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Shares as an object of civil law regulation

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Abstract

The objective of the article was to analyze the actions as an object of civil law regulation. The market contributes to the accumulation of capital and its transformation into investment resources for the financing of the productive and social spheres, which improves the general well-being of the population. Meanwhile, the legal nature of the shares has not yet been clearly defined in Russian law and there is, consequently, a dichotomy in the choice of ways to protect the owners of securities, including shares. For the development of the research, methods such as synthesis, theoretical analysis, abstraction, deduction, induction, classification, comparative law, refutation were used. Based on the legal acts that regulate the stock market, a comprehensive study of the problems of legal regulation of the rotation of shares is carried out, to determine the prospects for development and ways to improve the legal regulation of shares, as well as to look for ways to protect the rights of securities holders. Among the most significant results, the legal nature of the action was revealed, the meaning of categories such as: document, security and action was cleared, and the definition of action was formulated.

Keywords: securities document; security; cuota; undocumented participation; method of protection.

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Acciones como objeto de regulación de derecho civil

Resumen

El objetivo del artículo fue analizar las acciones como objeto de regulación de derecho civil. El mercado contribuye a la acumulación de capital y su transformación en recursos de inversión para el financiamiento de las esferas productiva y social, lo que mejora el bienestar general de la población. Mientras tanto, la naturaleza legal de las acciones aún no se ha definido claramente en la legislación rusa y existe, en consecuencia, una dicotomía en la elección de formas de proteger a los propietarios de valores, incluidas las acciones. Para el desarrollo de la investigación se utilizaron métodos como síntesis, análisis teórico, abstracción, deducción, inducción, clasificación, derecho comparado, refutación. A partir del examen de los actos jurídicos que regulan el mercado de valores se realiza un estudio integral de los problemas de regulación legal de la rotación de acciones, para determinar las perspectivas de desarrollo y las formas de mejorar la regulación legal de las acciones, así como buscar formas de proteger los derechos de los titulares de valores. Entre los resultados más significativos, se reveló la naturaleza legal de la acción, se clarificó el significado de categorías tales como: documento, seguridad y acción y se formuló la definición de acción.

Palabras Clave: documento de valores; seguridad; cuota; participación indocumentada; método de protección.

Introduction

There is a rather complex structure of objects of civil rights in various legal systems, and Russia is no exception, where the attention of researchers is drawn to the study of certain objects and rights to them, because there are significant differences in the ownership of corporal and incorporeal things, in the rights to objects that cannot belong to persons on the property right. This applies not only to the controversial construction of «right to right», the possibility for a person to be the owner of property rights, but also to be the owner of objects of the natural environment.

The concept of property in the legal doctrine is always associated with the possibility of individualizing property and transferring it to the exclusive right of ownership to a person, organization, or society. Therefore, space, celestial bodies, and atmospheric air are not considered by legal scholars as property that can be the object of property rights and other rights regulated by civil law. However, the possibilities of «legalizing» individual objects of nature will constantly expand with the development of science and technology.

In science, issues concerning property rights are debatable, in terms of their understanding as a subjective right or the object of the right itself. Therewith, they can act both as an element of the content of the legal relationship, and as its object. Therefore, the difficulty lies in the fact that often transactions are concluded concerning property rights that are the content of legal relations (for example, the right to lease). In other words, there is a substitution of concepts that determine their essential belonging to various elements of legal relations.

Attempts to present a document as an object of law in the doctrine are interesting. A well-known discussion about securities takes place not only in Russian but also in foreign doctrine. Without touching upon the issue of uncertified securities, we note that in any case, the boon means those rights that are certified by securities. It is for their sake that the person acquires them. Then there are relevant questions about what is the object – the rights themselves or the security?

The concept of the object of law is blurred with the emergence of such very specific objects as machine-place, exchange place, bioresources, human organs, etc. The attitude in the doctrine to human organs, anatomical materials, and tissues, which, as is known, can be acquired and used in one way or another (for transplantation and other medical or cosmetic purposes), is very ambiguous. The doctrine also raises the question of the attribution of human cells to the objects of civil rights (legal relations) and, consequently, the recognition of their legitimate turnover. If until recently such cells were considered exclusively an integral part of the human body, without which they perished, then the situation is gradually changing with the development of medical science, for example, during the collection, storage, and use of blood and its components (plasma, erythrocytes, platelets, etc.); withdrawal and use of stem cells. Currently, embryonic, reproductive, and somatic cells are widely used. Today, tissue is grown from the cell, for example, skin tissue, which is used for human skin grafting. Hence, in civil language, «the making of one thing into another thing» comes. Due to the demand (in medicine), they cannot but be considered a good, since they are often called upon to save a life, which in itself is the highest good.

