

# Judicial foresight in the Hawaii Judiciary

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**This report describes the process and the products of the 1991 Hawaii Judicial Foresight Congress, held in Honolulu, Hawaii, 6–8 January 1991.<sup>1</sup> The report aims both to contribute to the dialogue on how to have an appropriate futures conference and to present futures thinking on the US courts.**

The 1991 Judicial Foresight Congress was funded through an appropriation of the 15th Hawaii Legislature and cosponsored by the American Judicature Society. It drew over 275 participants from Bench, Bar and community. The purpose of the Congress was to *anticipate* the changing judicial needs of the public and the legal system by exploring Hawaii's social, political and economic environment and its impact upon state courts, and then to respond to these forecasts through the creation of new visions and structures for the Hawaii Judiciary.

The Congress was a natural outgrowth of nearly 20 years of futures research activities conducted by the Hawaii Judiciary. The 1972 Hawaii Citizen's Congress on the Administration of Justice attempted to examine the legal problems of the coming decades. Besides inviting futurists such as Alvin Toffler and James Dator, study groups developed recommendations for the courts. In the late 1970s a problem-solving approach to planning was developed. But management conferences using this result merely restated the present—instead of visions of court futures or the creation of alternative dispute resolution forums, problems such as the lack of parking for personnel dominated conference agendas.

Dissatisfaction with this approach led to comprehensive planning and the

articulation of fundamental dimensions (ways of configuring the courts) and missions. From this planning framework, a futures research project emerged.<sup>2</sup> Housed in the Office of Planning, futures interns meeting with attorneys and administrators researched long-range, high-impact, 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 shift within the courts moved research from the long range to the quantitative trend level. Trends examined the future of attorneys, the future of the family, the future of specific regions in Hawaii and the implications of rapid caseload expansion on the courts. Would there be enough resources? Would the courts collapse if public approval or caseload continued to increase?

Emerging issues and trends were eventually published in the Judiciary review, *Justice Horizons*. In addition, the review summarized future-oriented issues from the literature. These ranged from issues that made problematic the notion of 'crime', 'judging', to issues that presented law from cross-cultural perspectives. Recent issues have focused on essays dealing with the social construction of law and crime, legal implications of genetic engineering advances, the future of mediation, as well as on virtual reality and its impact on incarceration and judging.

None the less, even with these various projects the futures programme failed to involve judges in the futures process, failed to include the larger legal

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community and public, failed to translate futures research from the social science discourse to the legal discourse and, in general, failed to become an efficacious information source for administrative and judicial policy shaping. Foresight activities remained largely research-orientated, although on occasion successful strategic planning meetings for the Judiciary as a whole and for specific courts were held.

In 1989, however, perceiving the need to keep the courts responsive to the changing judicial needs of the public, the Chief Justice proposed that Hawaii convene a Foresight Congress with the mission of generating new visions and ideas about the role and structure of the courts. Congress participants were to include members of the Bench, Bar and public so as to encourage much needed interaction between Bar and Bench and so as to include community input into the planning and policy creation process in the courts. This Congress remedied many of the failed links of futures research and judicial policy making.

### **Legitimacy**

The legitimacy of convening a Foresight Congress was greatly aided by the May 1990 San Antonio Congress on the Future and Courts, funded by the State Justice Institute. This conference, sponsored by the well regarded institution, the American Judicature Society and funded by the State Justice Institute, invited chief justices, court administrators, law professors and futurists to a five-day meeting on the future of law and the courts. That a conservative national organization took designing the future so seriously made it easier for the Hawaii Judiciary management to convince sceptical judges and justices to hold in abeyance viewpoints such as: 'we already have so many conferences and immediate problems: why a conference on the future?'

