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Criminal Dimensions of Corporate Rights in Ukraine: Content, Remedy, and Enforcement

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Abstract

This study critically examines the intersection of corporate relations and criminological implications in Ukraine, with a focus on legislation, its real-world application, and prevailing doctrinal positions. The paper investigates the civil and economic dimensions associated with the enactment and protection of corporate rights from a criminological perspective, highlighting potential areas of misconduct or criminal activities within corporate structures. The core intent is to shed light on the economic, legal, and criminological concepts surrounding the safeguarding of corporate rights for both individuals and legal entities, underscoring the methods and challenges of their enforcement, restitution, and protection. The paper also considered the possibility and expediency of applying a derivative claim in national practice. Problematic issues of civil liability in corporate relations, including the responsibility of the main enterprise for the obligations of the subsidiary enterprise, officials for losses caused to the company, violation of the right without actual loss of the possibility of using, unification of the statute of limitations for vindication and for judicial appeal against decisions of the meeting of participants or the registration authority, etc. The theoretical and practical part of the work is to ensure that the research results can be used for future studies and developments of various aspects of regulating and remedying corporate rights. The insights presented are poised to enrich both the academic discourse on corporate rights and practical law enforcement strategies, fostering the holistic development of corporate law and its criminological dimensions in Ukraine.

Keywords: Corporate Relations, Legal Remedy, Criminological Perspective, Corporate Disputes, Derivative Claim.

Introduction

As a result of the transition to the market economic system, many new economic entities of business entities of various legal forms. Due to the lack of appropriate rules for regulating corporate rights that have arisen upon the activities of such farms, many problems have emerged relating to the violation of both property and non-property rights of participants (shareholders) and related parties. This area has subsequently undergone many changes at the regulatory level and in the organisational and practical aspect. However, many issues remain unresolved to

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this day, and an effective mechanism for remedying violated rights is yet to be developed, which makes it relevant to investigate the nature of the rights of participants of business entities of various legal forms for further development of issues regarding their legal content and remedy (Piddubnyi and Rohovenko, 2023).

An effective system for remedying the rights of business entity participants is the most important tool for organising the structure of the modern world economy. Legislative ways to determine the most optimal and adequate ways to remedy the rights of participants in economic societies in the modern conditions of globalisation of entrepreneurial activity is one of the problematic and opposite issues in both foreign and Ukrainian legal theory (Tomashevski and Yaroshenko, 2020; Kisil, 2022). In this regard, the improvement of the valid legislation of Ukraine on the legal status of participants in corporate rights and relations, their correct legal characteristics, including the possibility of applying foreign experience of legal regulation, is an urgent issue.

The system of corporate rights has its own legal nature, which has been the object of study by researchers for a long time. However, constant legislative changes and expansion of the scope of application lead to the need for constant research in this area to further clarify their content and develop an effective statutory remedy in the event of a violation. Due to the fact that these relations and, accordingly, rights were initiated abroad much earlier, this issue is the best covered in the foreign doctrinal environment (Petersone et al., 2016; Badovskis et al., 2017). In particular, the following foreign scientists studied the legal nature of corporate rights: J.C. Sven van der Velden (2016), D. Bilchitz (2016), Brian R. Cheffins (1997). In the CIS countries, corporate rights were the object of research among scientists as V. K. Andreev and V. A. Laptev (2017), L.F. Gataulina (2016) and others. Among the Ukrainian researchers of corporate rights, one should mention such scientists as O.V. Bignyak (2019), Yu. V. Wojciechowska (2009), L. Gachak-Velychko, B. Kupchak (2010), T.I. Burdak (2011), I. Spasibo-Fateeva (2009) and others (Belov, 2009; Vasilieva, 2013; Galian, 2019; Kostruba et al., 2020). Generalisation of existing approaches indicated that the doctrine is dominated by recognition of the special nature of corporate rights (Law of Ukraine, 2006, 2008, 2018; Recommendations of the presidium, 2007; Resolution of the plenum, 2008; Resolution of the supreme, 2010). Furthermore, they were defined through the use of the following three approaches: the manifestation of relations of a real nature, a specific type of obligations and real relative law, which over time was refuted by a considerable number of studies (Commercial Procedural Code of Ukraine, 1991; Tarasov, 2000; Economic Code of Ukraine, 2003; Puchniak et al., 2012).

