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THE LEGAL ESSENCE OF THE ELECTRONIC EVIDENCE IN THE ADMINISTRATIVE PROCEDURE: A BRIEF COMPARATIVE HISTORICAL AND LEGAL ANALYSIS

*The **purpose** of the scientific paper is to explore the foreign and national historical preconditions and the logic of the development of the sub-institute of electronic evidence, with a primary focus on the administrative proceeding in Ukraine, based on the documented factual data of different periods. Considering the theoretical nature of the present research, the main research **methods** used in the course of its preparation are as follows: combination of historical and logical, systematic method, methods of comparison, description, generalization, synthesis and induction, convergence from general to local. As a **result** of the research the main trends of the development of the sub-institute of electronic evidence in the administrative proceeding during different historical periods were studied, with a special emphasis on the foreign pre-history of the emergence and the development of the legal provisions related to electronic evidence. **Key findings (conclusions)** of the study are briefly summarized below. The legal provisions on electronic evidence have been subject to numerous amendments beginning from the 1970th, when they were firstly implemented in the procedural legislation in United States of America. Considering the fact that the matter of periodization is always an open question, in the author's view the historical development of the regulation regarding electronic evidence may be divided into four main periods: 1) From the 1970th to the early 1990th (this period is related to the emergence of the first national cases of specific legislation, forensic practices and scientific researches); 2) From the 1970th to the early 2000th (when the transformation of the approaches to the understanding of the electronic evidence's essence happened, and the issue on the autonomous role of electronic evidence within the system of evidence was raised); 3) From 2000 to 2010 (this period is associated with the active development of the legislation and the legal practice on the electronic evidence); 4) From 2010 till nowadays (this is the present stage of the legal provisions on the electronic evidence's development, when a special definition and procedural rules for electronic evidence were implemented into the national procedural codes, including the Code of the Administrative Procedure of Ukraine).*

Key words: evidence, electronic evidence, administrative proceeding, history, historical preconditions.

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1. Introduction

A lack of researches on the historical preconditions regarding the development of the legal provisions related to *electronic evidence* today gives rise to a number of theoretical and practical problems. For instance, in the Ukrainian judicial practice there are occurring certain difficulties with respect to the use of the evidence in *electronic* form, alongside of the existence of the well-established approaches, being applied to *written* and *physical* evidence. That regards especially the particularities of the procedures for collection, securing and evaluation of certain kinds of electronic evidence; the rules for distinguishing the copies and the originals thereof; the necessity of applying technical standards and rules when deciding specific legal issues with regard to electronic evidence.

In the Ukrainian juridical science today there are virtually no researches devoted to the historical development of the legal provisions appertaining to the electronic evidence in the administrative procedure. Meanwhile, for instance, J. Pavlova in her dissertation (published in 2019) explored the historical formation of the legal provisions, regulating the use of the electronic evidence in the *civil* procedure in Ukraine. Certain historical aspects of the implementation of the sub-institute of electronic evidence in the national legal system were studied by N. Blazhivska (administrative procedure), D.Tsekhan, A.Ratnova (criminal procedure), A.Yu. Kalamaiko (civil procedure) (Ukraine). The author of the present paper, in the course of its drafting, has also resorted to the academic and practical writings of such foreign legal scholars as S. Mason (UK), D. Sang (Singapore), Ph. Basin (France) (researches regarding the development of the rules on the use of electronic evidence in particular European countries); M. Pollit (UK), C.M. Whitcomb (USA), G.Mohay, A.Anderson (Australia), E.Casey (USA) (digital forensics), J. Cortada, P.J.Denning (USA) (the development of the computing field) as well as to the writings of the other scholars, whose works are cited in this article.

The present scientific paper is aimed at elaboration on the main historical trends and cause-hereditary chains in the events, connected to the formation of the legal provisions on electronic evidence (with the main emphasis on

the administrative procedure). The achievement of the stated target in the most efficient way, in the author's view, is possible provided the following tasks are completed: 1) general identification of the main historical trends regarding the formation of the sub-institute of electronic evidence; 2) chronological systematization of the specific factual data, revealing the particularities of the thematic legal norms' (as well as the scientific and practical researches') development in different periods: 2.1.) from the 1970th to the early 1990th (emergence of the first special studies and legislative reforms in the field of electronic evidence); 2.2.) from the 1990th to 2010 (systematic and focused research of electronic evidence on different scales; development of relevant national legal provisions; increasing international cooperation); 2.3.) from 2017 to the present (from the period when thematic legal norms were implemented into the procedural codes of Ukraine until today).

2. The emergence of the specific legislation, forensic practices and scientific researches (from the 1970th to the early 1990th)

The use of electronic information as evidence in judicial procedure is inextricably connected to the development of the information technologies and computing machines. M. Pollit emphasizes that from the 1960s until the early 1980s, computers were primarily an industrial appliance, owned and operated by corporations, universities, research centers and government agencies (Pollit, 2010). According to J. Cortada "…then a fundamental shift occurred in the history of computing technology involving the development of small devices that could sit on one's desk, that by the early 1980s were called personal computers, or just simply PCs… By the end of the 1980s, people were buying tens of millions of PCs all over the world…" (Cortada, 2020).

