

Keynote Speech by Harriet Lansing, former President of the Uniform Law Commission, at the 2018 Annual Conference of the European Law Institute (ELI) in Riga (Latvia) on 6 September 2018

HOLDING ONTO THE CENTER

I.

General Comments

It is a pleasure and a privilege to be here with you in the culturally historic and beautiful City of Riga for this ambitious agenda of the Annual Meeting and General Assembly of the European Law Institute.

I bring you greetings from the President of our American Uniform Law Commission, Anita Ramasastry and from Carl Lisman, the chair of our executive committee, and the good wishes of our 350 commissioners who share with you the commitment to Law Improvement and the belief in the positive effects of integration to achieve just and effective laws.

I also bring with me a strong wave of positive energy from the Uniform Law Conference of Canada. I was honored to join the ULCC just last month at their celebration in Quebec City of the 100th anniversary of the formation of their Uniform Law Commission. At their opening session they recognized the work of the European Law Institute and read a letter from your Vice President, Sjef Van Erp, congratulating them on their centenary and expressing continuing interest and ideas for working together on joint projects and three-way projects among the Canadian ULC, the ELI, and the American ULC.

Ideas for possible joint projects and creating a forum for discussion of joint projects grew out of meetings at the American Uniform Law Conference in Kentucky in July. Your Vice President— Dr. Van Erp was able to join us and our international committees to discuss forward-moving projects. We were honored to have him address the full ULC conference and to have him participate in our proceedings. There is a keen interest among the ULC commissioners to learn more about the work of the ELI and to participate in joint projects that mutually support the goals of our organizations.

II OVERVIEW

When your Secretary General, Dr. Vanessa Wilcox, in consultation with President Wendehorst, invited me to speak at this session, I was, of course, honored, but in some ways a little unsure of whether this would be a good plan for two reasons. First I questioned whether I could contribute a perspective that would not be a reprise of the remarks that I made in Vienna at your annual meeting and general assembly in October 2014. I have strong and positive memories of that conference, beginning with the evening reception where we focused together on the meaning and purpose of cross border unification and harmonization of the rule of law as we looked out from the top of the Law School building over the gathering lights of Vienna and listened to the magnificent chamber music ensemble playing Mozart's Clarinet Concerto. It was a beautiful setting as we attempted to address with gravity and with some measure of knowledge or wisdom the unfolding events that we were beginning to anticipate as platform-changing for our organizations and for our world.

And the second reason I was ambivalent about speaking again is that in light of the current political circumstances in the United States, as an American citizen – even a citizen whose lifework has been in the legal system and has a strong commitment to law reform – I questioned whether I might currently be viewed as someone ill-suited to bring forward worthwhile ideas on successful law improvement. In these intervening years since 2014, at least on a national level in the United States, the evolution of law improvement and the unification of the rule of law seem to have hit a harsh reverse gear. We are struggling mightily to regain grounds of mutual respect and to give each other the benefit of the presumption that we all love our country even when we don't all agree on the best course forward.

What moved me ultimately to accept the gracious invitation was the reality that although our own national example of hubris and bone-chilling devisiveness may stand large in proportion to other countries right now, we are far from alone in facing these difficult trends toward autocracy and destructive nationalism. Also, the fact that in basic structure our law improvement organizations, even though interrelated to our country's governance structure are independent organizations that stand apart from our elected structures and may even help to

provide a counterweight to problematic political leadership. And, finally, that the power of the negative example should not be cavalierly overlooked. Even though it may not be a good idea to decide long-term policy in the middle of difficult times, it may be useful for us to assess our vulnerabilities and to evaluate what policies could be mobilized or prioritized to ameliorate a difficult situation or forestall the arrival of the next one.

So that is what brings me to this podium. A desire to continue our conversation from four years ago and to essentially probe three areas:

- (1) whether cross border law reform and harmonization is at the same level of importance as it was when last we spoke or whether these efforts are inevitably marginalized as we confront exigent circumstances within our own borders?
- (2) To analyze by looking at our current issues and activities whether there is still a sufficient overlap in the work and the issues confronting our individual organizations that we instill a positive value by working together on joint solutions or to achieve better-informed solutions?
- (3) And, finally, if there is a value in that process, and if our central incentives remain strong, to reflect on what is the best way to fortify the foundations of our work and protect them from corrosive forces?

