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NON-FEASANCE IN THE ALGORITHMIC BOARDROOM: DIRECTORS' OVERSIGHT DUTIES OVER AI SYSTEMS UNDER THE COMPANIES ACT, 2013

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Abstract

With the advent of Artificial Intelligence in the present era, the systems and structures of corporate decision-making are now being increasingly mechanized. It is now the algorithms that determines how to marks borrowers, examine suitable candidates, appropriate pricing of goods, detect any misconduct or breach as well as format the main reports which the Board can lean on and in many firms today, AI is gradually replacing man to take the central place. The Companies Act, 2013 is the primary statute that provisions for the duties of Board of Directors in India so as to ensure that the corporate processes that involve human subordinates can be made accountable and the systems can be made transparent. This paper throws light on how, in firms where AI is becoming the business, the habitual governance failure due to an inactive Board is not misfeasance but *non-feaseance as only* self-learning AI systems are made to gradually modify or even mutilate its risk exposure and profiling. The paper proceeds to highlight how the statute already encompasses an indispensible obligation to monitor such systems, ranging from Section 166(3)'s standard of care, skill and due diligence as well as the risk profiling provisions of Sections 177, 134 and 149, Schedule IV and the SEBI listing obligations. But the ambiguity of depending on non-human AI agents, inequity of data and information and the automated drift makes obligations dormant where they must have been non- negotiable. This research relies on the Delaware duty to monitor and eventually concludes that it is an issue of interpretation and not of legislative breach and finally provides one comprehensive pack of reform recommendations that in no way needs amendment of the Act.

Keywords: Directors' duties; Duty of oversight; Non-feasance; Companies Act, 2013; Algorithmic decision-making.

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I. Introduction

Today the situation is that the boards manage and command via automated systems that they cannot fully understand. Automated algorithms are now the norm between the board of directors and control of the governance. They now mark and screen borrowers and narrow down candidates, tries to appropriately give prices to goods, detect any unwanted act or fraudulence and frame almost all management reports for the board administration. Now AI does not sit in the back seat anymore among the new corporate of automated traders and lenders' platforms, ad-tech corporations and platform intermediaries. It is now at the nucleus of the business. But the Board's obligations were meant to bind human secondaries who perform the corporate obligations and who can be controlled, surveilled and can be held accountable.[1]

This paper thus highlights that the main issue at hand is not of abuse of AI by the Board but of its inactivity due to its sole reliance on it. What an automated boardroom does wrong is an omission like not understanding or even examining the system's design, how it was made, the inputs it provides as well as its possible risks, not planning for risk management or risk awareness and profiling and the likeliness to pass a machine output without verification due to lack of required knowledge. Such omissions can only be termed as non-feasance.[2]

We advance three claims here. Primarily that the Companies Act, 2013 imposes a material duty to examine automated algorithms under Section 166(3) and the risk oversight routine although it does not mention technology at all. Secondly the AI based decision-making impounds on the inherent obligations through insufficient clarity, outsourcing to automated agents, data disparity and the nonstop advent of self-learning systems, leaving such necessary obligations misinterpreted. Thirdly the paper also suggests that a total legislative overhaul is not what is necessary and replaces such broad amendment with proportionate recommendations. The already present panel structure ought to be entrusted with and made aware of the algorithmic threat and the provision of Section 166(3) is to mean an obligation of technological due diligence. The paper is limited to the provisions of the Companies Act but its neighbouring enlisting duties, data protection, industry specific oversight and supervision along with delictual obligations are omitted.[3]

[1] Companies Act, 2013, § 166, No. 18, Acts of Parliament, 2013 (India).
[2] Companies Act, 2013, § 166(3), No. 18, Acts of Parliament, 2013 (India); In re Caremark International Inc. Derivative Litigation, 698 A.2d 959, 971 (Del. Ch. 1996).
[3] Digital Personal Data Protection Act, 2023, § [relevant section, if applicable], No. 22, Acts of Parliament, 2023 (India).