It is possible to give the opposite example when there is a turnover of objects, but it is impossible to determine which one, for example, in the case of the so-called «acquisition of an athlete» by a sports club. Usually, they prefer to talk about the services provided by the athlete and the ability to assign him/her from one club to another. However, such a legal construction is far-fetched and is intended to avoid understanding the athlete (person) as an object, since he/she, being a person, is a subject, and not an object of the law. Thus, in these cases, the establishment of a valid object of law is very problematic.

It is also worth touching on such objects, which, based on objective, material positions, are too difficult to isolate from the surrounding equivalent objects. Conventionally, they are called «meaningless objects», an example of which is an apartment. Disputes about who owns the walls, floors, and, accordingly, ceilings in apartments located next to each other, and to what extent it is possible to assert the right of one person to these «contours» of the apartment, and where the right of another person to them begins. The answers to these questions also require special research.

Thus, the above proves not only the complexity of understanding the objects of rights, their various types but also makes it difficult to regulate them, which must be coordinated in a certain way, considering all aspects of intersectoral science.

1. Methods

In the course of the research, general scientific methods of cognition were used, including the principle of objectivity and consistency. Private scientific methods were used along with general scientific methods of cognition: theoretical analysis and synthesis, comparative law, technical and legal analysis, concretization, interpretation, deduction and induction, classification. The methodological basis of the study was the method of the theory of knowledge.

2. Results

Securities are independent objects of civil rights. Their emergence is associated with trade turnover when there was a need to facilitate and accelerate the turnover of certain types of binding rights.

For a long time, security has been primarily understood as a document in the doctrine that acquires significance, not in itself, but because it embodies certain rights (Agarkov, 1994). However, under the influence of scientific and technological progress, a paper document, which is necessary for the circulation of civil rights at the initial stage, fades into the background, giving way to a document as digital information, which today is a more convenient tool for the digital economy. Russian legislation classifies securities as things (The Civil Code of the Russian Federation, 1994).

In addition, securities, in particular shares, were considered as movable things. F. Shershenevich (2003) pointed out that the share expresses the right to participate in the enterprise, it is always mobility, so the rules on the turnover of movable things should apply to the share. The share is the most common type of securities in the modern world, but the epistemological

essence of the share caused earlier and today causes controversial points in the doctrine of law, which can be seen even from the lexicology of one word— «Action» of French origin means security, and «Actio» of Latin origin means an order, permission, appointment.

Security and a share are related to each other as general and particular. A share is security without a specific validity period, which is limited only by the life of the company itself. The appearance of the share is directly related to the creation and operation of the joint-stock company.

In Russia, the first joint-stock companies, and therefore the first securities issued by them, appeared in the second half of the 18th century, that is, much later than in most of the United States and Western European countries. Historians claim that the first corporation in Russia was created in 1757 when the Russian Constantinople Company was established, but the first share was issued only in 1827 (Borzykh, 2005). The rapid development of the joint-stock form of management in Russia occurred only in the 19th century and is due to the development of capitalist relations. By this time, scientific works began to appear justifying the advantages of the joint-stock organizational and legal form. In addition, according to M.V. Chernozhukov (2001), the foundation of joint-stock companies was facilitated by the reduction of interest rates on deposits by state credit institutions, which caused an outflow of capital from the credit sector to the sphere of corporate securities (shares).

The development of joint-stock forms of management in Russia did not last long, until 1917. The command and administrative principles became the fundamental principle in the economy in the young Soviet state. In this connection, joint-stock companies were reorganized into state-owned enterprises in the late 20s and early 30s, and, unfortunately, such an organizational and legal form had not been used for a long time on the territory of the Soviet Union. A new stage in the development of the joint-stock business in Russia began in the late 90s of the last century.