Due to the contemporaneous technical trends, the Civil Procedural Code of the Ukrainian Soviet Socialist Republic of 1963 did not contain special provisions on the use of electronic information as evidence in justice (Civil Procedural Code of the Ukrainian Soviet Socialist Republic, 1963). Neither were there any relevant provisions in Chapter 31-A of the mentioned code, entitled «Complaints against decisions, acts or omissions of government authorities, bodies of local self-government, officials and officers», which actually laid the foundation for the development of the modern administrative justice in the territory of Ukraine, and which was implemented into the code in 1988 (The Decree of the Verkhovna Rada of the Ukrainian Soviet Socialist Republic on the amendment and supplementation of the Civil Procedural Code of the Ukrainian Soviet Socialist Republic, 1988). In the meantime, it is worth noting, that in the Soviet Union in 1984 there was adopted a State standard 6.10.4-84 named "Granting legal force to the documents in the machine-readable form, created with the computing machinery. Basic provisions" (Pavlova, 2019).

According to G.I. Rasin and J.P. Moan in 1970, Rule 34 of the Federal Rules of Civil Procedure was amended to address changing technology and communication. Amended Rule 34 made electronically stored information subject to "subpoena

and discovery" for use in legal proceedings (Rasin, Moan, 2001). Evidence extracted from computer storage has been used in courtrooms since the 1970s, but in its earliest phase the computer was regarded as no more than a device for storing and reproducing paper records, which constituted the real evidence (Mohay, Anderson, Collie, de Vel, McKemmish, 2003). A. Jurkeviča notes (with reference to Lampe E.-J.) that since the 70-ies of the previous century, in Europe country scientific literature there have been legal discussions on "documents produced by machines" term determination, its legal status and the document mentioned proof force (Jurkeviča, 2018). According to the authors to the "Computer and Intrusion Forensics" treatise "…computer evidence presented a challenge even in these limited conditions, as in some jurisdictions the workings of the system that produced it had to be explained in detail to the court. For example, under the U.K. Police and Criminal Act (PACE), Section 69 of which governed admissibility and weight of computer evidence, introducing computer evidence in a court case was not straightforward. The computer had to be certified as ''operating properly'' in the same sense as a device like a lamp or radar speed detector…" (Mohay, Anderson, Collie, de Vel, McKemmish, 2003).

Similar was the situation on the former Soviet Union territory. In this regard J. Pavlova points out in her dissertation that "…in 1979 the State Arbitration of the USSR issued instructions with regard to the use of the computing machine-produced documents in judicial procedure. According to paragraph 9 of the State Arbitration's instructions the data, contained in the technical media (in particular, punch tape, punch card, magnetic tape, magnetic disk) might be used as evidence in judicial cases provided they were converted into the form that was appropriate for the ordinary reproduction and storage in the case file…" (Pavlova, 2019).

The period between the 70th and the 80th , as mentioned before, is associated with the beginning of the specific scientific researches and the establishment of the specialized forensic institutions (focused on the respective types of the forensic examination, including computer forensic examination). Donn Parker's 1976 book, Crime by Computer, is perhaps the first description of the use of digital information to investigate and prosecute crimes committed with the assistance of a computer (Pollit, 2010). As C.M. Whitcomb states, in USA, as early as 1984, the FBI Laboratory and other law enforcement agencies began developing programs to examine computer evidence. To properly address the growing demands of investigators and prosecutors in a structured and programmatic manner, the FBI established the Computer Analysis and Response Team (CART) (Whitcomb, 2002).

The development of the computer forensics on the former Soviet Union territory mainly fall on 1990th.

3. 1990 – 2000: transformation of the approach to the understanding of the electronic evidence's essence

The 1990th were characterized by: a) further spread of the Internet and computers all over the world, including the former Soviet Union territory; b) enhancement of the created in the 1980th electronic digital signature; c) establishment of the electronic

document management and electronic government foundations (Parziale, Britt, Davis, Forrester, Liu, Matthews, Rosselot, 2003; Grinchenko, 2009; Lupton, 1999; Adam Azad, 2007; Winston, Millett, Osterweil, 2007).

Conceptual changes with regard to the understanding of the essence and the specificity of the electronic evidence's probative value are inherent to the period in question, in particular:

1) The electronic form of information storage (expression) gradually becomes autonomous along with the written form.

It is illustrative, for instance, as J. Pavlova notes, that UNCITRAL Model Law on the Electronic Commerce of 1996 defined the term «data message» as information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy (Pavlova, 2019). Subsequently the said trend was displayed in paragraph 2 of the Article 8 of the Law of Ukraine «On the electronic documents and electronic document management»: «The admissibility of the electronic document as evidence shall not be rejected solely on the ground that it has an electronic form» (The Law of Ukraine "On the electronic documents and electronic document management", 2003). Meanwhile, for example, under the provisions of the Code of Administrative Procedure of Ukraine until 2017 electronic documents were categorized as "written evidence", what to some extent had been giving the impression of theirs "derived" nature;

2) There is developing special procedural legislation on the use of the electronic evidence in proof. For instance, the Singapore Evidence Act of 1896, as amended in 1996, contained special provisions, devoted to the electronic evidence ("computer output") (Evidence (Amendment) Act of Republic of Singapore,1996).

3) In the common law countries in the stated period there takes place a legislative transition from the obligation of proving in each particular case that the computer operated properly to the so-called "presumption that computers are reliable" (1996-1997) (Mason, 2017). Interestingly, in about 10-15 years (from the specified period) English legal scholars and lawyers will raise the issue of reforming of the said presumption due to the number of issues that made its application impractical (in particular, the imperfect character of the computer's functioning, the difficulty of the presumption's rebuttal) (Mason, 2014).

In the period 1990 and 2000 generally electronic evidence was not popular and widespread compared to other means of proof. According to V. Kroll, for instance, in 1996, only 5% of discoverable documents derived from electronic format (Kroll, 2007).