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II. Establishing Non-Feasance through Directorial Obligations

When a legal obligation is skipped and is not performed, such an omission is termed as non- feaseance, while misfeasance can be defined as the abusive execution of a lawful obligation and malfeasance can be defined as the performance of an absolutely unlawful act. Such difference between the terms is necessary to be understood as the director's obligation of oversight is a positive duty to act which can be performed lawfully by active actions of administration and not by an effort to skip harm. Such actions might involve inquiring with the right questions at the right time, framing adequate reporting procedural systems, investigation of the responses and thus meeting the needs of governance as such. If a director is just appearing in meetings, simply casting their votes while the infrastructure still remains unchecked; he has not committed a wrong of execution but has left out the much needed control and duty of care vested in them.[4]

Such a duty is provisioned for in Section 166(3) of the Companies Act, 2013, which says that all directors have to render their obligations "with due and reasonable care, skill and diligence and … exercise independent judgment." Such an obligation is imposed on both executive and non-executive directors and is for the requirement and smooth flow of operations in the company, subject to any statutory limitations. Each of the three important words has their own role to play: while 'care' necessitates comprehension of the automated structures that carry with them corporate risk; 'skill' inculcates an important baseline criteria for evaluation of every directors' technological knowledge and ability and 'diligence' is introduced to call for assertive and constant inquiry into the system that sheer attendance will not gratify, thus making this word the most essential.[5]

The words of "independent judgment" introduce the most crucial duty because judgment, entirely of the director can in no way be used to understand an output that he cannot comprehend at all and can nor enquire into. If any board inculcates in its governance such an automated conclusion that it can in no way examine, it cannot employ its independent judgment in any way thus handing over all judgment in the hands of AI. This makes the AI led governance to be just an illustration of the earliest duty and not a unique obligation which is the indelible, central duty to manage and run the company just put to test by another agent.

[4] In re City Equitable Fire Insurance Co., [1925] Ch. 407; Companies Act, 2013, § 166(3), No. 18, Acts of Parliament, 2013 (India).
[5] Companies Act, 2013, § 166(3), No. 18, Acts of Parliament, 2013 (India); Rishabh Mohnot & Hrithik Merchant, § 166(3) of the Companies Act, 2013: Filling the Gaps of an Incomplete Provision, 15 NUJS L. REV. 154 (2022).

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III. What the statute says about oversight?

There is no one section of the Companies Act, 2013 that provisions for a "duty to supervise." Such an obligation arises when we read certain number of sections at once. While Section 166(3) asserts the foundational norm of care, skill and diligence, Section 166(2) by asserting that the director needs to act in good faith in order to achieve the organization's objectives and to further the beneficial needs of its employees, the local community, environment and its stakeholders who are the most vulnerable ones to the failure or discrimination of an algorithm, certainly gives a medium for fulfillment of the said norm. [6]

The oversight gear is provisioned for by the risk management equipment. The audit body is mandated by Section 177 which entrusts it with investigation into the internal fiscal regime and governance along with the assessment of the threat or risk oversight structures and also assigns the execution of the monitoring systems by way of which any issue can be forwarded like concerns over a dysfunctional structure or design.[7] Moreover, Section 134(3)(n) necessitates that the Board's Report ought to have an assertion and information relating to the origin and enforcement of a risk profiling and governance strategy that can even forward and indicate any such issue which according to the board may prove to be hazardous for the survival and sustenance of the company. Any fatal degradation of the automated model constitutes a survival crisis to an algorithmic enterprise whereby any breach of the threat management strategy is difficult to be harmonized to the sub-section.[8]

Further, another class of directors known as the Independent directors has been given heightened duties. They are known by their independence, freedom and knowledge under Section 149(6) and Schedule IV needs that such independent directors are able to content themselves of the truth of the finances and fiscal regime. They must also examine if the body's risk management structures are vigorous thereby placing them in the position of a supervisor by not giving them a ceremonious role.[9] The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 places more duties on listed companies. Their board has the responsibility of not only examining into the risk profiling but also ushering the strategy (Regulation 17), an audit panel is made statutorily indispensible (Regulation 18), with the largest ones needing a separately allocated risk-management committee (Regulation 21). In the absence of any changes or modifications, all such provisions will necessarily and by all means

[6] Companies Act, 2013, § 166(2), No. 18, Acts of Parliament, 2013 (India);
[7] Companies Act, 2013, § 177(4), (9)–(10), No. 18, Acts of Parliament, 2013 (India).
[8] Companies Act, 2013, § 134(3)(n), No. 18, Acts of Parliament, 2013 (India).
[9] Companies Act, 2013, § 149(6) & sched. IV, ¶ II, No. 18, Acts of Parliament, 2013 (India).