The main goal of this scientific work is the study of the fundamental provisions of the economic and legal system and concepts, corporate rights of individuals and legal entities, methods and limits of their protection. The aim was to expand scientific research in this area, improve human rights, law-making and law enforcement activities of governmental, law enforcement, and judicial bodies.

Materials and Methods

The methodological base of the work included legal, analytical, social and statistical research methods. General scientific and special legal methods were also applied in the work to analyse the regulatory framework for corporate law regulation in Ukraine, which constituted the theoretical level of analysis. For this purpose, a regulatory method was applied, which consisted in a detailed analysis of the legal regulation of corporate rights. The analysis of the structure of legislative norms was carried out on the basis of methods of induction and deduction for the description of legal norms in the context of the subject. The descriptive method contributed to the formation of a logical sequence of the obtained results. Application of the graphic method allowed for presenting some of the material in a visual form. The paper also used the classification method, in particular upon analysing the types of actions (inaction) that caused losses to a business entity, entailing the responsibility of officials, and types of liability of "controlling persons".

The following methods were applied to basic resources on the subject of scientific research: synthesis – to solve the research problem; analytical – to identify effective provisions for regulating corporate rights and gaps in the national legal system. The use of the method of analysis of these sources allowed for shaping recommendations for the implementation of the international foreign legal system into the national legal system; to determine the main areas of application of the experience gained in the protection of corporate rights and the compliance of the national system with international legal frameworks and judicial practice. The retrospective analysis was performed using the following methods: the historical method allowed studying the improvement of corporate law in Ukrainian legislation and in the doctrinal environment; the genetic method helped determine the main stages of the development of corporate law ensuring the remedies for participants in corporate relations changed.

Analysis of the content of legislative texts, features of legal provisions in the context of the subject of research was carried out using the methods of induction and deduction. The comparative method of analysis allowed comparing the Ukrainian definition of the content of corporate rights regarding their regulation and legal framework abroad. The comparative method was also used for the purpose of

comparing practice of applying the corporate rights protection system in Ukraine in its regulation internationally and individually in other countries. The system method was employed to generalise the legal content and the system of regulation of corporate rights in the rule-making, doctrinal, and judicial spheres. To achieve the purpose of this study, learning socio-legal phenomena was also used because the development of the mechanism of law for governing and remedying corporate rights, considering the possibility of implementation of foreign and international provisions into the Ukrainian legal system is a difficult stage.

The methods used made it possible to identify the main problems in determining the content of corporate rights, compliance with them and their remedies in Ukrainian practice, and to develop the main areas for solving these issues. The applied methodology also helped to obtain reliable results and substantiate the conclusions.

Results and Discussion

At the regulatory level, corporate rights are mainly governed by two codified acts – the Tax Code of Ukraine (TCU) and the Economic Code of Ukraine (ECU) (Sub-paragraph 14.1.90 of the TCU and Part 1, Article 167 of the CCU) (Commercial Procedural Code of Ukraine, 1991; Economic Code of Ukraine, 2003). These acts apply almost an identical approach: corporate law arises due to a share in the authorised capital and grants the right to manage the enterprise, to a share of profit (dividends) and to receive part of the property during liquidation. In practical terms, the share in the authorised capital and the provisions of the charter play a crucial role. As for the share, its insignificance leads to the formalisation of participation in management. For the payment of dividends, a corresponding decision of the enterprise management body is made. The right arises to a part of the assets remaining after deducting all liabilities of the enterprise (equity) (Makalyuk, 2014; Tymoshenko et al., 2022). Thus, the legal formula for corporate rights is as follows:

$$\text{corporate rights} = \text{management} + \text{share in profit} + \text{property in liquidation}. \quad (1)$$

Consequently, the owner of corporate rights receives not only the equivalent of his or her contribution, but also part of the profit and part of the earned assets at the closure of the company. Corporate rights as a share in the authorised capital are registered in the constituent documents (charter) and in the Unified State Register (USR on the website of the Ministry of Justice). This applies to limited liability companies (LLC), additional liability companies (ALC) (Recommendations of the presidium, 2007), joint-stock companies (Resolution of the supreme, 2010).