According to M. Pollit, at the same time, "…the formalization of digital forensics made great strides during this epoch. The IOCE, G-8 High Tech Crime Subcommittee and Scientific Working Group on Digital Evidence (SWGDE) all published digital forensic principles between 1999 and 2000. Going beyond mere principles, the American Society of Crime Laboratory Directors – Laboratory Accreditation Board (ASCLD-LAB), in cooperation with the SWGDE, recognized

digital evidence as a laboratory discipline. In 2004, the FBI's North Texas Regional Computer Forensic Laboratory became the first ASCLD-LAB accredited digital forensic laboratory…" (Pollit, 2010).

In the post-Soviet area computer forensic examination for a particular period did not have an official status, despite this kind of expertise had been carried out by the forensic laboratories and scientific institutions since 1994. In Ukraine one of the earliest methodologies of the computer forensic examination was the methodology of the examination of the information on the hard drives, designed in 2003 by the Kharkiv National Scientific Center «Hon. Prof. M. S. Bokarius Forensic Science Institute» and officially registered in 2009.

The other related type of forensic examination – judicial telecommunication examination – was singled out into a separate kind only at the end of 2006. Until 2006 in Ukraine the computer-technical forensic examination was applied for dealing with a wide range of issues regarding, in particular, computer hardware and software, telecommunication systems, electronic appliances. As the range of issues, submitted for the consideration of the forensic expert, was continually widening, the branch of knowledge expanded; and the logical consequence of the processes in question was the separation of the telecommunication forensic examination into the single kind of the group of judicial engineering-technical forensic examinations (Korshenko, 2017).

4. 2000 – 2010: active development of the legislation and the legal practice with regard to electronic evidence

From the end of the 1990th until the beginning of 2010-2011 there takes place a wide implementation of the information technologies into the social life: the development of the electronic document management in public and commercial spheres**,** development of electronic government, emergence and popularization of social networks **–** Facebook, Twitter, Youtube, Instagram; special legal provisions are evolving in various countries on the use of electronic evidence and the initial law enforcement practice. An important step towards the legal advancements in the mentioned area had become the adoption in 2003 the Laws of Ukraine «On Electronic Documents and Electronic document management» and «On Electronic Digital Signature» (the latter in 2017 ceased to be effective according to the Law of Ukraine «On Electronic Trust Services») (The Law of Ukraine "On Electronic Digital Signature", 2003).

Notwithstanding the fact that in the mentioned period there are developing special legal provisions on the use of electronic information in proof, the context of both contemporaneous legislative norms and legal enforcement practice predominantly display the application of the traditional rules with regard to the definition, collection and evaluation of electronic evidence. Generally, electronic evidence were categorized as "written" evidence, namely – «documents» (except for audio- and video-recordings, which under the then legislation were classified as *physical* evidence). J. Pavlova in her dissertation research raises important issues in this

connection – "…such inferences were leaving a lot of questions: how to secure the submission and the direct examination of the original of electronic evidence? Does the electronic evidence cease to remain electronic after it is transformed into the written form? How to classify the documents, the information in which is presented by non-graphic symbols? The CAP of Ukraine, adopted on 06 July, 2005, though has explicitly «recognized» electronic evidence as means of proof, nevertheless added emphasis to the above-mentioned dilemma, categorizing electronic documents as written evidence… The classification of audio- and video recordings as electronic evidence was also disputable…" (Pavlova, 2019).

In this context coeval trends in foreign countries deserve special attention.

For instance, P. Bazin in his article of 2008 «An Outline of the French Law on Digital evidence» (commenting on legislative developments on the evidence and proof) carried out a general analysis of the Electronic signature Act no 2000-230 that was adapting, in particular, the rules of evidence to the information technology advancement. The lawyer draws attention to three main contemporaneous legislative improvements: 1) changes to the definition of the written evidence; 2) updated definition of the concept of signature; 3) implementation of the principle of the equal probative value of electronic and written documents. The author notes the dissociation of the written document from the medium and emphasizes (with references to the contemporaneous legal practice) that "…the written document is not only a paper carrier any more. It is a message, whatever the medium, whatever the means of transmission…" (Bazin, 2008).

In 2006 in the USA there were presented amendments the Federal Rules of Civil Procedure regarding the Electronically Stored Information. In theirs 2011 review article J.Frieden and L.Murray emphasized that though certain issues, such as authentication, may be more complicated in the context of electronic evidence, traditional evidentiary principles can be consistently adapted to address questions regarding the admissibility of electronic evidence (Frieden, Murray, 2011).

More "revolutionary" approaches for a long period of time had remained merely the subject-matter of scientific disputes. Actually, legal science is what brought a substantial progress to the development of the issue in question. Probably, primarily, that regards the fundamental scientific research «Electronic evidence» under the editorship of the British and Singaporean, respectively, legal scholars and practitioners S. Mason and D. Sang, revised editions of which were published in 2007, 2010, 2012 and 2017. Notwithstanding the fact, that the research is mostly focused on the approaches applied in common law countries, it highlights issues that are basic and universal with regard to electronic evidence in any legal system, including (but not limited to) the problem of distinguishing the original and the copy of electronic evidence, specific issues regarding the collection, evaluation, storage and the exchange of electronic evidence.

In the Ukrainian legal science the Odessa scholar D. Tsekhan may be considered as a pioneer in researching the use of digital evidence in criminal procedure.

In the mentioned period the scientific and practical support of the forensic examination continues to grow: in 2003 a research by M.M. Fedotov «Forensic – computer criminalistics» is published. In 2010 there was released a fundamental forensic treatise by O. Casey «Handbook of Digital Forensics and Investigation».