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lead to algorithmic-risk oversight.[10]

If taken up as one and read together, we will see that the statute in itself requires that a structure and policy be formed and incorporated into the system for overseeing any possible corporate risk. Thus, the problem is not of want of duty but of its disempowerment. The gaps are the statute not mentioning technology or automated threat and Section 166(3) being broadly silent on the meaning of the obligation imposed thus keeping no other Indian alternative to the oversight framework with the obligation branch fixated otherwise. Simply put, these laws are like empty cardboard frames.[11]

IV. Analyzing the rift in Algorithmic Oversight

Algorithmic decision-making creates pressure on the latent obligation, distinct from paper-based governance. To begin with, opacity is the reason behind this. A lot of machine learning systems are considered as "black boxes" by their own deployers. This means that there are no causes which can explain the results of these algorithms. An outcome which cannot be explained as it is impossible by definition cannot be subject to "independent judgment" as mentioned in Section 166(3). Openness does not make one excuse from this obligation; rather, it changes the spotlight from the result to the machine itself.[12]

The second one is delegation to a non-human being. Abdication has always been prohibited within the concept of the duty of care given that directors can entrust tasks to other people but are not obliged to entrust their own reasoning abilities. Due to the fact that a non-human agent is not subject to examination and questioning, the algorithmic way of task completion negates all the usual aspects of delegation. Legitimate delegation becomes illegitimate abdication for the board that frequently validates the creation of models.[13]

The third issue is information asymmetry. The model of oversight that the law envisions presupposes that a sound system of reporting will guide to the raising of red flags up through to the board level. The problem with AI is that it interferes with this anticipation on both ends by covering up the flag and normalizing its effects till they are considered normal and later producing the very reports which are used by the board as information.

Fourthly, there is deviation. The model once accepted as valid will conclude to be valid;

[10] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, regs. 17, 18, 21 (India).
[11] Rishabh Mohnot & Hrithik Merchant, § 166(3) of the Companies Act, 2013: Filling the Gaps of an Incomplete Provision, 15 NUJS L. REV. 154 (2022).
[12] Pierluigi Matera, From Red Flags to Black Boxes: Corporate Oversight in the Age of Artificial Intelligence, OXFORD BUS. L. BLOG (Mar. 2026).
[13] Official Liquidator v. P.A. Tendolkar, (1973) 1 SCC 602.

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the way it acts will change as conditions change, sometimes indiscernibly. The oversight of a learning machine should not be an exercise done once and done for good, it should be a constant responsibility, a constant task of reassessment that is ill-suited to the calendar of periodical meetings of the board. All together, these features mean that the vague diligence test of Section 166(3) will apply with particular force where the director is particularly unrehearsed: dealing with a structure that is ambiguous, self-designated, information-controlled, and variable. In recent studies, this reaction is seen as two emerging duties - the duty of AI due care that weights the cognitive capacity to examine and oversee the tools that the board uses.[14]

V. Comparative yardstick of the Duty to monitor

Delaware delivers the most thorough discussion concerning the duties of the directors to supervise, and its importance lies exactly in the fact that there is no comparable standard in India. In Caremark case, Court of Chancery held that the directors have a duty to make an honest endeavor to create a reporting mechanism within the corporation, and if they fail to do so thoroughly, it can result in liability.[15] Duty of care was later recognized in Stone v. Ritter as a part of duty of good faith, which is a part of duty of loyalty. Liability ascends when directors totally neglect setting up the reporting system or deliberately ignore supervising it.[16]

In the case of Marchand v. Barnhill, the principle was defined as a necessity for supervision over "mission-critical" risks, whereby it became clear that the board should try to produce an suitable mechanism for monitoring and reporting the core risks of the enterprise; the lack of such a mechanism at the board level in respect of a food risk of the food company was appropriate to bring a case to court.[17] In re McDonald's prolonged the scope of duties of corporate officers related to the area under their responsibility .[18]

India is being valued based on the content and not the references. The essential principle for Delaware is consistent with the principles of the algorithmic firm in that a disappointment to have an oversight mechanism for the risks of algorithms on the board amounts to the Marchand oversight. There is no Caremark equivalent in India, but in concurrence with section 166(3), it can and should be inferred as having the same suggestions. The second benchmark comes from the UK. Section 174 of the Companies Act 2006 creates a double subjective-

[14] Maria Lillà Montagnani et al., Fiduciary Duties and Business Judgment Rule 2.0 in the AI Act Age, OXFORD BUS. L. BLOG (Jan. 2026).
[15] In re Caremark International Inc. Derivative Litigation, 698 A.2d 959, 971 (Del. Ch. 1996).
[16] Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).
[17] Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019).
[18] In re McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343 (Del. Ch. 2023).