The share acts as part of the authorised capital, but due to its affiliation to securities, it is also regulated by the National Commission on Securities and Stock Market (NCSSM) and the securities legislation (Commercial Procedural Code of Ukraine, 1991). Shares in electronic form are registered in special securities depositories (National Securities Depository of Ukraine). Shares usually exist in a simple form that secures all corporate rights (management, dividends). As for preferred shares, corporate rights may be restricted (in terms of management), but their owners always receive dividends instead of corporate rights, regardless of the profit received and the decision of shareholders. It is also necessary to point out such a feature of corporate law that allows managing a business, then this is not considered entrepreneurship (Part 2, Article 167 of the ECU (Economic Code of Ukraine, 2003)). On this basis, corporate rights may be held by persons who are prohibited from doing business (for example, civil servants) (Teymurova et al., 2023).

Notably, other securities issued by enterprises (bonds, promissory notes, etc.) cannot be considered corporate rights (these are debt rights) due to the inability to manage the enterprise and receive a share of profits or property during liquidation (Miller et al., 2023). According to Article 167 of the ECU (Economic Code of Ukraine, 2003), corporate rights include the authority for a person to take part at the company management stage of the business, to receive part of the profits (dividends) of the company and assets in the event that the latter company is liquidated in accordance with the law, and also all other powers provided by law and regulatory documents

The rights of a participant in a business entity are defined by Article 116 of the Civil Code of Ukraine (CCU) (2003), as well as the provisions of the company's charter and, in fact, are reduced to receiving a part of the company's profit, managing it, determining the main areas of activity, etc. Frequently, a company member who believes that their rights have been violated upon the company selling property belonging to them, motivates one's claim by violating the personal corporate rights regarding the rights to receive part of the profit from the activities of this company and the right to company management (Vovk and Yurkevych, 2022). Often, as a justification for a claim for invalidation of a transaction, the company participant indicates that as a result of the sale of property, their rights to receive a part of the property value in the event of its further withdrawal from the company will be violated and they will receive an amount to be paid that would be less than what they could have expected if the transaction had not been performed (Yesimov and Borovikova, 2022; Terkenli et al., 2022). In part, one could agree with such reasoning. Especially when the property is sold at a price evidently lower than its real market value (Tastulekova et al., 2018; Kataeva et al., 2019).

Paragraph 11 of the Resolution of the Plenum of the Supreme Court of Ukraine No. 13 (Resolution of the plenum, 2008) stipulates that a shareholder (participant) of a commercial company has no right to seek judicial remedies for the rights of other shareholders (participants) of a commercial company. There is an agency relationship between the company and the company itself, and it justifies its claim by violating the rights of other shareholders. Paragraph 51 of the same Resolution of the Plenum states that the law does not provide shareholders (participants) of commercial companies with the right to seek judicial remedies for legally protected rights or interests of the company other than related representatives. On this basis, the commercial court should refuse to satisfy the company's shareholder (participant) settlement request, modifying, terminating, or invalidating agreements and other transactions concluded by the business entity (Uliutina, 2022; Shalbolova et al., 2017). This position is justified by the fact that the legal consequences of invalidating a transaction at the request of a company participant lie in the return of property to the company's ownership, which formally cannot be identified with the remedy for the interests of a participant in the given enterprise, since the participant was not the owner of the property. In fact, it is clear that the return of property to the company's ownership affects the scope of property rights of a company participant, since it is much more pleasant to be a company participant owning considerable assets by right of ownership than to be a company participant with little capital (Tlessova et al., 2016; Tsybukh, 2023).

This aspect will become particularly relevant when a participant sells its share to third parties, when it is necessary to determine its selling value. The value of such a share is affected precisely by the availability and commercial value of the assets of the company, as well as the company's rights to use land plots, rights to build territories, rights of claim to other business entities, etc. (Zabzaliuk and Besaha, 2023). Thus, there is no reason to claim that the participant, represented by the director of the company and other company participants, is not a stakeholder having the right to appeal for invalidation of the company's transactions. Such a participant must have a way to remedy their rights, even though the fact of their actual violation may take place only in the future, when, for example, they decide to sell their share (Yaroshenko et al., 2018).

There is certainly a legislative gap on this issue, because a business company participant is deprived of an effective remedy for rights if the property is sold without consideration of their opinion and at a deliberately low price. Analysis of judicial practice indicated in case of a transaction performed by the company without the participant having the authority to perform representative functions on behalf of the company, a participant can file a claim for invalidation only on behalf of the company itself (Krush and Makaliuk, 2014; Mansurova et al., 2018). This

situation is most applicable to participant's right whose share in the authorised capital is insignificant, which, accordingly, complicates remedying the rights for such a participant (Kosova et al., 2022).