Without a mandate from the Chief Justice and without the national conference, institutional legitimacy would have been severely lacking. When a planning committee composed of judges, attorneys, administrators and futurists was

formed, the Chief Justice continuously reminded the Committee that this was to be a conference on the future (like the San Antonio conference) not a restatement of the past or of the present (as with the routine annual Hawaii judicial conferences). This commitment to the future allowed organizers to move beyond problem solving and design a conference with a high level of conceptual risk, with few familiar conceptual anchors. It also allowed organizers to invite speakers with controversial views of the future.

This is not to say there was no conflict between organizers in planning meetings. As might be expected, there were disagreements over the appropriate time horizon, the balance between the practical and the ideal, the balance between structure and free time, and the role of youth delegates in participating in the Congress. In addition, attempts to make the conference truly cross-cultural instead of cosmetic gender and ethnic participation were raised. However, given the problems associated with not only inviting speakers from traditional cultures but convening a conference organized around alternative cultural frames of reference proved to be too risky and difficult to manage.

### **Conference design**

While the mission of the Hawaii Judicial Congress was to anticipate future changes and respond to these changes, the conference was not predictive or empiricist in its epistemological orientation. The goal was not to conclude with a list of predictions of the next 10–30 years. Rather, the more important goal was to use the future to think and reshape the present. The conference attempted to take participants to distant future places and times and return them to the present so that strategies for transformation could be developed. Moreover, the conference intended not merely to end in a series of exhortations on what the future should be like nor merely to restate the present. The conference design thus attempted to move away from the empiricist–predictive mode of futures studies to the critical–post-structural view in which the cate-

gories which give us the present are made problematic.<sup>3</sup> Sessions on the history of the courts too were framed not to invoke nostalgia but to use the past to help understand how a particular 'present' came to be and how different futures might come to pass.

Organizers designed both plenary and small group sessions so that participants would both receive expert input and produce their own expert output. The plenary sessions had the following focus:

- the future of US Courts;
- the future from the Hawaii Court's view;
- science, technology and environment;
- culture, demographics and appropriate dispute resolution mechanisms; and
- world economy and Hawaii's role in the pacific.

These sessions featured local, national and international speakers.

#### **Plenary sessions**

Speeches on the theme of 'The future of the American courts' focused on court futures derived from changes in biological, genetic and computer technologies. The social implications for these technologies were also developed. Whether the courts become divided into private high-tech courts for the rich and public underfunded low-tech courts for the poor was a question articulated. More than the future of technology, this session focused on the centrality of the public in creating the future of the courts. Some argued that the courts need to become more consumer- and public-education-oriented. They must continuously respond to the changing needs of the public. But can the courts become future-oriented instead of precedent-oriented, given the conservative nature of the Judiciary? In addition, while a strong public-oriented mediation movement is creating a new future for state courts, some research shows that Americans want blame to be assigned, *not* conflicts to be resolved.

Speeches on the 'The future from the Hawaii Court's view' developed a

range of perspectives. It was argued that courts, especially the family courts, should first of all be caring and compassionate. A survey of Hawaii judges was also presented in which respondents favoured increased judicial leadership and increased use of mediation. There were mixed feelings as to the desirability of the present adversarial legal system. Future directions for reforming the legal system were also articulated. It was argued that there should be improved access to the courts, certain types of disputes should be diverted to other forums, and lawyers should better understand and help clients.

Speeches from the 'Science, technology and environment' session focused on the magnitude of changes ahead. Genetic engineering and artificial procreation promise significantly to increase the court's caseload as well as the complexity of future cases. The decline of the quality of the planet's environment and the increased popularity of the environmental movement suggest new laws that may be conducive to specialized courts. In addition, increased belief in alternative epistemological, specifically non-material views could transform the nature of trials and conflict resolution. Finally, there was a discussion of the failure of prisons to create a better, more cohesive society. Perhaps it is time that a new model of crime and punishment be developed; one that is tied to larger social goals and theory instead of immediate needs and issues.