III

Importance of International Approach

So, let's break down those issues and address them in order. First, whether cross border law reform and harmonization is at the same level of importance as it was when last we considered this question together?

From the origins of both of our organizations we have recognized the inevitability and the benefits of working in a global context. Your ELI Articles of Association recognized this by listing first among your stated aims, the aim of studying and stimulating European legal development in a global context.

Although our ULC formational documents do not formally recognize international work quite that explicitly, our past president and now chair of our International Legal Developments Committee, Dean Robert Stein, in his published History of our ULC stated "There has been an

international dimension to the work of the ULC from its earliest days.” And for us, that means more than 125 years ago. Dean Stein’s text concludes that in order for state laws to be effective they must be able to cross not only state borders, but also national borders.

I noted that the Uniform Law Conference of Canada, in the preamble to its constitution, states that Canada’s active participation in international law heightens the significance of harmonization of laws as a national objective and also noted that the ULCC’s Statements of Policy specifically provide for a liaison committee with the American Uniform Law Commission. So the foundational commitments remain strong.

Similarly, there is clear evidence of all three organizations’ continuing international involvement.

Your May and June Newsletter reports not only on the vitality and range of activities of the Hubs and Special Interest groups but also on activities that include participation with the International Union of Judicial Officers in Bangkok and hosting and exchanging information with a Chinese delegation. The July-August Newsletter received earlier this week brings news of your Vice President in New Zealand on issues of property law and your Digital Special Interest Group co-ordinating an Interdisciplinary Conference of European and Asian Perspectives on the Digital Economy.

This direction is parallel to that of the ULC. Dean Stein continues as the Chair of our International Committee, he has a new book, entitled “A Worldwide Perspective on the Rule of Law in the 21st Century,” co-edited with South African Supreme Court Justice Richard Goldstone, and he was recently in Melbourne, Australia, addressing the Commonwealth Association of Law Reform Agencies on the issue of Effective Law Reform.

The Uniform Law Conference of Canada has a deep involvement in the Commonwealth Law Reform Association. And like the ULC’s summer meeting agenda, the ULCC’s meeting agenda was also replete with references to international law.

A former ULC president in 1956 modestly claimed that the uniformity of local laws on an international level is a pivotal factor in the attainment of world peace. A tall claim, many thought then and still think now. But whether we believe that we are advancing the mega principle of working toward world peace or a more narrowly defined principle of working toward the improvement and integration of effective and just laws – or, more likely, something in between – we are unquestionably working in an international context. History has taught us

that successful movements are usually not accomplished by one big action but rather a multitude of small actions all going in the same direction. It is evident that we are all moving in an international direction.

And, in answering the other part of this first question on whether international law improvement efforts are inevitably marginalized as we confront exigent circumstances within our own borders, most community leaders who have commented reject that concept and instead respond with an affirmation of the value of our work and a perception that our joint efforts are even more important now than they were four or five years ago. They express a continuing belief that we are strengthened by the joint search for solutions and that in these challenging times we must put our strongest energy into continuing the searches.

IV

Commonality in Work and Issues

So that brings us to our second question, which is: Accepting that international communication on a general level is important to our organizations, is there an enhanced or added value for our organizations to work together on specific projects or designated issues of law reform and law integration?

One way to analyze whether there is a benefit to working together on joint projects is to look comparatively at our work agendas to see whether we are confronting similar issues.

As we recognized at the 2014 Conference, technology and the digital age was making significant inroads into the ways in which we transfer and define property and we were on the threshold of possible major shifts in settled areas of the law. As we compared ideas on the transfer of digital assets we also explored questions of social media privacy and the regulation of virtual currency. And we had some fun exploring whether the impact of the digital age with its souped-up telephone technology could be sorted out and comprehended by the general application of our traditional areas of law – contract, property, trust and estates, commercial, privacy, etc.,--or whether the functional differences were so fundamental that that we needed to catapult electronics into a whole new category of law.

It is clear that all things digital remain in the forefront. First up this morning on your panel presentations, was the ongoing project with the ALI on Principles for a Data Economy. It is good to see that following your successful Feasibility study you are now making significant progress on your project to study, identify, and collate legal rules applicable to transactions in which data is an asset or tradeable item.