The legal personality of a legal entity is manifested through the activities of management bodies and its purpose is to achieve results and satisfy the interests of other legal entities, participants or stakeholders (Lukianov et al., 2021). However, in the process of the interaction of the governing body of the corporation with the subjects of corporate legal relations regarding the activities of the organization that they carry out, a situation may arise in which the participants of these actions will pursue completely different goals that stem from the desire to protect the organization. The absence in the future of the necessary technology to control the execution and adoption of corporate decisions by management bodies leads to the expansion of abuses (Dragos and Przybytniowski, 2022; Cenolli et al., 2023). To avoid infringement of the rights of corporations and shareholders, the court provided shareholders, as owners of capital, with the opportunity to bring claims against directors in the procedural form of a derivative claim, which was later identified as an achievement of the legal system and features that distinguish American legislation (Miller & Galunets, 2023).

In the first half of the 19th century, the first court decision issued by a US court regarding a derivative action took place. In Robinson v. Smith, (1984) the New York Court of Chancery upheld the rights of shareholders to sue for the protection of corporate interests, explaining that the crimes of corruption should not occur, torts against corporations are derivative forms of torts against shareholders, and that allows other claims arising from this to become common in the 20th century (Hulak et al., 2022). The derivative claim again became the subject of Dodge vs Woolsly in 1855 (1885). During the settlement of the case, the Supreme Court of the United States determined the more difficult nature of the derivative claim, which combines two main requirements. The first related to the fact that a suit against a corporation in order to encourage it to comply with its obligations regarding the protection of the rights of shareholders. The second lawsuit was intended to advance the idea of protecting corporate rights from those capable of causing such harm (Maidanyk, 2016). In such cases, the lawsuit is filed because of the interests of the company or those whose rights were violated. The process of motivating plaintiffs in this legal strategy is formed in the formula "legislative means of legal protection of interests", which aims to ensure personal interests through the protection of corporate rights, because by virtue of them, the ownership of a legal entity may not meet legal requirements, the rights of the participant or the founder are subject to a certain influence, which at the level of procedural activity should be expressed through legal interests (Kaplina and Sharenko, 2020; Udalova and Khablo, 2022).

At the stage of introduction into the national legal system of Ukraine of such a corporate conflict resolution tool, which includes a derivative lawsuit related to the adopted Law of Ukraine on the procedure for resolving corporate conflicts "On Amendments to Certain Legislative Acts of Ukraine Concerning the Protection of Investors' Rights" (Recommendations of the presidium, 2007) by the Verkhovna Rada of Ukraine. In the case that in the USA, the creation of a derivative claim is determined by the already existing necessary practice, which is the result of the current judicial legislation, as a response to certain problems of corporate law, while in Ukraine this institute is now at the level of development from the identification of the problem of a derivative claim in the works of the field of science and law with the aim consolidation in legislation of alternatives to such a claim in the legal system of Ukraine, the development and formation of the foundations of the establishment of the institution of a derivative claim. Despite extensive training, such a legal tool for solving corporate conflicts has not yet acquired the necessary importance in legal science, despite the presence of historical and theoretical prerequisites (Yaroshenko et al., 2020).

In this case, it is appropriate to bring the definition of an outstanding civil figure to the revolutionary era, I.T. Tarasov (2000), who claimed that a properly organized system of responsibility not only of the shareholder of the company, but also of its bodies, is capable of protecting shareholders and third parties from offenses that are difficult to avoid both as a result of abuses and due to the inability to identify the boundaries of the competences of various bodies by legislation, instructions or the statute. In turn, the amendment of Part 1, Article 12 of the Economic Procedural Code of Ukraine with Paragraph 4-1 (2003) opens legal procedural ways to resolve a corporate dispute, since it is determined that there are differences between the business association and its official (including the person whose authority has been terminated) regarding the compensation of losses by its actions (inaction) to the business association within the jurisdiction of economic courts (Commercial Procedural Code of Ukraine, 1991). This resolution made certain changes to Article 89 of the Economic Code of Ukraine, which are defined in the new version. According to Paragraph 2, Article 89 of the ECU, officials are responsible for losses they caused to a business entity by actions (inaction) as presented in Figure 1 (Resolution of the supreme, 2010).