In 2012 the international standard "ISO/IEC 27037:2012 Information technology – Security techniques – Guidelines for identification, collection, acquisition and preservation of digital evidence" was adopted by the International Organization of Standardization. The specified standard was primarily focused on the criminal procedure. It was legally implemented in Ukraine in 2017.

It is worth noting that in the stated period there emerges a trend on the inclusion into the practice reviews, issued by the superior courts in Ukraine, special provisions related to the probative value of the electronic information, although mostly within the scope of civil and commercial litigation. For instance, it was stated in subparagraph 3 of Article 12 of the Resolution of the Plenum of the Supreme Court of Ukraine of 27.02.2009 No.1 "On the judicial practice in cases regarding the protection of honor and dignity of an individual and the business reputation of an individual and a legal entity" that «…information on the owner of the web-site may be requested… from the administrator of the system of registry and recording of the domain names and the address of the Ukrainian segment of the Internet…" (Resolution of the Plenum of the Supreme Court of Ukraine No.1 "On the judicial practice in cases regarding the protection of honor and dignity of an individual and the business reputation of an individual and a legal entity", 2009). Analogous provisions were contained there in the Resolution on the Plenum of the Supreme Court of Ukraine of 04.06.2010 No.5 "On judicial practice on protection of the copyright and neighboring rights" (Resolution on the Plenum of the Supreme Court of Ukraine No.5 "On judicial practice on protection of the copyright and neighboring rights", 2010).

5. From 2010 to date: the present stage of the legal provisions on the electronic evidence's advancement

In 2014-2016 with the financial support of the European Union there was implemented the "Evidence" project (European Informatics Data Exchange Framework for Court and Evidence). As a result of the project implementation several standards, recommendations, drafts of the international documents, scientific reviews were prepared with regard to the probative value of electronic information and practical mechanisms/procedures of its use in proof in judicial procedure.

Also today, almost on a regular basis there are published scientific, practical and other kinds of reviews that are devoted to the issues of the cross-border exchange of electronic evidence (see, for example, "Handling and exchanging electronic evidence Across Europe" [edited by M. Biasiotti, J. Bonnici, J. Cannataci, F. Turchi]).

Meanwhile, obviously most of such researches are predominantly geared towards the needs of criminal, civil and commercial procedures due to the fact, that administrative procedure has a more "*intra*-national" nature and specificity.

Yet neither the sphere of administrative litigation remained unexplored on the international scale: in 2019 there were adopted Guidelines by the Committee of Ministers of the Council of Europe on 30 January 2019 entitled "Electronic evidence in civil and administrative proceedings".

In the meantime in becomes increasingly evident that each national legal system applies (bearing the respective sovereign right) a different approach towards the regulation of the use of electronic evidence in litigation. Such specificities relate to subsumption of electronic evidence under the existing means of proof, or its separation out of them; as well as to the particular aspects of the evaluation and use of electronic information in proof. The results of the research of 2016 carried out by S. Mason and U. Rasmussen are illustrative in this context. The research contained the results of the survey of the representatives of various European countries with regard to certain national particularities on how the use of electronic information in proof is regulated by the national procedural law (Mason, Rasmussen, 2016).

It should be mentioned also that in spite of the existing diversity of the approaches towards the regulation of electronic evidence and the multidimensional nature of the legal enforcement practice, the need to give a timely response to the technological challenges in the legal sphere, including the procedure for the resolution of legal disputes, remains common for all of the states.

The separation of the sub-institute of electronic evidence in the Administrative procedure in Ukraine is primarily connected to the amendment in 2017 of the respective provisions of the Code of Administrative procedure of Ukraine, Codes of civil and commercial procedures of Ukraine, regarding the regulation of the use of electronic information in proof. Since 2017 there were enshrined in the Code of Administrative procedure of Ukraine provisions on the definition and the types of electronic evidence as well as non-exhaustive enumeration of its sources; the procedure for the submission of the originals and the copies of the electronic evidence (electronic and paper copies); general provisions on the storage of electronic evidence in the case file (Articles 99-100 of the Code of Administrative procedure of Ukraine). Special provisions there were set out on the procedure for the inspection of electronic evidence in the Internet in the place of theirs location (Article 81 of the Code of Administrative procedure of Ukraine), as well as established the distinction between the electronic copy of the written evidence and the electronic evidence itself (Article 94 of the Code of Administrative procedure of Ukraine).

In general, it should be noted that during the last decade in Ukraine there took place an active development of the electronic (information) "ecosystem". It regards, in particular:

- mature legislation in the sphere of the access to public information; the establishment of the explicit legal status and the conditions on the access to open data (since 2010 and up until today);
- digitalization of a significant number of the administrative procedures in various spheres of social life: starting with tax administration and ending with

the technical support of the provision of public utilities (since 2014 and up until today);

- further development of the electronic document management and gradual replacement of the paper documents with the electronic ones (even with the impossibility of requesting a paper item/copy/duplicate – for instance, that regards the electronic Certificate for film broadcasting, that is issued by the Ukrainian State Film Agency) (since 2017 and up until today);
- formation of the organizational and technical preconditions for the exchange of electronic evidence and theirs storage in compliance with the rules of the judicial procedure (this includes, in particular, a full and complete launch of the Unified court information-telecommunication system).

From the perspective of the development of the respective judicial practice, it is worth noting that controversial judicial practice was existing long before the implementation of the legal provisions on electronic evidence as well as even after the procedural Codes were amended.