The ULC has also been working on those issues that we discussed. And in 2017 we completed our proposed act on the Regulation of Virtual Currency Businesses, which provides a statutory framework for the regulation of companies engaged in virtual-currency business activity. It requires a type of state licensure that would have the effect of regulating these types of currencies uniformly across state lines and also providing user and consumer protections. Our proposed statute is now out in the state legislatures for enactment and has been introduced in several states.

At our July annual Meeting we approved the Article 8 Companion Act to the Virtual Currency Act. The companion act integrates the existing legal structure that is in place for the holding and transfer of securities and financial assets held by a securities intermediary under Article 8 of our Uniform Commercial Code. It does not treat virtual currencies as securities, but it incorporates a well-understood and effective system that makes the holding and transfer of virtual currencies more efficient and effective.

Our Scope and Program Committee now has before it issues and proposals that arise from block chain technology and a study committee looms on the horizon. You, of course, have already been moving forward on Blockchain Technology and Smart Contracts and that is on your Friday afternoon agenda.

The issue of Fiduciary Access to Digital Assets that we discussed in a joint panel in 2014 is on this afternoon's agenda. We passed our act in 2015 and we have had excellent enactment activity. Forty-three out of 53 jurisdictions have enacted the statute and an additional 5 states have introduced it into their legislatures and are currently working on enactment. The joint work that we did on Digital Assets with the ELI and the Canadian ULC has highlighted the ability to work together cross border to define an issue and have beneficial exchange of information and experience, and then to tailor different approaches or to expand or contract the scope to address what each organization perceives to be the most effective way to move forward. Your approach embraces not only digital inheritance, but also marital property in

dissolution actions and defaulting debtors in commercial transactions. But working together on the basic components was still worthwhile. And I note that you are now working on the related subject of Principles of Liability in Digitalised Environments.

This leads us to other issues inherent in our digital realm – the critically important issue of privacy – an issue that the ELI and other European bodies early recognized as an enhanced vulnerability in our digital world. As in other comparative law endeavors we perceive the enhanced value of the extended perspective.

The serious and challenging work that you are doing on the Draft Model Rules for online Intermediary Platforms, which was addressed this morning, will, I am sure, provide light and energy to our continued work in this area. In 2016 we approved our proposed Employee and Student Online Privacy Protection Act and that is now in the state enactment phase. At our July meeting this summer we approved a proposed act on Unauthorized Disclosure of Intimate Images and our Executive Committee approved a study committee on the core issue of Online Data Privacy. This is a study committee that I will follow closely for possible shared cross-border action.

In other technology related subjects we have a drafting committee that is working very hard on a statute relating to Highly Automated Vehicles and also a drafting committee on Tort Law Relating to Drones. I believe that your Vice President Van Erp sat in on some of those considerations at our annual ULC meeting.

I know that I will not be able to cover all of the areas of commonality in which we are currently working, and that is probably a great relief, but I note that there are many others including Protection of Adults in International Situations, authenticated transmission of legal materials, and a host of other issues past and present that we have been working on with the Uniform Law Commission of Canada – The Recognition of Substitute Decisionmaking Documents, International Wills, Online Wills, the cross-border Enforcement of Domestic Violence Protection Orders, the Registration of Money Judgments for enforcement purposes and several others.

As we can readily see, even a summary comparison of our ongoing agendas confirms the continuing bond of common issues, which brings with it the value of joint action to forge better solutions. Peter Lown, who is the Chair of the ULCC International Committee and a highly valued consultant to the ULC on international law, describes the essential purpose of law reform

and improvement in this way: “Through addressing our common needs with our shared experiences, we can achieve better informed solutions that are principled and evidence based.” And, I say, that is definitely what we are working toward.

V

Working in the Context of Dangerous Times

That brings us to the last question – a little longer because of the answers to the first two. But the question is this: Understanding that cross border law reform and improvement is as important now or even more important than it may have been in our most recent years, and understanding also that there are many and complex issues to address together in this work, is there anything more that we need to be looking at now to assure our continued vitality and success?