The emergence of the first shares in the Soviet Union is associated with the adoption of the Resolution of the Council of Ministers of the USSR of October 15, 1988, No. 1195 «On the issue of securities by enterprises and organizations», in paragraph 1 of which it was fixed that

(...) enterprises and organizations transferred to full economic accounting and self-financing following the Law of the USSR on State Enterprise (Association), can issue two types of shares: 1) shares of the labor collective distributed among the members of their collective; 2) shares of enterprises (organizations) distributed among other enterprises and organizations, voluntary societies, banks, as well as cooperative enterprises and organizations (Resolution of the Council of Ministers of the USSR, 1988: 56).

Shares of enterprises could also be issued by commercial banks. However, the above-mentioned resolution was limited only to listing the types of shares and did not contain a definition of the term «share». This definition was later fixed by the Resolution of the Council of Ministers of the USSR (June 19, 1990) No. 590 «On Approval of the Regulations on Joint-Stock Companies and Limited Liability Companies and the Regulations on Securities». In paragraph 31 of the Regulations on Joint-Stock Companies and Limited Liability Companies, it was noted that a share is security and secures a triad of rights, i.e., a share is security confirming: the right of a shareholder to participate in the management of the company, in its profits and the distribution of the remaining assets in the event of the company's liquidation. The disadvantage of the above-mentioned resolutions was that they provided for the possibility of issuing shares not only by joint-stock companies but also by other enterprises and organizations, including cooperatives, which does not correspond to the semantic essence of the share.

A more correct definition of the share was given later in the law «On the Securities Market» (Federal Law of the Russian Federation, 1996). It was noted in part 1 of Article 4 of the law, that a share is a security without a fixed circulation period, certifying equity participation in the authorized fund of a joint-stock company, which confirms membership in a joint-stock company and the right to participate in its management, entitles its owner to receive part of the profit in the form of a dividend, as well as to participate in the distribution of property in the event of liquidation of a joint-stock company. Although such a definition consolidated the classical triad of rights to shares (the right to receive dividends, to participate in the management of the joint-stock company, and to part of the property remaining after its liquidation), the main drawback was that the legislator clearly distinguished the right of membership from the triad of rights, which contradicts the civil law doctrine, according to which the right of membership is just a set of rights for a share.

This raises two relevant questions: what the legal nature of a share as a special type of security is, and what is the ratio of a share to security. The theory of securities, including shares, has been developed by civilized doctrine for several centuries. A. Shershenevich (2003) rightly argued that the very concept of securities is not clarified either in life, or in science, or legislation.

The official definition of the term «security» is fixed in part 1 of Article 142 of the Civil Code of the Russian Federation, according to which «Securities are documents which meet the requirements established by law and certify the rights under the law of obligations and other rights which may be exercised or assigned only upon the show of such documents (paper securities). Also, the following are deemed securities: the rights under the

law of obligations and other rights which are stated in the decision on the issue or in another document of the person that has issued the securities following the provisions of a law and which may be exercised and assigned only if the rules for keeping a record of these rights according to Article 149 of the present Code are observed (paperless securities).

It should be noted that such regulation of the registration of rights and turnover of non-documentary securities is more perfect than that which was in force before the adoption of amendments to the Civil Code of the Russian Federation, where it was noted that «security is a document certifying, in compliance with the established form and mandatory details, property rights, the exercise or transfer of which is possible only upon its presentation. With the transfer of a security, all the rights certified by it are transferred in the aggregate» (Federal Law of the Russian Federation, 2013). However, it seems to us that the new definition of security has some drawbacks. Namely, the legislator indicates that a security is a document certifying a monetary or another property right.

This disposition makes the definition of security too narrow and does not fully cover the content of the share. This conclusion follows from the analysis of the concept of a share, which is contained in Article 2 of the Law of April 22, 1996, No. 39-FZ «On the Securities Market», which states that a share is «issue security that secures the rights of its owner (shareholder) to receive part of the profit of a joint-stock company in the form of dividends, to participate in the management of a joint-stock company and to part of the property remaining after its liquidation.