For instance, with regard to the use of the paper printouts from "Viber" application it was indicated in the Judgement of the Second Appellate Administrative Court of 29 October, 2019, in case No. 440/1622/19 as follows: "…in relation to the plaintiff's reference to the electronic evidence– message screenshots from the "Viber" app, the court considers that the message chain between the plaintiff and an unidentified person, that was provided by the plaintiff, shall not be treated as relevant and admissible evidence due to the existence of technical capabilities to change the information in question…" (Judgement of the Second Appellate Administrative Court of 29 October, 2019, in case No. 440/1622/19). At the same time the Supreme Court of Ukraine in the Decision of 27 November, 2019, in case No.1540/3778/18 reached an opposite conclusion: "…the fact of belonging to the PERSON_1 of the phone number from which the call was made to the PERSON_2's mobile phone, is supported by the screenshot from the "Viber" social network, that contains the plaintiff's photo, reaffirming that phone number belongs to him…" (Decision of the Supreme Court of Ukraine of 27 November, 2019, in case No.1540/3778/18).

Generally, in the author's view, the judicial practice consistently becomes more flexible and sensitive with regard to the technological and juridical novations. An interesting legal position was laid out in the Decision of the Cassation Criminal Court of 10 September, 2020, in case No. 751/6069/19 in relation to the absence of tight link between the electronic document and a physical medium: "… physical carrier is merely the way to store information; it is significant only in cases when the electronic document is considered as physical evidence. The main feature of the electronic document is an absence of a tight link to a specific physical carrier. The same electronic document (video recording) may exist on different media. All identical in its substance electronic document samples shall be treated as originals and may vary one from the other merely by the date and the time of its creation…"

(Decision of the Cassation Criminal Court of 10 September, 2020, in case No. 751/6069/19).

It also should be noted that the Criminal Procedural Code of Ukraine back in 2012 contained particular progressive legal provisions regarding the use of electronic evidence. For instance, even under the primary edition of the Criminal Procedural Code of Ukraine (paragraph 3 of the Article 99) "…An original document shall mean the document itself whereas the original copy of an electronic document shall mean its representation, which is attributed the same importance as the document itself…" (without diving deep into the discussion on the necessity of the distinction of the original and the copy of the electronic document, it should be emphasized that, for instance, the state standard ISO/IEC 27037:2012, IDT distinguishes the original and the copy of the digital evidence. In the author's view the specificity of the electronic document lies in the electronic digital signature, that proves the authenticity of the document. At the same time far not every unit of the electronic information may be copied flawlessly and without any distortions; accordingly the elimination of the existing legal distinction between the copy and the original seems to be premature and not sufficiently substantiated) (Budkevych, 2020).

On the one hand, distinctions in legal regulation on electronic evidence in different procedural codes may cause collisions. On the other hand, when drafting legislative amendments, the specificity of each kind of proceeding should be considered, in particular, with regard to evidence and proof.

The scientific activity with regard to the research of electronic evidence in Ukraine has recently intensified. For instance, the following dissertation works have been published over the past few years:

- A. Kalamaiko, Electronic means of proof in the civil procedure, Kharkiv, 2016;
- J. Pavlova, Electronic document as a source of evidence in the civil procedure, Odessa, 2020;
- A. Ratnova, Criminal procedural and criminalistic foundations of the use of electronic evidence in proof, Lviv, 2021;
- O. Husiev, Electronic evidence in the civil procedure in Ukraine, Kyiv, 2021.

In the area of forensics currently continue to develop new methodologies of the forensic examination.

6. Conslusions

The Ukrainian administrative proceeding as a legal environment for the use of electronic evidence in its present has itself emerged at the beginning of the twenty first century, partly, as a consequence of the dissolution of the USSR and the democratization of the legal system. Along with that fact in worth noting that the legal provisions regarding electronic evidence started developing long before that time, namely, in the early 1970th. Primarily being set up in the leading (economically and technically) countries those provisions thereafter (especially in

the last two decades) were implemented in the legislation of the particular countries cumulatively representing almost each continent in the world.

The period from the 1970th to the early 1990th is associated with the emergence of the specific legislation, forensic practices and scientific researches with regard to the probative value of the electronic information. On the earliest stages computer was regarded as merely a device for storing and reproducing paper records, which actually constituted the evidence itself. Moreover, in some common law countries it had to be proven that the computer was operating properly.

In the decade after 1990 there had occurred a shift in basic approaches to the understanding of the practical essence of the evidence in electronic form. For instance, the *electronic* form of information storage (expression) gradually was becoming autonomous along with the *written* form; special procedural legislation on the use of the electronic evidence was continuing to evolve; in certain common law countries in the stated period there takes place a legislative transition from the obligation of proving in each particular case that the computer operated properly to the so-called "presumption that computers are reliable".

In the period between 2000 and 2010 notwithstanding the fact that there were continually developing specific legal provisions on the use of electronic information in proof, predominantly electronic evidence was still being categorized as "written" evidence, namely – «documents» (except for audio- and video-recordings, which under the then legislation were classified as physical evidence). More "revolutionary" approaches for a long period of time had remained merely the subject-matter of scientific disputes.

The decade after 2010 is significant, especially for Ukraine (including the administrative proceeding), in terms of adoption of amendments supplementing the procedural codes with a new type of means (sources) of evidence – "electronic evidence". Those changes were, in particular, influenced by the adoption on an international scale (in particular, by the Scientific Working Group on Digital Evidence, International Organization of Standardization, Council of Europe) of a range of standards and policies. A considerable shift is observed in the field of legal science – treatises, dissertations, scientific papers and researches regarding electronic evidence are being published and conducted on an increasing scale.

Bibliography:

1. Azad A. Implementing Electronic Document and Record Management Systems 1st Edition, Boca Raton, Fla 2007.

2. Цивільний кодекс Української РСР від 18.07.1963 № 1540-VI. URL: https://zakon.rada.gov.ua/laws/show/1540-06#Text (дата звернення: 26.10.2022).