The answer to this question may turn on how we view the current circumstances in which we find ourselves. As I have been working on these comments I have been caught up in the great sense of loss that Americans are feeling and expressing at the death last week of Senator John McCain. Perhaps Senator McCain is not as familiar a figure as some other American politicians – past and present – but he has been a greatly respected national leader during his more than three-decade career in public office primarily as a United States senator and also as a past candidate for the Presidency. The respect accorded him transcends political parties and national boundaries and in tributes last week he was hailed by past presidents and current world leaders as a guardian of the soul of America and a force for unity among valued allies. Americans greatly appreciated the thoughtful expressions of respect from Prime Minister Trudeau, President Macron, and Chancellor Merkel, who saluted McCain as “a tireless fighter for a strong trans-Atlantic alliance.”

Cyling through my thoughts have been Senator McCain’s solemn words at the security conference in Munich, in February 2017. With caution and with evident concern, McCain said: “Make no mistake, my friends, these are dangerous times,” “But you should not count America out,” he said, and focusing his gaze on the 500 listeners from around the globe, gathered in Munich, McCain added “and we should not count each other out.”

Those words resonate with the same stentorian tones that William Butler Yeats expressed in his 1919 poem that described the atmosphere of post war Europe on the eve of the Irish war for independence, when he lamented his justifiable fears that the center could not hold. That line from his poem, that the center could not hold, according to Factiva (a fact checking service) was quoted more often in the first 7 months of 2016 than in any of the preceding years since it was written.

Even though law improvement and law reform may represent only one of the layers of concentric circles that exert a force to hold the center of a possible world order in place, it is an important enough circle that it has enlisted the time and energy of a vast number of people over long periods of years.

And so, at least to those of us who gathered at the Uniform Law Conference in Kentucky this year and at the Uniform Law Conference of Canada in Quebec City, and I believe to those of us gathered in this room, it is critically important to reflect on how we can, during what Senator McCain referred to as dangerous times, keep our law reform and law improvement organizations secure and productive and whether there is something more or different that we should be doing.

In my conversations throughout the summer with people concerned about the future of the rule of law and the continued vitality of law reform, there has been, of course, a range of opinions on what is the best way forward. But there is also a perceptible core of consistency and resilience that I want to draw from in this final section of my remarks – and to offer some ideas for your reflection or to incorporate in our ongoing discussion. Although some of the people that I have had discussions with are members of the ULC, I want to be clear that in these ideas I am speaking for myself and not the entire ULC.

In my view, these core consistencies break down into three affirmative admonitions:

The FIRST is to do all within our power to CONTINUE TO PROVIDE CRUCIAL FORUMS FOR THE DISCUSSION OF POLICY ISSUES.

We need to hold firm and not to lose a sense of commitment to our mission and our current projects and activities as we struggle to support and build on an international rule of law. Forums for genuine discussion of policy issues are absolutely essential to arriving at well-considered and sound solutions to shared problems.

The SECOND is to CONTINUE TO RELY STRONGLY ON FACT-BASED METHODS AND REASONING

Those of us who are enduring life in a vortex where the attorney for our President takes the position, as he did earlier this month on a national news program, that “truth is not the truth,” yearn for the continued validity and the coherence of fact-based discussions. Law improvement and integration relies on concepts of trust and a common search to find just and effective solutions. Although we understand and respect the relativity of positions on philosophical issues or the variations in people’s personal choices, we cannot rationally and productively live in a universe of alternative facts or fake news.

This was reinforced by a comment of the President of the Quebec Bar Association at the closing banquet of the ULCC last month. In attempting to describe the ULCC to an audience of non-lawyers, he said that after a long search for a phrase that would be the complete opposite of fake news, he had finally concluded that the best he could come up with was the Uniform Law Commission of Canada.

Now I think that may mean that law reformers and improvers are not part of the world of glitzy spin or glittery news cycles or cynical politicization as we spend countless hours poring over legal texts and hard policy issues. But his comment made me proud of the work and reputation of the ULCC. I believe it is a noble cause for all of us engaged in law reform to aspire to be the complete opposite of fake news.

Disinformation is antithetical to our purpose. And we do not welcome a world where we cannot trust the words of our world leaders. Fact-based methods and reasoning must remain at the center of our work to establish the trust we need to succeed.

