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LINKING THE PRESENT WITH THE FUTURE: THE POLITICS OF FUTURES RESEARCH IN JUDICIAL BUREAUCRACIES¹

by

Sohail Inayatullah

INTRODUCTION

Using the experience of futures research in the Hawaii courts² as a departure point, this article examines the politics of futures research and planning, particularly the ways in which the present and the future can be linked in judicial bureaucracies. Successful and failed attempts to link the present and the future in the planning/policy cycle are explored.

After a series of citizen and judicial conferences in the 1970s, the Hawaii courts initiated a problem-oriented planning process. However, problem solving simply reinscribed the present on to the body of the future making the immediate all pervasive and hence unsolvable. Leadership dissatisfaction with this approach led to a comprehensive planning project in 1979 with futures research a central part of this project. Futures research focused on long range, high impact, but low probability issues such as the rights of robots, sentencing in the context of natural brain drugs, the secession of Hawaii, and the governance implications of a runaway Constitutional Convention.

An institutional power shift within the courts forced research to move from the long range to the shorter quantitative trend level. While the philosophical issues were seen as secondary, the gains made from the view of the court bureaucracy in terms of justifying budgets were critical in further legitimizing futures research. Without acceding to the politics of the immediate, the future would have immediately been forgotten.

Eventually, the Judiciary developed a review titled *Justice Horizons* which summarized future oriented issues. In 1990, a Foresight Congress to generate new visions and ideas about the role and structure of the courts was held.³ Congress participants included members of the bench, bar and public. Through the use of scenario writing, participants developed recommendations for the future of

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the courts. However, in a surprising turn of events, the court futures research program was abandoned in 1991. This was a result of changes in internal politics, the Hawaii recession and the sudden realization by top management that the Congress had developed not vague scenarios but concrete implementable recommendations for system transformation. Thus--while the often evasive link between the future and the present was made--the impact of this link was that the future was made fugitive, all but eliminated. At present, the newly appointed Chief Justice has decided to revisit the future and use the Congress recommendations as a tool to develop an agenda for the next decade. However, it remains to be seen how successful he is, for instead of foresight the short term political interests of various pressure groups might force him to return to incrementally oriented planning activities.

TENSIONS

Prior to the recent debacle in the use of futures research, in the eleven years of institutionalized futures research in the Hawaii courts there were numerous conflicts between researchers, bureaucrats and top administrators. Among these were the classic issue of researchers presenting too much information and management desiring one future, a plan, not a range of alternative futures. While researchers privileged the educational view of forecasting (to learn about the future so as to understand today), management privileged the political, strategic discourse (the "bottom-line" for bureaucracies). The time horizon for researchers and administrators was also different. While the futures perspective is often to unleash time, the management focus was to domesticate time, to make it predictable and routine. Finding a balance between these divergent views as to what constitutes appropriate planning and forecasting was a challenging task. Some of these issues were naturally resolved; others remained structurally endemic to any institutional forecasting project whether in the courts or in business.

The 1990 national conference held in San Antonio, Texas on the "Future and the Courts" saw many of the tensions that the Hawaii courts had experienced in the 1980s resurface. However, pre-conference meeting assurances that good futures research meant being able to be disjunctive from the past and present (to say the outrageous and the impossible) created an atmosphere where creative visions were possible. Participants developed a range of visions and scenarios for the courts (for instance, the present continued, the global courts, the green courts, transformational high-technology courts) and strategies to achieve these visions. The Hawaii courts in

the planning of their own foresight conference used these lessons and created a similar creative atmosphere. By developing a planning committee that had representation of judges, attorneys, futurists and planners, the conference managed to speak to the near and long term future, to the creative and the routine, and to the practical and the ideal. However, in that there was no senior bureaucrat who was held responsible and accountable for the future—even though the judges and others had legitimized it—the entire foresight effort was eventually eliminated. In this sense, while planning theory often assumes that a program will be more successful if more people own it, in the Hawaii case, since no one particular individual had ownership and control of foresight, it eventually fell by the wayside.

LINKS

Given the structural problems in planning and forecasting in court bureaucracies, what then are the possible ways with which to link the (needs of the) present with the (vision of the) future and thus potentially resolve the policy conflicts embedded in forecasting in court bureaucracies? While we use the Hawaii courts as a starting point, the following discussion is generalized for institutions and other policy environments.