As a result of the conducted research, it should be concluded that the share grants its owner not only property rights but also several non-property rights. Therewith, with the undeveloped stock market in Russia, the interests of shareholders are usually not aimed at making a profit from shares at the expense of the stock exchange speculation but are reduced only to the ability to influence the work of the bodies of the joint-stock company. Therefore, it can be concluded that the non-property rights of the shareholder become the main ones. A.S. Shvydenko (2006) also points to the unsuccessful wording of the legally enshrined term «share», since from his analysis it is impossible to unequivocally assert what the property and non-property rights to the share are certified by.

According to the current positive law of Russia, a share should be considered both a unit of measurement of the authorized capital of a joint-stock company and a document that has a close legal relationship with the right (property and non-property) enshrined in it. Such a dichotomy of the essence of the share is rather a disadvantage of the legislative technique than its advantage.

A share as a type of security belongs to equity securities and it is characterized by all the features inherent in equity securities, but there are also exceptional features. Following part 1 of Article 25 of the law on joint-stock companies, all shares of one enterprise must have the same nominal value, and other equity securities must have an equal number of rights only within one issue. In addition, the share is corporate security, since it provides a set of rights to the owner: the right of membership in the company, from which

(...) both property rights (the right to participate in profits and, upon the termination of the company, to share in the liquidation balance) and non-property rights of the shareholder (the right to participate in the general meeting, active and passive voting rights to hold positions in the company, the right to get acquainted with accounting and reporting data and other documentation of the joint-stock company) (Krashennikov, 1995: 54).

There is a pluralism of opinions in the Russian scientific literature on the definition of the main characteristics of securities, including shares. S.A. Mikhaltsov (2006) draws attention to the fact that a number of the features cited by scholars do not express the legal nature of the share, but only make it possible to reveal the economic essence of securities more deeply. Indeed, such characteristics as the «marketability» of the share or «liquidity» (Galanov *et al.*, 2017) do not in any way affect their legal regulation, since regardless of whether the share is liquid or not, it is subject to the same legal norms.

In this connection, it is necessary to analyze only those features of the share as a type of security that express its legal nature, with the acquisition of which the share becomes a full-fledged object of civil turnover. The peculiarity of the share is that it is the largest among all securities that carry regulatory functions in the system of social reproduction. It is the share that maximizes the flow of capital into promising and steadily developing sectors of the economy from withering industries.

Such a construction as non-documentary security is used in the Russian scientific literature when disclosing the question of the civil nature of a share. This justifies the need to conduct a legal analysis of the essence of the security as an «undocumented one».

The analysis has shown that researchers currently lack a unified approach to understanding the legal nature of undocumented securities.

Thus V.A. Belov (2001: 14) pointed out that “securities as objects of civil rights can only be understood as documents, but not the subjective civil rights enshrined in them». D.V. Murzin (2001) noted that the form of the «issue» can be considered another institution of civil law that does not coincide with securities. E.A. Sukhanov (1997) wrote that the undocumented form (in the form of a record in a computer) is not a security, but a method

of fixation, it is not even securities, but an electronic form of accounting for the owners of capital, who have pre-defined rights and corresponding obligations towards the user of this capital. E. Vazhinskii (2007) noted that non-documentary securities are not securities in the traditional sense as objects of property law. In the doctrine, researchers believe that securities and uncertified securities are institutions that have a different legal nature, and therefore should have different legal regimes.

Thus, in the first place, the form of the document is taken out when analyzing the legal nature of securities. According to the presented concept, securities can only be documentary, and non-documentary ones go beyond the scope of the securities institute.

The fallacy of such judgments lies in the fact that the authors of such a concept unreasonably restrict the material medium of information, indicating that it can only be paper. Such a restriction of the form of securities is erroneous with the development of digital technologies. This conclusion also follows from the analysis of the current legislation. In particular, the law «On Information, Informatization and Information Protection» (Federal Law of the Russian Federation, 2006), does not associate the term «document» only with paper.

As for the point of view of the representatives of the non-documentary concept, they define security as (Shevchenko, 2004):

1. An incorporeal thing that is devoid of a material substratum and is a binding contract law that is regulated by the rules of real law. Therefore, the document recedes into the background before the phenomenon of security, which is something external to the essence of security.
2. Securities are considered as a set of property rights.