The THIRD affirmative admonition is a little harder to easily summarize. The overarching idea is that often in our work in forging international connections in law improvement and reform we have used the metaphor of the bridge. Exhilarating images of these aerial spans have been the antidote to the chilling drumbeat of people who advocate building walls. But in dangerous times, fortification of our existing bridges becomes a matter of great importance, and thus the

THIRD and last positive admonition: EVEN AS WE CONTINUE TO BUILD BRIDGES, WE MUST CAREFULLY ATTEND TO OUR DUTIES TO KEEP SAFE AND FORTIFY THE INFRASTRUCTURE THAT SUPPORTS THOSE BRIDGES.

As part of maintaining, repairing, and protecting the bridges we have in place and keeping a careful eye on the infrastructure, we need to assess and address our vulnerabilities. But as we have shared the opportunities for building these bridges we can also see the value and wisdom in working cooperatively to address our vulnerabilities.

We cannot ignore the evidence that suggests that there are connections other than the free-blowing winds of politics to explain the Brexit Referendum vote and the 2016 United States Presidential election. And the connected explanations that appear to be more intricate and more electronic – yes even digital--do not stop at national borders. The corruption that is coming to light through investigations and court proceedings has global roots and will need to have global solutions. So what are the fundamental elements that need fortification? These may vary somewhat between our organizations, but the similarities are compelling. I have identified six important areas where I believe the rule of law and law improvement must stand guardian as we evaluate areas to watch and work in:

- (1) First, Voting Processes and Vote Counting Processes. These, of course are the most essential – the access that protects our right to vote and the structure that assures that those votes are accurately counted. As one of my heroes, American Supreme Court Justice Ruth Bader Ginsburg said – “The American constitution, the oldest written constitution that we have, begins with three words, ‘We the People.’ ” And I say that we must be able to be very sure that it is We The People who are deciding our fate and the direction of our policies. We cannot tolerate corruption in voting practices. Voting processes become intertwined with digital issues and the use and abuse of these channels must be carefully monitored. This is a lesson we learned – belatedly – in our 2016 elections when extremist activists and propagandists – managed to create huge numbers of fake accounts and distribute millions of pieces of made-up incendiary content on Facebook, Twitter and even You Tube.

- (2) Second, We must keep safe and fortify the structures that guarantee the independence of the Judiciary. Our state of West Virginia shares with Poland what has been described as an “unauthorized takeover of the judiciary.” Although I acknowledge that in the case of West Virginia there appears to be a basis for inquiry into the unchecked spending of at least some of the justices, it does not seem to support a wholesale impeachment of the entire sitting court and the timing aligns uneasily with possible court challenges to the constitutionality of redistricting decisions. Having spent nearly four decades as a judge I watch these developments with great concern, knowing that the judiciary, which does not have the legislative power of funding itself, or the executive power of defending itself, must rely on the strength of its formation documents, the settled traditions of the people, and the commitment to a system of checks and balances. Autocrats know that an independent judiciary is necessary to maintain democracies and their attempts to destroy that independence is often the first line of attack.
- (3) Third, in our work as guardians of the infrastructure we must keep very high on our priority list the importance of Privacy. And, of course, your organizations have been a strong force on understanding and protecting privacy, especially as it relates to social media. We need only to say two words – Cambridge Analytica – to be reminded of the disrupting effects from that political data firm acquiring access to more than 50 million Facebook users. And, as previously noted, these issues inter-relate with the integrity of voting processes.
- (4) The fourth area where law improvement must stand guardian is the area of Fundamental Human Rights. And I emphasize here that this is not fourth in importance – all of these six are of equal and paramount importance. And Fundamental Human Rights are at the foundation of all. Several Human Rights issues are singled out by your panel presentations over the next couple of days including the issues of human rights as they relate to Immigration that has continued to be a focus of your thought and action throughout these years. The Uniform Law Commission has worked over a period of years on a combination of civil and criminal laws on Human Trafficking and continues to work in this area.

- (5) A Fifth fundamental area where we need to keep watch and maintain fortification is on the laws relating to money and the regulation of money systems. We must guard against the manipulation and corruption of money systems that disable or disenfranchise ordinary citizens. And, again, this is an area in which we are all at work and our current inventory of acts and projects attest to our knowledge of its importance. We struggle with the balance of efficiency and security – as we continue to chart our way in this area.