The first necessary link is *leadership*⁴. The future as vision or as mission can be linked with the day to day operations through administrative and judicial leadership. But this link is difficult as leadership comes and goes; some leaders are open to futures studies, others are not. Their reasons for openness could be to enhance personal power or indeed to transform the institution. Both reasons might be present depending on the particular life-cycle of the institution.

The proximity of the futurist to the leader also influences the type of futures studies that develops and the success and failure of transforming the institution. For example, is the futurist a researcher in the planning or research department, is he a chief planner, or is she the advisor to the leader (that is, the organizational wizard)? While proximity is often helpful to the futures effort it can paradoxically hurt. If leadership changes, then the follower or advisor associated with the leader may also have to leave. Alternatively, being a researcher may not lead to grand, high status projects, but while leadership goes through its various cycles, the researcher can continue to write, forecast, and continue to transform the local and institutional environment where possible.

This certainly has been the case in the Hawaii courts, where leadership has gone through various cycles of enthusiasm and a lack

of concern with respect to the future. Institutionalization is important but, without vision embodied in leadership, institutionalization--even as it protects the program--does so at the expense of the quality of the research. Paradoxically, too much interest in futures research may threaten the bureaucracy, thus endangering the program, while being cloistered in a research office may in the long run cause it to thrive.

The second link is *epistemological*⁵, specifically, the need for a critical epistemology. The future within a critical view becomes relevant, not because of the specific predictive forecast, since these forecasts usually leave decision-makers still puzzled as to how events and trends ten years from now will change their own worlds. However, futurists continue with popular (but often empty) exhortations such as: "change is rapid, we will live our life in the future or the classic, and future awareness will improve decision-making." In contrast, in the critical futures view, the future becomes relevant because we can use it as an asset to remark about the present. The future then is used to make the present unnatural, to make it contentious, to open it up. The past, too, can be used in a similar way.

Here, by gaining distance from the present--through scenarios, through visions, through the construction of alternative realities--the present is made problematic. What is, does not always have to be. This is different than using forecasts to state what will occur. Much of futures research often ends up--as discussions in the bureaucracies often do--in arguments over whose forecast is correct, more reliable, more likely and so forth. But using the future as a way to comment about the present allows the immediate to become less frozen in time--the present to become unnatural, one present among many, thus allowing for the possibility of real change. The way one then constructs the future greatly impacts the success of research. The goal here is to argue that the future is similar to the present and the past in that it is one possibility among many. The real becomes interpretative and a particular reality becomes authoritative, not because of *a priori* ontological factors, but because of various struggles of meaning among constitutive groups.

The third link is *ownership* or *self-identification*. Instead of situating the future in experts, it is better to have the judge (or bureaucrat or technocrat) own the future him- or herself. Even if the judge's work or the administrator's vision is not as radical as the futurist might want it, ownership allows that person to move into an alternative temporal dimension. While the futurist might want to present the information to a panel or committee, thus enhancing his own self-image as an expert, this posturing merely in the long run makes it

more difficult to futurize the institution in question. The more useful view, then, is that there is a futurist in every person. The person who locates herself professionally as a futurist should then aim at facilitating the other's view of temporality, of change, and of design. At the same time, within bureaucracies there needs to be some office or person who is officially in charge or responsible for the future.

The fourth link is focusing how change will impact the *role* or *purpose* of an institution. Predictions or scenarios about the future are more interesting if they can be linked to how the institution or the people within it will have to change. This is applicable again to history. For example, by using a sixty-year time horizon--the last thirty years and the next thirty years--we can see how the mission, the purpose (of the courts, for example) itself has been or could be transformed. Once the changing role has been understood, then goals and operational tasks can follow. By locating conferences or commissions in the prediction discourse, the question of significance remains unanswered. However, by asserting that a forecast is important because it will change one's purpose, one's personal mission, or the mission of the institution in question, then it has more currency. Merely providing a forecast in a government setting--where profit is not what gives overall institutional meaning--leads nowhere. The linking question then becomes: how will the institution change its basic purpose because of technological, demographic, political, cultural or economic changes?