When analyzing the two concepts, it should be concluded that the non-documentary concept has advantages over the documentary one, since it pedals an attempt to develop a common understanding of securities, in which documentary and non-documentary securities are completely identified. As K.B. Koraev (2019: 302) points out, security is «a special kind of thing, which is understood as an incorporeal object that grants its owner certain property and non-property rights». Despite the attractiveness of this definition, it should be noted that the legal construction of «incorporeal objects» is inappropriate. Since, according to E.S. Demushkina (1999: 43), «this concept aims to justify new phenomena in life with the help of classical norms and does this for already known instruments – classical documentary securities, which are considered as real rights». It is hardly possible to apply the construction of «incorporeal things» to objects that by their characteristics do not relate to things in their usual sense, for example, electricity, information, and so on. The disadvantage of this approach is

that it does not consider the dualistic nature inherent in all securities, which is understood as an indissoluble link between the document and the right certified by it. Since, as D.D. Borzykh notes, after the loss of the material shell (i.e., paper), undocumented security remains an ideal shell, that is understood as security... the ideal shell is just an external manifestation of the structure of interrelated rights that are contained in undocumented security.

The presence of an ideal shell, which is also characteristic of non-documentary securities, makes it possible to establish proprietary rights to such security and transfer it without any danger since any rights will not pass to the buyer (Borzykh, 2005). In this case, it is important to conclude that the undocumented nature of the securities is compensated by a documented record of an authorized person in a special simple or computerized register of rights. Thus, the difference lies only in the method of fixing the rights certified by securities.

Uncertified securities in the form of shares are the most common, and there is an opinion that it was the share that became «the basis for the emergence of a special institution of securities in modern conditions» (Butina, 2006: 67). Undocumented securities are the result of the evolution of the securities institution and have long been an element of everyday legal life.

Undocumented securities emerged as a result of the evolution of the securities institute. As A.V. Shulga rightly points out:

This is a stage of modification of documentary (classical) securities, caused by the need to accelerate the turnover of these objects of civil rights, since «the development of industry and economy, the influence of scientific and technological progress and competition have led to the modernization» of the concept of property, its unusual expansion and, accordingly, to the legal recognition of new types of property, a multiplicity of its varieties (2008: 35).

A share or any other security replaces the certifiable rights, not in all respects, but only in terms of turnover. Uncertified securities, in particular, shares in comparison with documentary ones have several advantages, which, according to K. Fradkin (2007), consist in increasing the circulating capacity of non-documentary securities in comparison with documentary ones, since non-documentary shares are more convenient for active modern civil circulation, in contrast to their documentary predecessors, because today there are well-developed communication systems that make it possible to carry out transactions with shares, being in any city where there is a branch of the registrar, which maintains the register of securities of the corresponding issuer.

In addition, the economic costs associated with the cost of both material resources and the time required to issue a significant number of

certificates that are protected from forgery are reduced. The advantages of non-documentary securities should also include the fact that there is no risk of loss or damage to the security certificate, as is possible with the documentary form. N.N. Kalashnikova (2005) also notes the convenience of storing such shares, since the volumes of the paper and electronic archives do not correlate with each other.

The Russian legislator was categorical about the possibility of the issuer choosing the form of securities, namely shares. Since the introduction of amendments to Article 16 of the law «On the Securities Market», registered equity securities (which are also shares) may be issued only in non-documentary form, except in cases provided for by federal law. Thus, with the entry into force of these changes in Russia, the process of dematerialization of securities, which began in 1990, was completed.

Despite the obvious advantages of non-documentary securities, the question of how to protect the rights of the owners of such securities is quite controversial today. There are different points of view on this issue in the doctrine. Some researchers note the need for the use of mandatory legal methods of protection (Filippova, 1998; Zherugov, 2008). Others consider it possible to use proprietary methods of protection (the use of a vindication claim).

Finally, representatives of the third concept consider it necessary, given the special legal nature of undocumented securities, to develop new (special) ways to protect the rights of the owners of these securities (Mollerius, 2005). In this case, this suggests the possibility of applying both binding legal means (a claim for damages or invalidation of the transaction, but it should be noted that the recognition of the transaction as invalid, according to which the transfer of rights to securities occurred, does not mean the restoration of the rights of their owner, since the invalidity of the first transaction does not entail the invalidity of the following transactions, and the securities after them (the following transactions) can also pass to third parties), and material legal (vindication claim), based on the dualistic nature of securities.