The plenary session on 'Culture, demographics and appropriate dispute resolution mechanisms' focused on the dramatically changing ethnic mix of the USA. A key question was: 'should the legal system find ways to incorporate alternative dispute resolution forums from other cultures?' It was also asked, 'should there be a multi-door and multi-culture courthouse?' A video representing the conflict styles of Hawaiian, Filipino, Korean and Samoan groups was presented. Commentary from representatives in these communities was also presented. Some argued that their culture is vastly different from American legal culture and both need to learn from each other, while others argued that their culture will easily be able to adapt to the litigious American culture.

In a related matter, it was forecasted that an ageing population would lead to increased white collar crimes.

The final plenary session focused on the world economy and Hawaii. Changes in the world economy have been especially dramatic recently. The keynote speaker predicted that the geopolitical world of the future will no longer be bipolar or unipolar; instead, there will be many superpowers with their own exclusive areas of hegemony. The strong possibility for an economic depression was also discussed. The panel discussion on Hawaii's economy indicated that this could translate into increases in Pacific-based litigation and in international law. Hawaii could play an important role in creating specialized courts and international non-judicial conflict resolution systems. Among the key concepts that Hawaii should use to create this future is *aloha*.

The concluding Community Response Panel featured distinguished community representatives. They commented on the previous three days, sharing their thoughts on what was lacking and what directions the courts should pursue in their planning efforts. This last panel increased the conference legitimacy as community representatives were given an opportunity publicly to critique the Congress and the courts. They fulfilled their task of raising the voice of the community's conscience.

### Small group sessions

Along with plenary sessions, small group meetings (10–15 participants per group) were held each day and were structured to produce a concrete list of recommendations as to desirable changes in the Judiciary and the legal system.

Small group sessions were run by facilitators and recorders. To train them a half-day preconference was held in which they were familiarized with the futures discourse. This session led to an important change in the conference design. The small group session for the first day was designed to lead participants out of the present by focusing on 10 predictions of the future. However, instead of discussing implications, facilitators and recorders argued over the possibility of the occurrence of such events.

Long-range events such as sea level rise or cheap cold fusion were dismissed. Organizers then rephrased these predictions as 'possible future events' and asked participants to focus on the potential impact of the event on the legal system, holding in abeyance the likelihood of the event.

The following possible future events were put forth for discussion (each small group received five):<sup>4</sup>

- By 2005, machine intelligence has surpassed human intelligence.
- In 2009, commercial cold fusion is marketed, including 'table-top' fusion power generators.
- By 2004, the average level of the oceans has risen by three metres. The ozone layer has declined by one-half.
- By 2010, the entire human genetic code is deciphered and humans gain the right to a genetically defect-free baby.
- By 2000, federal court jurisdiction is severely restricted (because of funding shortages, among other reasons) leading state courts dramatically to increase their jurisdiction.
- By 2000, law practice becomes regulated by a central agency responsible for setting and standardizing fees.
- In 1995, a global economic depression begins, lasting a decade.
- By 2015, Northern California is separated and becomes a place where different native American peoples may establish sovereign states.
- In 2010 Pyongyang becomes the capital of the Federated States of Eastasia (which includes the present nations of Japan, the Koreas, all the Chinas and Mongolia) and Bonn becomes the capital of a United States of Europe (which extends from Finland on the north, Greece on the south, the UK to the west, and Russia to the east).
- In 2007, the participants of five major transnational computer network communities declare themselves citizens of the networks. The networks then issue them passports, collect taxes from them, and offer them various social benefits, including education and medical care.

These events were chosen to force participants out of their usual belief systems,

although from the viewpoints of the futurist organizers they were quite likely events.