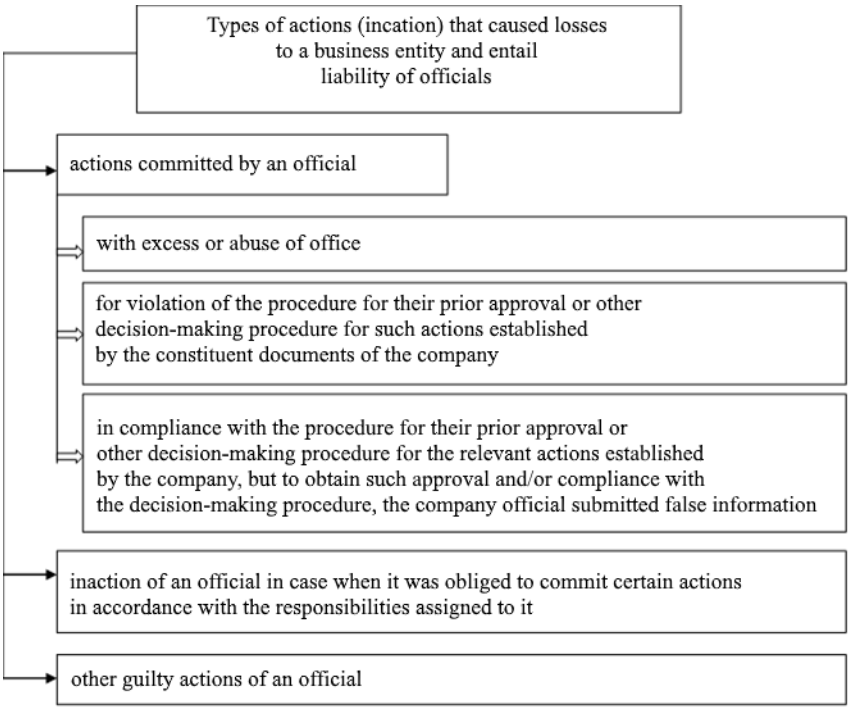

Figure 1. Types of actions (inaction) that caused losses to a business entity and entail liability of officials

At the same time, the national doctrine of law does not formulate the concept of a derivative claim. The legal definition of such a term is also not legislatively consolidated, which complicates the possibility of covering its legal nature, ensuring proper equations of legal regulation of disputed legal relations, and provides arguments to opponents of such claims. Thus, according to R. A. Maidanyk (2016), as a result of the imperfect theoretical reasoning of the derivative claim model in the procedural law of Ukraine, the academia raises doubts regarding the adequacy of protecting a minority of shareholders, that is, the absence of a certain standard of proof of an official's misconduct.

One of the problematic issues in civil liability of legal entities is the problem of joint and some variants of the responsibilities of the parent company in relation to the responsibilities of the subsidiary, a reasonable priority of this type of liability against subsidiary liability (Lutsenko, 2017). The judicial practice of considering corporate disputes indicates the underdevelopment and limited, formal application of the institution of responsibilities of the subsidiary to third parties. It suggests defining the types of liability of "controlling persons" at the regulatory level as follows:

– joint and several liability of the parent companies for operations of the subsidiary concluded by the latter in compliance with the instruction or with the consent of the parent company;

– subsidiary liability of the parent company if the subsidiary goes bankrupt as the result of the actions of the former;

– liability of a person who has the actual ability to determine the actions of a legal entity for losses caused through its fault.

Bringing the parent company to joint and several liabilities, along with the subsidiary for the latter's obligations to third parties, has the idea to limit the interference of the parent company in the affairs of the subsidiary company by prevention of its own property liability. That is, this institution is aimed at maintaining one of the features of a legal entity – signs of separation of personal property from property owned by participants or founders, and signs of independent liability of a participant in a legal entity for its obligations within the limits of contributions made (Dudorov and Kamensky, 2022; Makaliuk et al., 2022).