3. Whitcomb C.M. An Historical Perspective of Digital Evidence:A Forensic Scientist's View , *International Journal of Digital Evidence*. 2002, Vol. 1, Issue. URL:https://www.utica.edu/academic/institutes/ecii/publications/articles/9C4E695B-0B78-1059-3432402909E27BB4.pdf (дата звернення: 26.10.2022).

4. Постанова Касаційного кримінального суду від 10.09.2022 у справі №751/6069/19. URL:https://opendatabot.ua/court/91722819-93e76ea2f74e62f20f51670f8768c219 (дата звернення: 26.10.2022).

5. Постанова Касаційного адміністративного суду від 27.11.2019 у справі №1540/3778/18.URL:https://opendatabot.ua/court/85934103-526871a023b1915523032df2dd8615e8 (дата звернення: 26.10.2022).

6. Evidence (Amendment) Act of 1996 of Republic of Singapore. *Government Gazette*. 1996, No. 10. URL: shorturl.at/dlHMZ (дата звернення: 26.10.2022).

7. Rasin G.I., Moan J.P. Fitting a Square Peg into a Round Hole: The Application of Traditional Rules of Law to Modern Technological Advancements in the Workplace. *Missouri Law Review*. 2001, Vol. 66. URL: https://scholarship.law.missouri.edu/mlr/vol66/iss4/2 (дата звернення: 26.10.2022).

8. Mohay G., Anderson A., Collie B., O. de Vel, McKemmish R. Computer and Intrusion Forensics, Boston 2003. – 417 p.

9. Cortada J. Living with Computers. The Digital World of Today and Tomorrow. Cham, 2020. 133 p.

10. Frieden J.D., Murray L.M. The Admissibility of Electronic Evidence Under the Federal Rules Evidence. *Richmond Journal of Law and Technology,* 2011, vol. 17, issue 2.

11. Павлова Ю.С. Електронні документи як джерело доказів у цивільному процесі: дис. … канд. юридичних наук: 12.00.03. Одеса, 2019. 257 с.

12. Постанова Другого апеляційного адміністративного суду від 29.10.2019 у справі №440/1622/19. URL: https://opendatabot.ua/court/85384630-9c49e37e7c6f859312908ea7c60f6e6e (Дата звернення: 26.10.2022).

13. Про електронний цифровий підпис: Закон України від 22.05.2003 №852-IV. *Голос України.* 2003. №119.

14. Про електронні документи та електронний документообіг: Закон України від 22.05.2003 №851-IV. 2003. №119.

15. Про електронні довірчі послуги: Закон України від 05.10.2017 №2155-VIII. URL: https://zakon.rada.gov.ua/laws/show/2155-19 (дата звернення: 26.10.2022).

16. Parziale L., Britt D.T., Davis C., Forrester J., Liu W., Matthews C., Rosselot N. TCP/IP Tutorial and Technical Overview. 2006. URL: https://www.redbooks.ibm.com/pubs/pdfs/redbooks/gg243376.pdf (дата звернення: 26.10.2022).

17. Pollitt M. A History of Digital Forensics [in:] *Advances in Digital Forensics VI*, ed. K.Chow, S.Shenoi, Heidelberg, 2010. URL: https://hal.inria.fr/hal-01060606/document (дата звернення: 26.10.2022).

18. National Research Council, Division on Engineering and Physical Sciences, Computer Science and Telecommunications Board, Committee on the Social Security Administration's E-Government Strategy and Planning for the Future, ed. Winston J.D. , Millett L.I., Osterweil L.J. *Social Security Administration Electronic Service Provision: A Strategic Assessment*, Washington, 2007. URL: https://nap.nationalacademies.org/catalog/11920/social-security-administration-electronic-service-provision-a-strategic-assessment (дата звернення: 26.10.2022).

19. Bazin P. An Outline of the French Law on Digital Evidence. *Digital Evidence and Electronic Signature Law Review*. 2008. Vol. 5. P.179-182.

20. Про застосування судами норм законодавства у справах про захист авторського права і суміжних прав: Постанова Пленуму Верховного суду України від 04.06.2010 №5. URL: https://zakon.rada.gov.ua/laws/show/v0005700-10#Text (Дата звернення: 26.10.2022).

21. Про судову практику у справах про захист гідності та честі фізичної особи, а також ділової репутації фізичної та юридичної особи: Постанова Пленуму Верховного суду

України від 27.02.2009 №1. URL: https://zakon.rada.gov.ua/laws/show/v_001700-09#Text (Дата звернення: 26.10.2022).

22. Mason S. A proposal to reform the presumption of reliability and hearsay (An Extract). *Computer law and Security Review.* 2014. Vol. 30.

23. Mason S. The Presumption that Computers are Reliable [in:] Electronic evidence, Fourth edition, ed. Mason S., Sang D. London, 2017.

24. Грінченко Т.А., Полумієнко Історія інтернету в СРСР і Україні: основні етапи розвитку. *Математичні машини і системи*. 2009. №3. С. 151-156. URL: http://dspace.nbuv.gov.ua/handle/123456789/47229 (дата звернення: 26.10.2022).

25. Про внесення змін і доповнень до Цивільного процесуального кодексу Української РСР: Указ Президії Верховної Ради Української РСР від 25.04.1988 №5803-XI. URL: https://zakon.rada.gov.ua/laws/show/5803-11#Text (дата звернення: 26.10.2022).