The second day modified the results of the San Antonio conference, largely 12 visions of court futures, and analysed them. These scenarios were chosen as they developed a true range of alternative court futures. The scenarios offered participants some real choices of what could lie ahead, positive and negative. The San Antonio visions were as follows:<sup>5</sup>

- Generic justice—a justice system that is overburdened with inadequate public funding and has low status;
- Courts gone AWOL (Adjudication Without Legitimation)—courts only resolve criminal cases with private mediation for the rich (suite justice) and street justice for the poor;
- High tech/super surveillance—totalitarian use of technological developments to control criminal and anti-social behaviour through electronic monitoring, genetic screening (in employment), and genetic alteration of prisoners and deviants;
- Apartheid justice—white minority refuses to share power in the face of newly emerging black/brown/yellow majority and white court system now main means of social control of emerging pluralistic society; however, Anglo-Saxon, 'white law' completely alienated from non-white majority;
- Road warrior justice—natural disasters, severe depression, and plague create the conditions for social collapse and communities develop their own private security systems with vigilante justice prevailing;
- Citizens as active consumers of justice—high degree of citizen involvement in all areas of the legal process, and local and national consumer report magazines for the courts thrive as do law-oriented consumer association movements;
- Decentralized, bottom-up justice—neighbourhood/community-based justice with lay judges (advised by law-trained clerks; multiple alternative dispute resolution forums in accessible forums; and from the adversarial 'let's sue' society to the mediation, 'let's resolve' society;
- The postmodern humanistic courts—judicial education incorporates broader 'ways of knowing and perceiving' the world, including the effective use of intuition and emphasis on the whole rather than compartmentalization and humanistic and transpersonal methods used to alter prisoners' behaviour and perception;
- Green justice—focus on community and environmental responsibility not on individual property and economic rights, and self-help focus in all aspects of life including solving your own disputes (self-reliance and self-sufficiency);
- High-tech/high efficiency justice—extremely efficient, elimination of clerical staff/paper flow, even with large, diverse, complex caseload and computer-driven jury selection; artificial intelligence relieves lawyers and judges of routine work;
- The automated courts—virtually no use of courtrooms or courthouses; video and satellite hearings, jury decision making by video or cable television (the interactive jury box), and interrogation via interactive TV of witnesses make personal appearances rare and computer judging of normal routine cases (eg child support, traffic violations); and
- Global justice—global economy breaks down national barriers of all kinds and legal and dispute resolution traditions of different cultures gradually evolve into global law; world constitution ratified and world government formed.

Using these futures, participants developed their own scenarios of Hawaii's courts and then chose a preferred scenario. Participants were then asked to design their own court system, to invent the courts anew. In this design task, they attempted to deconstruct the present system; to ask: if the Judiciary disappeared today, what would they invent to replace it? To this they were given a design checklist, presented below. Organizers wanted this available to ensure that participants would stay within various structural boundaries. Such checklists can be used for almost any institution or system.