According to E.A. Kharitonov (2006: 82), the term «obligatory means of protecting property rights» has some inaccuracy, since civil legislation provides for the possibility of protecting property rights from illegal actions of subjects of not only civil, but also public law (for example, when a legal act of a public authority is declared invalid), and therefore it is more logical to use the term «personal protective equipment». In this connection, it seems to us that the material-legal methods of protection are more effective since they provide an opportunity to claim securities from any person.

In the doctrine, there is an opinion that it is impossible to apply a vindication claim since undocumented securities are not individually

defined things, and they do not have characteristics that would provide an opportunity to implement their individualization, and, consequently, vindication. In particular, V. Dobrovolskii (2005) notes that the legislation of the Russian Federation does not provide for the possibility of identifying shares of one issue (with one number) on any other grounds than the issue number, and therefore they are not subject to vindication. However, it seems to us that this statement is controversial. Therefore, sometimes, taking into account the specifics of uncertified securities as objects of civil rights, the concept is not «vindication claim», but a claim of vindication nature is used in judicial practice. Therewith, in the absence of a judicial precedent, Russian law enforcement practice cannot boast of stability in this regard and, as we have already indicated, the rights of securities holders cannot be limited depending on whether the security is corporal or incorporeal (Svirin *et al.*, 2021).

The peculiarity of the claim, which has a vindication character, is that when it is used, there is no actual seizure of the thing from the defendant. Such a claim can be satisfied if certain conditions are met, namely:

1. possession of the right of ownership or other property right concerning the subject of the dispute on the part of the plaintiff.
2. individualization of the subject of the dispute.
3. the disputed property must be in the illegal possession of the defendant.
4. the defendant is an unscrupulous acquirer, or some grounds allow claiming property from a bona fide acquirer.

Concerning non-documentary securities, their individualization is fully preserved only when the securities are credited to the account of the first owner. With their further circulation, that is, when switching from «account to account», this identity is lost, because the shares within the same issue do not differ from each other. This scheme of switching «from account to account» is used for illegal deprivation of ownership of non-documentary securities, by creating a bona fide acquirer. In this connection, G. Osipov (2007: 157) points out that, in addition to individualizing the generic thing, to bring a claim, it is necessary to establish «the way of things (proof that the lost generic things in a certain amount passed from one owner to another, sequentially from the copyright holder to the defendant”. Given the legal nature of generic things, this is quite difficult to do, and sometimes even impossible.

To prevent this, the scientific literature has repeatedly noted the need to assign each non-documentary security an ordinal number. In this connection, A. A. Kukushkin (2007) concludes that to ensure proper protection of owners of undocumented and immobile shares, it is necessary

to assign a certain identification number directly to each share, and not to the entire issue of shares.

Having studied the legally fixed and theoretically developed provisions concerning the legal nature of a share as a special type of securities, the author's definition of the term «share» is proposed – as registered security without a certain circulation period, certifying the same corporate rights of its owner (shareholder) within a single issue relative to the person who assumes the corresponding obligations (issuer), which exist exclusively in an undocumented form.

Conclusion

As a result of the study, the following conclusions should be drawn:

1. A share belongs to equity securities, but in comparison with other equity securities, shares of the same company must confer the same rights to their owners within the same issue
2. A share is the only corporate security since it is the only one that grants its owner a unique set of rights and reflects one of the main characteristics of a corporation – management and participation in management.
3. There is no fundamental difference in the legal nature of the documentary and non-documentary form of the share, since all the «non-documentary» nature of the security, in particular the share, is compensated by a sufficiently documented record in a special register of rights certified by the security.
4. Shares, like any other undocumented securities, should be understood as *res incorporales* «incorporeal things» since undocumented shares exist in the form of an electronic digital code that is tangible to the human senses. Therefore, for the recognition of an electronic record as security (share), it does not matter whether it is a document. Such a share is the security (an incorporeal thing) through the direct recognition of this by the legislator.
5. A share can be considered as a unit of measurement of corporate rights. The stake in the equity capital and the share are related as a genus and a species. A share is a type of stake and at the same time security. A share is a stake in respect of which the law recognizes the property, quality of a security. However, such a particle has «evolved» concerning security, which opens up additional opportunities for its turnover, increases the mobility of its circulation.

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6 The full name of the authors was not added because in the original sources there were only the initials of the name, based on the APA style.

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