26. Jurkeviča T. Electronic evidence concept and essence in civil proceedings in Latvia [in:] Support for entrepreneurship and innovation economy in the EU, Latvia and Ukraine law*: I International Intersectoral Conference*. Riga, 2018. URL: https://ndipzir.org.ua/wp-content/uploads/2018/Ryga_07_12_2018/Ryga18(5).pdf (дата звернення: 26.10.2022).

27. Budkevych V.A. Electronic evidence in the administrative procedure in Ukraine in the light of the informational approach. *Administrative law and process.* 2020, vol. 1(28). URL: http://applaw.net/index.php/journal/article/view/690/609 (дата звернення: 26.10.2022).

28. Kroll, V.J. Default Production of Electronically Stored Information under the Federal Rules of Civil Procedure: The Requirements of Rule 34(b). *Hastings Law Journal*. 2007. Vol. 59. URL: https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3673&context=hastings_law_journal (дата звернення: 26.10.2022).

29. Коршенко В. Судова телекомунікаційна експертиза як джерело доказів під час розслідування кіберзлочинів. *Національний юридичний журнал: теорія і практика*. 2017. URL: https://ibn.idsi.md/sites/default/files/imag_file/192_194_Sudova%20telekomun%D1%96kac%D1%96jna%20ekspertiza%20jak%20dzherelo%20dokaz%D1%96v%20p%D1%96d%20chas.pdf (дата звернення: 26.10.2022).

30. Lupton W.E. The Digital Signature: Your Identity by the Numbers. *Richmond Journal of Law and Technology*. 1999, Vol. 6. URL: http://scholarship.richmond.edu/jolt/vol6/iss2/7 (дата звернення: 26.10.2022).

References:

1. Azad, A. (2007). Implementing Electronic Document and Record Management Systems 1st Edition*,* Boca Raton, Fla. [in English]

2. Tsyvilnyi protsesualnyi kodeks Ukrainskoi Radianskoi Sotsialistychnoi Respubliki [Civil Procedural Code of the Ukrainian Soviet Socialist Republic] (1963). The Verkhovna Rada of the Ukrainian Soviet Socialist Republic's news. No.30. art. 464. [in Ukrainian]

3. Whitcomb, C.M. (2002). An Historical Perspective of Digital Evidence:A Forensic Scientist's View. International Journal of Digital Evidence. 2002, Vol. 1, Issue 1. Retrieved from: https://www.utica.edu/academic/institutes/ecii/publications/articles/9C4E695B-0B78-1059-3432402909E27BB4.pdf [in English]

4. Decision of the Cassation Criminal Court of 10 September, 2020, in case No. 751/6069/19. (2020). Retrieved from: https://opendatabot.ua/court/91722819-93e76ea2f74e62f20f51670f8768c219 . [in Ukrainian]

5. Decision of the Supreme Court of Ukraine of 27 November, 2019, in case No.1540/3778/18. (2019). Retrieved from: https://opendatabot.ua/court/85934103-526871a023b1915523032df2dd8615e8 . [in Ukrainian]

6. Evidence (Amendment) Act of 1996 of Republic of Singapore. (1996). Government Gazette, No. 10. Retrieved from: shorturl.at/dlHMZ [in English]

7. Rasin, G.I., Moan, J.P. (2001). Fitting a Square Peg into a Round Hole: The Application of Traditional Rules of Law to Modern Technological Advancements in the Workplace. Missouri Law Review, Vol. 66. Retrieved from: https://scholarship.law.missouri.edu/mlr/vol66/iss4/2 [in English]

8. Mohay, G., Anderson, A., Collie, B., O. de Vel, McKemmish, R. (2003). Computer and Intrusion Forensics. Boston. [in English]

9. Cortada, J. (2020). Living with Computers. The Digital World of Today and Tomorrow. Cham. [in English]

10. Frieden, J.D., Murray, L.M. (2011). The Admissibility of Electronic Evidence Under the Federal Rules Evidence. Richmond Journal of Law and Technology. Vol. 17, issue 2. [in English]

11. Pavlova, J. (2019). Elektronnyi dokument yak dzherelo dokaziv u tsyvilnomu protsesi [Electronic document as a source of evidence in the civil procedure]. Odessa. [in Ukrainian]

12. Judgement of the Second Appellate Administrative Court of 29 October, 2019, in case No. 440/1622/19 (2019). Retrieved from: https://opendatabot.ua/court/85384630-9c49e37e7c6f8593 12908ea7c60f6e6e [in Ukrainian]

13. Zakon Ukrainy "Pro elektronnyi tsyfrovyi pidpys" [Law of Ukraine "On Electronic Digital Signature"] (2003). The Voice of Ukraine, No.119. [in Ukrainian]

14. Zakon Ukrainy "Pro Elektronni Dokumenty Ta Elektronnyi Dokumentoobih" [Law of Ukraine "On the electronic documents and electronic document management"]. (2003). The Voice of Ukraine, №119. [in Ukrainian]

15. Zakon Ukrainy "Pro Elektronni dovirchi posluhy" [Law of Ukraine "On Electronic Trust Services]. (2017). The Voice of Ukraine, No.206. [in Ukrainian]

16. Parziale, L., Britt, D.T., Davis, C., Forrester, J., W. Liu, Matthews, C., Rosselot, N. TCP/ IP Tutorial and Technical Overview (2006). Retrieved from: https://www.redbooks.ibm.com/ pubs/pdfs/redbooks/gg243376.pdf [in English]

17. Pollitt, M. A History of Digital Forensics [in:] Advances in Digital Forensics VI, ed. K.Chow, S.Shenoi (2010). Heidelberg. [in English]