- Presently, Hawaii is a representative democracy with the Judiciary the third branch of government. What are some other forms of *representation* (eg direct electronic democracy, rule of the elders)?
  - Presently, the courts are *structured* into appellate, trial, traffic violations and special courts such as the family court. What are some alternative court structures (eg elderly or science courts)?
  - The present *criteria* for a case to enter the various structures include the amount of money involved, as well as the seriousness of injury to body and property. What are some other criteria (eg public impact of case)?
  - Judges are presently *selected* by a Judicial Commission, appointed by the Governor and approved by the Legislature. What are some other ways to select judges (eg election by Bar)?
  - The present criteria for becoming a *judge* is a law degree, professional respect, experience, citizenship and membership in the human species. What are some other criteria? And do we need the present criteria?
  - Courts are presently *funded* through the Legislature based on indirect lobbying and formal requests based on needs. What are some other ways of gaining funds (eg automatic funding based on weighted caseload)?
  - In general the following adjectives are used to *describe* the courts: adversarial, bureaucratic, precedent-oriented, incremental, patriarchal, procedural, and win/lose. What would be the adjectives others would use to describe your design (eg matriarchal)?
  - The courts have been described as having the following *dimensions* and *missions*: (1) branch of government—uphold the constitution; (2) subsystem of legal system—coordinate and promote justice among sub-systems; (3) social institution—anticipate and respond to changing judicial needs of the public; (4) public agency—efficiently and economically use resources; (5) dispute resolution forum—fairly and speedily resolve disputes brought before the courts. Would you keep the above dimensions and missions? What are some other dimensions and missions (eg political institution—to shape public policy)?
  - The present *size* of the courts is: expenditures (\$62 million or 2.84% of the state budget), full-time judges (64), and personnel (1600). What would be the size of your preferred court system?
  - *Technology* is presently used for word processing, project management, electronic mail, and fax. What are some other uses for technology (eg judicial expert systems)?
  - Judges and administrators are presently *educated* while on the job and through special programmes. What are some other education strategies (eg an academy)?
  - Presently, only humans, the state and corporations have *standing*. What are some other entities that could have standing (eg cultures)?
  - Presently, *cases* brought before the courts are counted. What are some other possible categories?
  - Presently, attorneys (private, prosecutors and public defenders) *represent* cases. Who would represent cases in your design?
  - Cases are presently held in *court-houses*. Where are some other sites of dispute resolution?
- From the San Antonio scenarios and from the design checklist, participants developed their ideal judicial system. An analysis of the preferred scenarios, that is, what participants desired, centred around the following vectors:
- The Judiciary should be consumer/public-run instead of bureaucracy or attorney-run.
  - The Judiciary should wisely make use of advanced computer technologies.
  - The Judiciary should be sensitive to different cultural constructions of justice and should incorporate culturally appropriate dispute resolution forums.
  - The Judiciary should encourage and instigate public education about the law and judicial processes so as to make the courts more understandable and accessible.
  - The Judiciary should emphasize mediation and other less adversarial forms of dispute resolution.

In addition, by using the data from the second day a range of possible scenarios was derived. These included scenarios focused on incremental justice, preventive law, community standards, intuitive justice and negative scenarios such as 'loser pays all'.

The third day further focused the process on the desirable and specific. Participants developed a list of recommendations for changes in court missions and goals, court structure, judicial and legal education, and judicial policy and legal culture. These exercises coupled with the plenary session led participants to alternative conceptions of law, justice and court structure; they moved individuals out of the rigid confines of the present into alternative frames of reference.

Recommendations followed the patterns of the preferred scenarios. They included changes in the following areas:

- mission (increase emphasis on pre-trial harmony);
- judicial evaluation and selection (sabbatical for judges);
- new programmes (ombudsman, Office of Ethics, Office of Information and Complaint);
- judiciary structure (mandatory mediation and arbitration, cultural officers and a multi-door, multi-culture courthouse, electronic trials, and improved information systems so as to provide judges with feedback throughout case);
- law school (redesign law school curriculum to include ADR training and make curricula more global, humanistic and environmentally focused);
- legal/criminal justice system (reevaluate concepts of crime and punishment and guilt v innocence and emphasize restitution and restoration instead of punishment); and
- public community education (demystify the law through broad-based public education, including adult education, public information forums involving judges and expanded teaching of mediation in schools).

The conference scenarios and recommendations now await the formation of a

permanent Foresight Commission with participation from Bench, Bar and community. This Commission would periodically advise the Chief Justice as to desirable changes in law, court rules, policies and structures. At one level, the Commission will function as an advocate of new ideas and, at another level, it is a filter for new ideas, probably choosing those that are politically and economically feasible to act upon. Participants at the congress, knowing that they could not cover everything, were relieved to know that their ideas would not die in a research office but that a blue-ribbon type Commission would keep them alive. Participants, in general, did not feel their ideas would die in the Commission. Indeed, most were pleased to attend a conference in which they were presented with new ideas and were asked for their own.

Unfortunately since that time, funding for the Commission has been denied by the State Justice Institute.<sup>6</sup> In addition, the Hawaii Legislature has not released funds for the Commission, believing that the Judiciary should internally fund this programme. Although the Judiciary intends to pursue legislative funding again in 1992, at present, the future of foresight remains in limbo, suspended between vision and bureaucracy.

