

The (small 's') Science and Fiction of A.I. Challenges to British Corporate Law

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A.I. and the economy

- A.I. and other transformative technology's potential to automate tasks, increase speed and accuracy, and cut costs generating gains from consumption side-effects (e.g. labour productivity, personalisation, time saved, quality)
 - e.g. *Uber's* driverless cars, diagnoses in healthcare, predicting customer preferences or demographics, algorithms for various (non-)financial purposes, enabling/limiting high-frequency trading
- Estimated that 30 per cent of UK jobs might be under threat from technology, but predicted the domestic economy could see productivity boosted by up to 30 per cent and savings generated of up to 25 per cent (['The economic impact of artificial intelligence on the UK economy'](#) (PwC Report, June 2017))
- 'Artificial Intelligence could contribute an additional \$15.7 trillion to the global economy by 2030' ([The Times, 23 May 2018, 12-13](#))
- Yet assisted, augmented, and autonomous technology presents various incontrovertible social and/or ethical controversies for economy and society

Challenges posed to English corporate law

- The potential legally (and ethically) disruptive nature of producing, and using, A.I. in business organisations:
 1. What are the potential social and ethical ‘costs’ of introducing, or purchasing/licencing, A.I. and other morally significant technologies?
 2. Does the existing law on directors’ duties effectively manage and contain the potential social and ethical costs of developing, or incorporating, A.I. into a company’s productive operations?
 3. Should directors’ duties (or an alternative legal-regulatory framework), as a normative matter, pursue this end?

Some potential socio-ethical 'costs'

- Increasing design, and use, of A.I. in corporate realm generates metaphysical questions about the fairness, reasonableness, and unconscious bias in the decisions of these 'novel beings'
- Broader ideological questions about permitting explicit ethical values for A.I. to be determined according to private (e.g. 'commercial' and 'professional'), rather than societal (e.g. ('philosophical', 'cultural', 'religious') criteria
- Yet failing to imbue A.I. systems with moral principles may place society in the dangerous situation of allowing algorithms to decide what is best for us
- More extreme concerns about having to save the world from corporate designed, patented, and distributed machine-learning overlords

Implicating directors' duties

- So, the question becomes one about the behavioural obligations of directors whose companies develop, or incorporate, A.I. technologies into productive operations
- But what are the applicable obligations and liabilities for corporate boards whose companies produce, or invoke, assisted, augmented, or autonomous A.I. in this way?

What are director's duties?

- Covers any form or size of company – CA, 2006, ss 170-177
- Comprises: (i) fiduciary duties (loyalty, good faith, no conflicts, etc.) and (ii) common law duty of care and skill
- Fairly abstract codifications of common law norms aimed more at identifying satisfactory decisional processes than on substantive norms
- Typically enforced, derivatively, through shareholder action on behalf of company against wrongdoing directors

Practical (in)significance of directors' duties?

- A key part of legal-institutional framework designed to address managerial 'agency' problems by regulating directors' discretion
- Provides *ex ante* threat of potential liability for moral hazard, incompetence, etc. or *ex post* remedies for breach
- But see Eisenberg on 'symbolic' (rather than realistic) standards of review (M.Eisenberg, 'The divergent standards of conduct and standards of review in corporate law' (1993) 62 *Fordham Law Rev.* 438)
- Further, English courts are traditionally diffident towards directors' business judgments, which *practically limits* duties as an effective managerial accountability mechanism (e.g. *Howard Smith v Ampol Petroleum Ltd* [1974] AC 821)

Focusing on the duty of good faith

- CA 2006, s 172(1) provides:

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.

The referents of 'Success'

- Further, CA 2006, s 170 add:

The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.

The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

- Common law equivalent duty required directors to act in the company's interests; cases apparently settle on commercial view
- See also, CA 2006, s 171 – duty to act within powers:
 - A director of a company must—
 - (a) act in accordance with the company's constitution, and
 - (b) only exercise powers for the purposes for which they are conferred.
- Shareholders retain constitutional prerogative – CA 2006, ss 21 and 33

(Im)permissibility of socio-ethical outcomes?

- CA 2006, s 172 is *owed to the company*, but the ‘mandatory-default’ content principle of first element of duty is plainly one of shareholder prioritisation and/or shareholder wealth maximisation
- Second element of duty contains non-exhaustive ‘regard list’, which permits, *instrumentally*, moral or ethical considerations related to A.I. in a company’s productive operations
- Yet the right to enforce directors’ general duties is retained, derivatively, by the company’s shareholders
- Accordingly, transformative morally significant technology might be produced – *or not* – based principally on shareholder value thinking

Contextualising UK's pro-shareholder bias

- Constitutional prerogative (CA 2006, ss 33 & 21)
- Mandatory 'without cause' removal right (s 168)
- Anti-dilution rights (ss 171, 549-551, 561-563)
- 'No frustration' principle (Takeover Code, GP 3 & rule 21))
- Approval rights for significant transactions ((in the case of Premium Listed companies) UKLR 10 and 11)
- UK impediments to adopting e.g. dual-class shares, staggered boards, etc.

Is normative change possible or desirable?

- The doctrinal and normative fabric of English company law would need to undergo a radical paradigm shift, both practically and juristically, to accommodate a different kind, or emphasis, of behavioural expectations
- Pre-existing *extraneous legal rules* arguably are better able to moderate the challenges posed by novel technologies: e.g. a fatality like the one involving *Uber's* autonomous vehicle would not necessarily implicate managerial accountability mechanisms, but just as, if not more, likely to focus upon:
 - (i) criminal and/or negligence proceedings against human “safety driver”
 - (ii) If “safety driver” was negligent, then *Uber* could be vicariously liable as employer; similar approach related to decisions to test or deploy the vehicle, training provided to the operator, etc.
 - (iii) product liability action in respect to suppliers of vehicle’s algorithm-based sensors (which may – or may not – have been *Uber*)
- Still, the global scale of corporate operations logically requires the formulation, adoption, and enforcement by international institutions of endogenous governance Codes of Practice, market-based regulatory frameworks, etc.



End.