- (6) And, sixth, and finally, we need to vigilantly stand guard over the survival of the Free Press. Law Improvement groups do not frequently take up issues relating to the survival of the Free Press. In my history at the ULC, I can recall only one. But the problems arising with repeated assaults on the press – the verbal use of poisonous phrases like “Enemies of the People” and the physical assaults – which include the shooting deaths of journalists in Maine in June of this year and the recent threats against journalists at the Boston Globe – underscore the vigilance that is critically needed. As Senator John McCain said in statements shortly before his death, “The first thing that dictators do is shut down the press.” We must work together to prevent this from happening.

So, these, I believe, are the six areas of our infrastructure of paramount importance where we need to stand guardian: (1) Voting processes and vote counting processes, (2) the independence of the judiciary, (3) the protection of privacy, (4) the guarantee of basic human rights, (5) laws relating to money systems and the regulation of money systems, and (6) the survival of the Free Press.

I recognize that in my comments, I have tended to draw geographically from the United States to provide examples of where these elements are in danger. Partially because they are the ones with which I am most familiar. But also, and I almost have to take a deep breath as I say this, because this is where we currently have the most vivid examples – a painful

acknowledgment of the fragile nature of some of our most deeply held truth and values that have sustained us and other Western allies through more than seven decades. But, again, as Senator McCain would say, Don't Count us out – don't count any of us out. Our present circumstances don't determine where we can go, they only determine from where we have to start. That said, I know that this is not a list for those who are short-winded or weak of spirit. But even if we cannot work on every front or accomplish all of it, we need to keep it at our forefront and the forefront of others as well.

VI

Closing

As I close, I am again reminded of the Yeats poem that raised the grim vision that the center could not hold. But it was not that chilling assessment in the poem that troubled me most, it was the two lines at the end of that quatrain. That is where Yeats describes those perilous events at the end of World War I as a time when "The best lack all conviction, while the worst are full of passionate intensity." Let me repeat that – When "The best lack all conviction, while the worst are full of passionate intensity."

That is the equation that I have seen out of balance in the United States and in other struggling countries in these dangerous times – an imbalance which I inveigh against. We, who are working for just and effective laws, need to get on the other side of this energy equation and take up the banner of passionate intensity so that those whose actions are designed for the worst purposes-- to divide us, corrupt us, and oppress us will be shown to have no just cause and truly be revealed as those without worthwhile convictions.

By Passionate intensity I do not mean getting together in stadiums and auditoriums chanting negativity and heartless venom.

Passionate intensity that has a positive charge can be expressed in the way that Leonard Bernstein did when he traveled to the Brandenburg Gates and conducted a Symphony at the Berlin Wall with an international group of musicians playing Beethoven's Ode to Joy or as he rephrased it Ode to Freedom – to celebrate the elimination of a wall. To use the affirming power of music as Bernstein did or as the beautiful Latvian music performed last evening--is an uplifting metaphor of harmony and an action that resounds with positive passionate intensity.

Also the passionate intensity of time and energy that people have dedicated in attempting to find productive and humane solutions to our deeply troubling immigrant issues as the ELI has continued to do. And I am proud to offer the example of the nearly unanimous outrage of Americans in response to the horrific policy of separating children from their parents when they were taken into custody in border disputes on immigration issues. Meeting that barbarian action with widespread and nonstop condemnation was a response of passionate intensity.

And I know that there are many examples of passionate intensity that could be drawn from the life stories and actions of people in this room “had we but world enough and time.” But we have two important sessions that immediately follow – one is the continuation of the discussion of Online Intermediary Platforms and the other is Fiduciary Access to Digital Assets – and I do not want to impinge on their time. And so I end, thanking you for inviting me to this conference and for this opportunity to share thoughts and continue our discussion. Most of all, I thank you and salute you for the work that you do in the world every day that is the opposite of fake news – that work which if it does not give you the sure certainty of attaining world peace, at least provides us with some confidence that we are headed in that same direction. May you have a safe and highly productive path on that road and may you take those steps in a spirit of passionate intensity.