The fifth link is *structure* and *participation*. If leadership owns vision and the long range future, then middle management must participate in creating the middle range future *with* other operationally oriented employees. Middle management then becomes the key to creating an alternative future. These middle managers make the vision real; they alter their goals in line with the vision and in turn change or transform the vision by their actions. Middle managers, too, must believe that the vision will benefit them, will clarify their lives, give them a role, and thus make the politics of everyday life easier. However, most often participation is avoided since it makes the decision-making process too messy; it brings in too many variables, and it allows the possibility of controversy. In this sense, a vision must both emerge from the group and lead the group out of what it thinks possible and out of how it defines itself in the *present*. Middle management, while often the most enthusiastic about futures research, has the least amount of available quantitative (linear) time to pursue the future. Rather, the manager's day is spent in making the bureaucracy work efficiently.

From another view, this is also true for lawyers. Their interest in

futures planning is whether or not it can increase profits. Lawyers will use futures research as long as it increases their wealth or prestige; otherwise the exercise remains overly speculative, divorced from real life facts. It is judges who no longer operate in the profit or bureaucratic discourse that can most easily use futures studies. However, judges, too, have interests that inhibit their use of futures studies. Besides working in bureaucracies, many judges live in places where they have reelection concerns. In addition, for administrative judges the pressures of caseload make using futures research difficult. Redesigning the structure of the courts (social engineering), changing law and policies (recommending changes to the legislature), or merely increasing bureaucratic efficiency is often problematic for judges as well.

The final and sixth link is *theoretical* or *historical*. The question in the legal context is: will the changes ahead (due to technology or demographics or other factors) alter the patterns of the past or will the weight of the past continue. Will the pendulum effect of history (of the structure of society, courts and laws)--shifts of professional/law; written/oral; centralization/decentralization; homogenization/diversity; formal/informal; adversarial/negotiation; absolute/substantive/procedural; individual/state--continue in the future? And how? Without this link, then conferences--while strong on data (trends and problems) and values (visions, preferred futures)--will miss the structural and historical. The historical view is critical in that it reminds us that, for example, the move toward informal justice (mediation) is understandable given the previous decades of formal adversarial justice. The pendulum view also predicts that a form of the adversarial system will return once mediation has gone to an extreme.

Can we then conclude that new technologies, however revolutionary, will not change basic historical patterns? If so, then perhaps institutional redesign is not needed. Basic social problems (such as the individual versus the collective) will remain the same, indeed, they have not changed noticeably in the last two thousand years if one takes the macroview of history as sociologists such as Sorokin do.⁶ Should we then relax and let these periods of dramatic change pass by and wait for a time when social change slows down?

Summarizing this section, we suggest that, without leadership, futures research will not impact the institution. Without an appropriate epistemological perspective, forecasting will remain bounded by a future that has no relationship to the present. Moreover, without a critical epistemology, the future will merely reinscribe the present instead of calling into question our definitions of rationality and the real. Without ownership or self-identification in the policy/futures

process, the future will remain foreign sited in a visiting consulting team. But by linking ownership of the future to institutional leadership, then the present can be changed. Central to changing the present is including upper and middle management in any planning for the future. At the same time, while everyone should participate and own the future, it needs to have an official site, an office or an administrator. In addition, for forecasts to have relevance they must relate to the changing purpose or mission of an individual or organization. Without this anchor, forecasts and designs remain interesting but they do not provide a context within which change can be understood. Rather, forecasts merely restate the obvious: there will be more or less technology, more or less centralization. Here the final link of theory and history is critical. Have the changes under study occurred before? Will changes in technology lead to substantive changes in the law or will they shift the pendulum away or toward the classic cycle of individual versus states' rights, for example?

FAILED LINKS

In the Hawaii courts (and other institutions) there have been many failed links. While the sites of responsibility for failed links are numerous, it is the futurist/planner that bears the brunt of this commentary as the self-professed agents of change, fear, and hope.