Notwithstanding the future of the Commission, however, the congress succeeded for the following reasons:

- (1) it had *authority* from leadership, the Chief Justice;
- (2) it gained *legitimacy* from a similar national conference;
- (3) local judges, administrators, futurists and attorneys were *involved* in the planning process;
- (4) the conference's *epistemological* design was not based on predicting the future but on using the future to rethink and reshape the present so as to create a new future;
- (5) imagination and brainstorming were critical at the beginning of the congress but on the last day *concrete* proposals for change were articulated;
- (6) futurists let others become *experts* in the future instead of owning it themselves;

- (7) there was a *mix* of plenary and small group sessions—that is, expert input and community output; and
- (8) finally because of the concluding *community* panel the conference's credibility was enhanced.

The area of conference design that needs to be rethought for future efforts was the second day. Evaluating scenarios and using a design checklist to develop their own scenarios was too difficult in the case of robotic judges, for example. In additions, during the second day participants merely opted for a menu approach without regard to conflicts between choices—for example, by wanting humanistic courts but with too much structure and not enough conceptual ownership (scenarios from the national conference were given to participants)—and the task of design, without months of prior preparation, was too complicated.

The most important *substantive* success of the congress was that a range of new ideas—some requiring incremental change and some requiring system transformation—that did not merely duplicate or reproduce the present, entered the judicial system. The most important *process* success of the congress was the dialogue between participants—the sharing of diverse visions of the future.

Finally, the conference worked well? because of the numerous individuals assigned to the little things—food, seating, room temperature, time for bathroom breaks, flowers for speakers, and so on—that are ultimately the big things. As one court planner remarked: scenarios and strategies are important in designing the future but six months from now most will only remember whether the lunch was served too cold or whether the microphones worked.

This conference may not be an appropriate model for professional futurist conferences, however. Futurists may not desire so much structure, nor would they want to limit their grand designs and idiosyncratic predictions to mere

policy recommendations. None the less, a structured conference, even though it might limit new ideas, often paradoxically allows for increased creativity and the possibility of transformative visions and strategies. From this point of view, the 1991 Hawaii Judicial Foresight Congress was exemplary.

#### Notes and references

1. This report has benefited greatly from comments on an earlier draft by members of the Congress Planning Committee, particularly, Chief Justice Herman Lum, Lawrence Okinaga, Judge Dan Heely, Clyde Namuo, Peter Adler and Phil McNally. Other Committee members include Judge Patrick Yim, Judge Bambi Weil, Irwin Tanaka, James Dator, Gregory Sugimoto and Joy Labez.
2. See Sohail Inayatullah and James Monma, 'A decade of forecasting: some perspectives on futures research in the Hawaii Judiciary', *Futures Research Quarterly*, Spring 1989; also see, Sohail Inayatullah, 'Futures and the organization: the Hawaii Judiciary research programme', *Futures*, June 1984.
3. For this view of futures studies, see Sohail Inayatullah, 'Deconstructing and reconstructing the future: predictive, cultural and critical epistemologies', *Futures*, March 1990.
4. The Hawaii Center for Futures Research—through the research of Wendy Schultz and Chris Jones—provided some of these 'possible future events'. The Center's address is: 2424 Maile Way, Honolulu, HI 96822, USA.
5. Clem Bezold of the Institute of Alternative Futures and Diana Farthing Capovich of the State Justice Institute developed these scenarios based on conferee responses. James Dator and Sharon Rodgers have further developed them. See James Dator and Sharon Rodgers, *The Future and the Courts Conference: Executive Summary* (Chicago, IL, American Judicature Society, 1990).
6. The State Justice Institute argued—among other reasons—that because of the congress's success and because of Hawaii's long history of futures research, the Hawaii Judiciary did not need any additional funding for the Commission.
7. Joy Labez was instrumental in organizing the conference.