18. National Research Council, Division on Engineering and Physical Sciences, Computer Science and Telecommunications Board, Committee on the Social Security Administration's E-Government Strategy and Planning for the Future, ed. Winston J.D. , Millett L.I., Osterweil L.J. Social Security Administration Electronic Service Provision: A Strategic Assessment (2007). Washington. Retrieved from: https://nap.nationalacademies.org/catalog/11920/social-security-administration-electronic-service-provision-a-strategic-assessment [in Ukrainian]

19. Bazin, P. An Outline of the French Law on Digital Evidence (2008). Digital Evidence and Electronic Signature Law Review, vol. 5. [in English]

20. Pro zastosuvannia sudamy norm zakonodavstva u spravakh pro zakhyst avtorskoho prava i sumizhnykh prav: Postanova Plenumu Verkhovnoho Sudu Ukrainy vid 04.06.2010 №5 [Resolution on the Plenum of the Supreme Court of Ukraine of 04.06.2010 No.5 "On judicial practice on protection of the copyright and neighboring rights"]. (2010). The Bulletin of the Supreme Court of Ukraine, No.6, P. 4. [In Ukrainian]

21. Resolution of the Plenum of the Supreme Court of Ukraine of 27.02.2009 No.1 "On the judicial practice in cases regarding the protection of honor and dignity of an individual and the business reputation of an individual and a legal entity" (2009). The Bulletin of the Supreme Court of Ukraine, No.3, P. 7. [in Ukrainian]

22. Mason, S. A proposal to reform the presumption of reliability and hearsay (An Extract) (2014). Computer law and Security Review, vol. 30. [in English]

23. Mason, S. The Presumption that Computers are Reliable [in:] Electronic evidence, Fourth edition, ed. S. Mason, D. Sang (2017). London. [in English]

24. T.A. Grinchenko, *The History of the Internet in the USSR and in Ukraine: the basic stages of the development*, Mathematical Machines and Systems 2009, vol. 3.

25. The Decree of the Verkhovna Rada of the Ukrainian Soviet Socialist Republic on the amendment and supplementation of the Civil Procedural Code of the Ukrainian Soviet Socialist Republic (The Verkhovna Rada of the Ukrainian Soviet Socialist Republic's news. – 1988.– No.19.– art. 480).

26. Jurkeviča, T. Electronic evidence concept and essence in civil proceedings in Latvia [in:] Support for entrepreneurship and innovation economy in the EU, Latvia and Ukraine law: I International Intersectoral Conference (2018). Riga. [in English]

27. Budkevych, V. Electronic evidence in the administrative procedure in Ukraine in the light of the informational approach (2020). Administrative law and process, vol. 1(28). [in English]

28. Kroll, V.J. Default Production of Electronically Stored Information under the Federal Rules of Civil Procedure: The Requirements of Rule 34(b) (2007). Hastings Law Journal, vol. 59. Retrieved from: https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3673&context=hastings_law_journal [in English]

29. Korshenko,V. Sudova telekomunikatsiina ekspertyza yak dzherelo dokaziv pid chas rozsliduvannia kiberzlochyniv. [Judicial telecommunication examination as a source of evidence in the investigation of cybercrimes] [in Ukrainian], National Law Journal: Theory and Practice 2017(April), p. 198, http://www.jurnaluljuridic.in.ua/archive/2017/2/47.pdf , 11.04.2022.

30. Lupton, W.E. The Digital Signature: Your Identity by the Numbers (1999). Richmond Journal of Law and Technology, vol. 6. Retrieved from: http://scholarship.richmond.edu/jolt/vol6/iss2/7 [in English]

ПРАВОВА ПРИРОДА ЕЛЕКТРОННИХ ДОКАЗІВ В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ: КОРОТКИЙ ПОРІВНЯЛЬНО-ІСТОРИКО-ПРАВОВИЙ АНАЛІЗ

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***Метою** цієї статті є дослідження зарубіжних та національних історичних передумов і логіки розвитку субінституту електронних доказів, з основним акцентом на адміністративному судочинстві в Україні, опираючись на документальні фактичні дані різних періодів. З огляду на теоретичний характер дослідження, основними **методами**, використаними в ході його підготовки стали: поєднання історичного і логічного, системний метод, методи порівняння, опису, узагальнення, синтезу та індукції, сходження від загального до конкретного. У **результаті дослідження** досліджено основні тенденції розвитку підінституту електронних доказів в адміністративному судочинстві в різні історичні періоди, з особливим наголосом на зарубіжній передісторії виникнення та розвитку права положення щодо електронних доказів. Основні **висновки** дослідження коротко викладено нижче. Законодавчі положення щодо електронних доказів зазнали численних змін, починаючи з 1970-х років, коли вони були вперше імплементовані в процесуальне законодавство Сполучених Штатів Америки. Враховуючи той факт, що питання періодизації завжди залишається відкритим, на думку автора, історичний*

розвиток регулювання щодо електронних доказів можна розділити на чотири основні періоди: 1) з 1970-х до початку 1990-х років (цей період пов'язаний з поява перших національних випадків конкретного законодавства, судово-медичної практики та наукових досліджень); 2) з 1970-х до початку 2000-х років (коли відбулася трансформація підходів до розуміння сутності електронних доказів і порушувалося питання про автономну роль електронних доказів у системі доказів); 3) з 2000 по 2010 роки (цей період пов'язаний з активним розвитком законодавства та юридичної практики щодо електронних доказів); 4) З 2010 року по сьогоднішній день (це сучасний етап розвитку законодавчих положень щодо електронних доказів, коли спеціальне визначення та процесуальні норми для електронних доказів були імплементовані до національних процесуальних кодексів, у тому числі до Кодексу адміністративного судочинства України) .

Ключові слова: докази, електронні докази, адміністративний процес, історія, історичні передумови.