First, futurists tend to give forecasts, predictions *only* in the hope of increasing general awareness. We are weak at implementation and at legislative money politics--the strategic discourse. More problematically, there is no way to measure increased "future awareness." *Second*, the location of futures research often remains in a specialized research team within a technocratic site. The futurist is seen as a planner as a technocrat. The image of the futurist as court wizard, as the giver of meaning is rarely used. The wizard speaks magic and thus continuously creates new worlds, while the planner (arguing that other views are fuzzy, less real, impractical) solves problems⁷. One speaks from mythology while the other speaks from a view representing the voice of science and rationality, the voice of the modern world. *Third*, the futurist does not speak to power and tradition. Giving information about the future does not necessarily change decision-making--decisions are made for other reasons--personal power, party power, tradition, fear, prestige, ego, to mention a few. This assertion counters most of the reasons that futurists give as to why institutions need forecasting, such as that the rate of change has increased or that we have entered an information

world (the post industrial world where politics and ideology will no longer exist). If more information does not necessarily lead to better decisions, then the efficacy of futures research becomes increasingly problematic. Futures research (and planning) then is used most often for symbolic power, to persuade critics that modernity and rational policy making has been reached. However, in most institutions (certainly the courts), there are times when futures planning has been used for symbolic purposes and times when an alteration in temporality is used for the purposes of social change, for meeting the changing needs of various constituencies. But when consolidation of power is the goal, then research suffers since power blinds the ability to see alternatives outside the self-interest of the status quo.

The *fourth* failure is that futurists research only a particular type of future: only spiritual or only technocratically orientated, that is, we do not develop true *alternatives*. While we claim to articulate alternative futures, the agenda of the researcher in terms of her or his particular politics remains. While leaders and bureaucrats are critiqued for their hidden agendas, futures researchers are not immune from this view. We too inhabit a politics of knowledge privileging some scenarios over others. Successfully creating true alternative futures is rare, although the recent US conference on the courts did develop a range of alternative futures. However, most likely--as the time distance from the conference grows and the shock experience from having futurists deconstruct the edifices of the present decreases--then the vision that continues the present will remain the dominant one even as futures researchers attempt to persuade others of a disjunctive vision.

In the Hawaii case, the *fifth* failed link was that the research was not intellectually *accessible* to the institutional culture, not phrased in the language of the legal discourse, for example. It remained housed in social science language. Futures researchers did not manage to successfully transform the visions and scenarios used in futures research into the language of court rules, laws and written policies. Futures research, then, must be contextualized in the language of the particular institution or discourse it is housed in.

The *last* and most critical failed link deals with a basic contradiction in futures oriented legal research in a judicial environment. Futures research is forward oriented while legal research, legal decision-making, and legal education is *precedent* oriented. Futures research suggests that decisions should be based on what is desired while judges base many of their decisions on past cases.

At the grand macro level and institutional level, moreover, futurists propose transformative change while those in institutions usually prefer incremental change. Judges and attorneys, while

occasionally acceding to the point that social change is disjunctive, continue to assert that it is tradition that civilizes humans. Constitutional law, that is, law that is primarily sacred and natural, provides the social cohesion necessary for a stable and good society. Constantly criticizing and deconstructing the epistemological pillars of society leads to the possibility of social chaos. Incremental common law allows for a decent level of change, letting the good become better and avoiding large scale disasters of fundamental change, for example, revolutionary change as in communist countries or military coups in which law is by-passed, wherein tradition is destroyed. Futures research (especially critical futures research) in this view is at best useless, and at worst dangerous, to the creation of a civilized society that continues the good of tradition and incremental change. Futures research is perceived as camouflaged social engineering. For the futurist, educating judges and others from the legal profession then becomes a challenge that from the outset is problematic--legal education, the bureaucratic context, organizational expectations, philosophical visions of the good and the real are vastly different.

REMEDYING FAILED LINKS?

The 1990 Hawaii Foresight Congress and the various State Justice Institute sponsored state foresight commissions have been attempts to remedy these failed links. In the Hawaii case, the Foresight Congress made futures more accessible, less specialized and less technocratic, more involved in the legislative and political process, and participants created a range of true alternatives to the present. By including administrators and futurists, the Congress developed a structure that had both visions of the future and practical suggestions for immediate action. In addition, by involving judges and attorneys in the planning process and as key speakers at the Congress, futures research (its language, its vision) became more accessible to the legal culture. Indeed, participants saw the futures approach as a way to potentially transform not only the judiciary bureaucracy but the legal culture as well. For example, recommendations focused on promoting mediation, culturally appropriate dispute resolution forums, and judicial outreach. This was made more possible by articulating the future not as a predictive empirical science but as a way to distance us epistemologically from the present (through scenarios) so as to make the present problematic and thus changeable. At the same time the problem of symbolic transformation remains. While numerous recommendations were made, none of these were ever implemented. The Foresight Commission which was to examine the recommendations was not established. These dramatic failures raise again the

problem of the structure of government and especially the historical bounded nature of law and the courts. This tension is embedded in the very foundation of the legal and judicial system.

