity,” or “effectiveness.” At the same time real life continues without the artificial developments and recommendations of science. In the end, terse and accurate principles which separate direct elections and the state are now being ignored even by the Constitutional Court.

VAK does not guide scholars towards exercising freedom of imagination

Today more lawyers understand that the law influences a wide range of different elements in society and that according to its nature and values base can't avoid being “eclectic.” For this reason law needs to be interpreted according to non-standard descriptive and analytical means. In other words, modern law is a phenomenon that should be analyzed in terms of everyday real life. This informality makes scholars happy but frightens bureaucrats.

In spite of the criticism expressed in this article, I believe that the VAK's existence is justified after all. However, it should exist in some other new form. Instead of espousing formalism and scholasticism, the VAK should become the unbiased and wise defender of original academic talent and professional competency. As for Ukraine's painful issue of dissertation review by outside officials, this process should be carried out solely within the university system. And finally — academic freedom must be guaranteed.

Dissertation review should be carried out solely within the university system

The VAK system will remain a necessary alternative in the dissertation evaluation process, a selective means in the fight against provincialism and academic obscurantism. But first this institution must change from an administrative policeman of form into a competent scholarly evaluator of content. The national VAK should acknowledge and support authentic research, non-standard approaches, and multiplicity and breadth of scholarly thought. Of course the VAK could remain as an appellate alternative for those who failed the university defense. It could also become the arbiter in the difficult defense of multidisciplinary work, in cases in which the research themes fail to fit narrowly defined professional boundaries.

In its revised version the VAK could continue to defend scholarship against false creativity and unsubstantiated criticisms. What the VAK does today is cause grief, suffering and boredom, something which creative people can hardly tolerate anymore. In its present form, the VAK is a horrible creation which is completely useless to scholarship.

It's no surprise that none of the professional legal publications officially recognized by Ukraine's VAK interest a single reputable library in the West. In the past the U.S. Library of Congress had subscribed to several Ukrainian legal journals. Today the Library accepts them only as gifts. This short story perfectly illustrates the case.

Finally, a few concluding words to those who suspect this author of bias. It's true, there is personal bias here. The author completed the dissertation in a prestigious law faculty, studied abroad for several years, and wrote four books and some 150 articles on topics related to his doctoral thesis. The academic theses that were presented at the defense have been published no less than three times. But E there was always something wrong. Either the ministry stamp was missing, or the reviewers weren't specialized enough, or it wasn't the right publisher. Of course there's always the option to patiently start the process all over again for the fourth time. But, is there any point to this in Ukraine?

¹ VAK — the Ukrainian Higher Certification Commission. The VAK is the government's evaluation authority on higher education in Ukraine. It is a centralized Ukrainian institution that certifies all higher degrees. No Ukrainian university or higher education establishment has the authority to grant degrees unless the VAK certifies the validity of the particular work.