At the same time, the scientist ignored the main problem of civil liability of legal entities – the priority of joint and several liabilities of the parent company over subsidiary liability or vice versa. Thus, Paragraph 4, Article 96 of the Civil Code of Ukraine (2016) establishes that joint and several liability is provided for persons who create a legal entity solely for obligations that arose before its state registration. From the time of state registration of the legal entity, it is responsible independently as a legal entity (Sopilko and Rapatska, 2023). And this point should be seconded since the legal relations between stakeholders prior to the new creation have the contractual nature of a simple company. After state registration, there is a joint and several distributions of responsibilities between companies, but at this point the possibility of bringing a legal entity and its participants to joint and several liability is limited, with the exception of legal entities of some functionally necessary legal forms (Filatova, 2020). The creation of a legal entity that, independent of the will of other persons, has the opportunity to personally ensure the dynamics of legal relations to which it is a participant excludes the possibility of sharing responsibility between many stakeholders. Extending the responsibility of the legal entity to founders or participants simultaneously with the responsibility of the legal entity itself (joint and several liability) casts doubt on the legal entity and its nature, the essence of which is to create an independent entity with the separation of capital and personality (U.S. Supreme Court, 1984).

Apart from eliminating actual violations of the owner's ownership rights that are not related to deprivation of ownership, their rights or legitimate interests may be violated without actually losing the possibility of using a good that needs remedy due to, for example, restoring external legitimation and/or eliminating the

appearance of legitimation of another person; removing external obstacles to proper legitimation (Tacij et al., 2014). At the same time, this approach does not apply to corporate rights. According to the results of judicial practice, here it is quite possible to use the provisions of Article 387 of the Civil Code of Ukraine extortion of property from illegal possession of it by others in the circulation of shares and interest in business companies, despite the fact that the Roman tradition limited the scope of vindication to individually defined things. By extending the rules on vindication to shares and interest, judicial practice also considers the facts of disposal against the will and integrity of the acquirer upon resolving a dispute on vindication of shares and interest. It is also impossible to identify the grounds for non-compensatory protection of shares and interest due to the immateriality of the object, which renders the application of traditional ideas about ownership impossible – the location of the object in the sphere of economic dominance (Borysova et al., 2019; Kateryniuk, 2022).

As the existing judicial practice shows, an appeal against decisions of the meeting of participants (shareholders) or decisions of the registration authority is not always capable of leading to the restitution. Thus, for example, if the management body of a business company makes an illegal decision to increase the authorised capital and then alienate newly issued shares (newly formed interest) to various purchasers (Miethlich, 2022). Notably, the legislator also sets different limitation periods for vindication and for judicial appeal against decisions of the meeting of participants (shareholders) or decisions of the registration authority. Their synchronisation (unification with the statute of limitations for vindication) is meaningless due to appeals against various decisions of the management bodies of a business company, which may not be related to the movement of shares and interest. Same rules apply to synchronisation of the statute of limitations of vindication and appeal against decision of the management bodies of a business company regarding the composition of participants, distribution of shares (interest) due to possible discrepancy in the statute of limitations, when shares (interest) are alienated "along the chain", and the last of the acquirers gets the opportunity to defend themselves by referring to the antiquity of vindication claims.

Conclusions

The state of corporate rights regulation and redress mechanisms in Ukraine presents itself as a complex amalgam of legal intricacies and challenges, which, from a criminological perspective, can expose vulnerabilities in corporate governance and oversight. Even though recent legislation has addressed various gaps, the persisting issues hint at potential avenues for corporate misconduct and malfeasance. The extensive regulatory framework governing the remedy of

corporate rights and legal persona of business entities in Ukraine brings into focus the intersection of corporate law and criminology. The nuances of civil liability, such as the liabilities of parent companies for subsidiaries or the liabilities of officials causing damage to enterprises, also have significant criminological implications. Breaches of corporate rights, especially when they don't manifest as immediate or tangible losses, can set the stage for complex frauds and criminal exploitation.

While doctrinal shifts and statutory regulations have begun to reshape the responsibilities of corporate governance bodies, the balance between corporate governance and the potential for white-collar crimes remains tenuous. The observed dichotomy in legal regulations — where state oversight of companies sees rapid evolution while the regulation of internal corporate affairs lags — accentuates the criminological risks inherent in corporate enterprises. In fact, the gaps and imbalances in legal frameworks might inadvertently be enabling corporate criminal behaviors or be exploited by malicious actors. The pressing need to delve deeper into the theoretical foundations for remedying corporate rights is palpable. This not only pertains to defining the scope and boundaries of these rights but also understanding the criminological implications and risks associated with potential violations. Crafting a unified, holistic system for redressing corporate rights is paramount. This system should not only streamline legal processes but also be acutely aware of the criminological threats and challenges, ensuring a safer and more accountable corporate landscape in Ukraine.

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