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objective standard of care - the highest between what could reasonably be anticipated from someone in the role and what the particular director recognizes personally.[19]

VI. Liability, Safeguards and Recommendations

Under which conditions will indecision on the algorithmic systems result to liability in India, and how can one be protected from such liability? In case of violation of Section 166, the penalty will be that is provided by Section 166(7), and serious breaches of the duty of care may also help to demonstrate mismanagement under the oppression and mismanagement doctrine. Section 447 dealing with fraud is not appropriate since there has to be an intent to deceive that is not present in the case of inactive neglect..[20]

Section 149(12) Safe Harbour Clause bounds the liability of the non-executive or independent director to the activities of the board which take place with the knowledge of the director, owing to board procedures and his approval, participation or lack of diligence. The final point forms the fulcrum for algorithmic oversight. It would be tough for a director who had not made any effort to apprehend, observe and supervise a major AI system to claim that they have implemented diligence and the safe harbor clause does not apply anymore..[21]

India doesn't have a well-developed business-judgment rule like Delaware. The best analog is the "independent judgment" requirement of Section 166(3), where the main issue is that the protection offered by it can be tied to no judgment ever made. A board that does not involve with the algorithmic system does not make any judgment to warrant the protection offered. The rule, as it presently exists, depends on the very process which its non-execution defines. Good-faith dependence on officers and experts is suitable, but it is adequate when it is reasonable - blind faith in a technical team that cannot be supervised is not a defense but, in fact, an example of the breach. There is still a hard evidentiary problem: attesting the counterfactual of how better oversight would have avoided the harm. This problem makes the case for diligence in documentation, not for negligence in the matter.

There are five reforms, all of which revolve around interpretation and institution-building rather than varying the Act itself. First, the Ministry of Corporate Affairs must define,

[19]Companies Act 2006, § 174, c. 46 (UK) (duty to exercise reasonable care, skill and diligence, assessed on a dual objective and subjective standard); see also Companies Act 2006, § 172, c. 46 (UK) (duty to promote the success of the company); cf. Re D'Jan of London Ltd., [1994] 1 BCLC 561 (Ch).
[20]Companies Act 2006, § 166(7), c. 46 (UK) (penalty for contravention); Companies Act 2006, §§ 241–242, c. 46 (UK) (oppression and mismanagement); cf. Companies Act 2006, § 447, c. 46 (UK) (fraud).
[21] Companies Act, 2013, § 149(12), No. 18, Acts of Parliament, 2013 (India) (liability of independent and non-executive directors confined to acts or omissions occurring with their knowledge, attributable through board processes, and with their consent or connivance or where they failed to act diligently).

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through circulars or explanatory notes, that the standard of diligence in Section 166(3) comprises technological diligence in respect of major algorithmic systems. Second, boards that arrange such systems need to have AI knowledge on board - an expert director or an advisor to the board who can observe models - in order to enable "independent judgment." Third, there is a strong need to address the issue of algorithmic risk in the prevailing committee structure - that is, either Section 177 audit committee or Regulation 21 risk management committee..[22] Fourth, in the case of companies that deploy large-scale AI, they should unveil the risks of algorithms in the Report under Section 134(3)(n), by tallying the risk of models to the existential risk report which is essential under the section. Fifth, there should be a standard for documentation comprising model inventory, validation reports, human-in-the-loop audit trail, and incident logs so that the process of due diligence is not only done but is documented for future use. All this will make a hidden duty into an active one deprived of changing the structure of the act.

VII. Conclusion

Though, the absence of provisions for artificial intelligence in the Companies Act 2013 cannot permit board members to continue inactive. The responsibility for care, skill and diligence in Section 166(3) of the Act, in the context of the audit committee, the risk policy, the independent director and the listing conditions allied with them, signifies an obligation that can be understood mostly enough to contain algorithmic systems. It is not in the Act itself where there is a need for an obligation, but in the way such an obligation is framed- a question of interpretation and institutional design rather than legislation failure.

Provided that non-involvement of directors in relation to artificial intelligence systems establishes a breach of the key obligation to control the company - and by means of guiding, equipping, empowering, being transparent, and documenting their performance, allow boards to discharge this obligation -will confirm that Indian company law can interface with the algorithmic firm built on the criteria set forth in the Act. Those managers who function by means of systems outside their full understanding should be obliged to at least watch.

[22] The use of the existing Section 177 audit committee or the Regulation 21 risk-management committee avoids the need for fresh legislation; cf. Maria Lillà Montagnani et al., Fiduciary Duties and Business Judgment Rule 2.0 in the AI Act Age, OXFORD BUS. L. BLOG (Jan. 2026).