However, in comparison to the legislative and executive branches where interest group politics and pressures of raising funds to get elected reduce the future to the next "democratic" contest, the Judiciary can afford to think of the long term. In this view the courts are the natural sites of futures research. Judges have long term tenure and thus can afford to be speculative (except those in locales where they are elected). They can be the true change agents of society, keeping what is historically good and simultaneously moving policy forward to respond to changing constructions of the real and the natural. Of course, this raises the question of the role of the Judiciary in the American design of governance especially with respect to the separation of powers.

Nonetheless, this dual view--that of keepers of the past/present and creators of the new (for the bureaucratic and judicial dimensions of the courts)--lies embedded in the missions of the Judiciary. As Chief Justice Harlan Fiske Stone wrote about Justice Benjamin Cardozo:⁸ "Cardozo believed ... that the law must draw its vitality from life rather than the precedents and that 'the judge must be historian and prophet all in one.' He saw in the judicial function the opportunity to practice that creative art by which law is molded to fulfill the needs of a changing social order." Any attempt to create a futures consciousness in the courts has to negotiate the tensions between these temporal dimensions. Possible negotiation strategies include linking the future with the present: this can be done through leadership, a critical epistemology, participatory ownership of the future, and a grounding in macrohistory and theory. While these linking strategies may not entirely bridge temporal gaps, they do create the possibility of sites of knowledge and action that are neither frozen in the present nor untethered in the future.

Moving back to the macro level, the Judiciary then is that institution that continues the lessons of the past, that does not try and create the ever new, however, much you and I, as futurists, would like to. This is especially so during times of considerable chaos when the real ceases to be dominated by any group *and* when it sets above and below waiting for a new authoritative definition. For while the real waits to be captivated, the worlds of power and control often continue. Here perhaps the wise judge, grounded in ethics and unaffected by the dazzle of the future, can continue the process of civilizing humans towards decency.

NOTES

1. This paper is based on presentations at the State Justice Institute/American Judicature Society Conference on "The Future and The Courts," May 18-22 at San Antonio, Texas; at the Eleventh World Conference of the World Futures Studies Federation at Budapest Hungary, May 27-31, 1990; and at the 1991 Hawaii Judicial Foresight Congress, January 6-8, 1991. A much earlier version appeared in the Proceedings from the Budapest conference.

2. Sohail Inayatullah and James Monma, "A Decade of Forecasting: Some Perspectives on Futures Research in the Hawaii Judiciary," *Futures Research Quarterly* (Spring 1989).

3. Sohail Inayatullah, "A Preliminary Report of the 1991 Judicial Foresight Congress: Hawaii," *Futures Research Quarterly* (Fall 1992).

4. Phil McNally asserts that leadership is the key, arguing that--instead of institutionalization--the futurist as wizard is a far more enabling role. See his "The Planner, Planning and Leadership," *Futures Research Quarterly* (Winter 1988).

5. Sohail Inayatullah, "From Whom am I? to When am I: Framing the Shape and Time of the Future," *Futures* (April 1993).

6. See Pitirim Sorokin, *Social and Cultural Dynamics* (Boston, Porter Sargent, 1970). Sorokin develops a pendulum theory of three social mentalities: sensate, dualistic, and ideational. Crime and law change as these mentalities fluctuate becoming more material (property oriented) or more ideational (morality) given the particular era. For a comparative perspective, see Johan Galtung and Sohail Inayatullah, *Macrohistory and Macrohistorians* (forthcoming).

7. "But do planners solve problems?" asks Phil McNally. "Don't they merely hide visions, problems and solutions within the structural closets of Plans--closets that among other attributes have a great amount of political dust?" Comments from McNally on an earlier draft of this paper.

8. Bernard Schwartz, *The Law in America*. New York: American Heritage, 1974, 201.