

# There is a Tide in the Affairs of Men... A Tribute to John Toulmin

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**Abstract** This text, in lieu of an editorial, pays a tribute to John Toulmin CMG QC, who served as member and Chairman of the Board of Trustees of the Academy of European Law (ERA) from 1993 to 2010. John Toulmin practised as a Barrister in London from 1965 to 1997 and was President of the CCBE in 1993. In 1997, he was appointed judge of the Technology and Construction Court of England & Wales, a position from which he retired in February 2011. For 19 years, John Toulmin has been instrumental in developing ERA's profile as the European provider of EU law training for judges and legal professionals.

**Keywords** John Toulmin · ERA · Technology & Construction Court · CCBE · Bar · Factortame · Mediation

## 1 Leitmotiv

*Be great in act, as you have been in thought.*

Shakespeare, King John, Act 5, Scene 1

Judge John Toulmin QC CMG, Chairman of the Board of Trustees of the Academy of European Law (ERA) since 1997, retired as Chairman of the Board on 31 December 2010. On his 70<sup>th</sup> birthday, 14 February 2011, he also retired as a Senior Circuit Court Judge of the Technology and Construction Court of England and Wales. Following the suggestion by ERA's Management Board, the Governing Board presided by Jacques Santer appointed John Toulmin Honorary Chairman of the ERA Board of Trustees for life in October 2010.

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This *Festschrift* or *Liber amicorum* is offered to John Toulmin by his fellow trustees and by the staff and friends of ERA. It is a tribute to an outstanding friend and supporter, a modest expression of our gratitude for ERA's untiring inspirer and an acknowledgement of his lasting contribution to European integration.

## 2 Pioneering

*See first that the design is wise and just: that ascertained,  
Pursue it resolutely: do not for one repulse forego the purpose  
That you resolved to effect.*  
Attributed to Shakespeare

The first time I met John Toulmin was at the very first, the “constitutive” meeting of ERA's Board of Trustees on 5 July 1993. Following an initiative emanating from the European Parliament,<sup>1</sup> ERA had been set up as a public foundation in Trier in June 1992 by Luxembourg, Rhineland-Palatinate, the City of Trier and the “Association for the Promotion of the Academy of European Law”, an association assembling very distinguished members of EU institutions (Parliament, Commission and Court of Justice) and eminent scholars of European law, which today is better known as the “Friends of ERA” association.<sup>2</sup> ERA's Foundation Statute then provided for the institution of three boards – the Governing Board as supreme organ representing the patrons, the Management Board to run the Foundation, and the Board of Trustees, or Advisory Board, to advise the other Boards on programme planning, public relations and marketing, and to establish contacts with the target groups and the Member States.

Those were exciting times: 1992 was the year of the “completion” of the Single Market, 1993 marked the entry into force of the Maastricht Treaty which for the first time introduced a “European Union” with its then three pillars and new competences in Justice and Home Affairs yet to be discovered and developed. The EU of the time had no more than twelve members, with Austria, Finland and Sweden not joining until 1995. It was the time when the practical relevance of Community law (as it then was) became gradually apparent in the Member States, though many continued to ignore this, particularly in the six founding Member States. The equally exciting mission of ERA matched the challenge: to build up a consistent training offer in European law for legal professionals of all kinds and from all Member States, targeting also the former socialist countries of Central and Eastern Europe which had yet to acquire official candidate status.

It was a time for pioneers, and as such we felt. No-one could have told us how to succeed setting up a new European institute which was unique in concept and shape. There was a model, certainly – EIPA, the European Institute of Public Administration in Maastricht, which had been created ten years earlier, also in the legal form of a

<sup>1</sup> Cf. EP Resolution of 10 September 1991 calling for the “immediate creation” of the Academy and requesting EC institutions to support ERA, OJ C267/33, 14.10.1991.

<sup>2</sup> Current Chairman is the former Spanish MEP Professor Manuel Medina Ortega, who in 2009 succeeded former Commissioner Peter Schmidhuber. For details see <http://www.era.int/>.

foundation. But EIPA was only targeting civil servants and did not have an exclusive focus on European law; it was essentially funded by its Member States and its internal governance reflected quite clearly its public-sector orientation. ERA's mission was different and complementary; encompassing all legal professions but exclusively dealing with European law made it wider and narrower at the same time.

The founding years of ERA were a time for pioneers, and as such we were in need of sound advice and of strong political and moral support. Many false friends offered their suggestions – such as the invitation to be involved in well-funded national initiatives aiming to export their legislative models to the future candidate countries in the east. Many temptations marked our way – such as the offers to participate in distinguished academic projects, which essentially meant to sponsor them. There even came a time when we had to fight for our autonomy. The best advice, the strongest moral support and the soundest political guidance then came from our Board of Trustees.

From the outset in 1993, the Board of Trustees was conceived as a genuinely European assembly of stakeholders. The original concept, still valid today, foresaw three core groups of members: representatives of the EU institutions; representatives of the target groups (judiciary, legal profession, in-house counsel, notaries etc.); and representatives of the member states. In 1993 John Toulmin was President of the CCBE, and the European Bar being a core target group made his nomination almost mandatory. To our great relief he not only accepted his nomination but also attended the Board's constitutive meeting which, when looking at its agenda and the list of participants, reveals the progress made: The agenda listed just five items (welcome; election of a chairman; report on ERA's activities; programme discussion; any other business). The meeting was scheduled to last only three hours and there were sixteen participants. Nowadays, despite breaking the 40 trustees present into working groups for part of the time, we have problems squeezing all topics into a full-day agenda.

### 3 ERA Years

*'Tis not enough to help the feeble up, but to support him after.*  
Shakespeare, Timon of Athens, Act 1, Scene 1

In 1994, John Toulmin was elected Vice Chairman of the Board. In 1997, he succeeded Willi Rothley MEP as Chairman, a position to which he was re-elected in 2000, 2004 and 2008. He has not missed a single plenary meeting since 1993. He attended numerous other ERA meetings – of subgroups of the Trustees, which on his initiative were first introduced in 2000, and of the Governing Board.

During an institutional history of nineteen years, the fourteen years of John Toulmin's chairmanship stretch from the very modest beginnings into the current phase of growth that has just been marked by the opening of a second conference building in Trier. One of his first requests as newly elected Chairman was a mid-term strategy for ERA's future role, which was discussed at the plenary meeting of the Board on the eve of the inauguration of ERA's new conference centre in 1998. It was a crucial moment, as local politics jealously defended their rather tight line of command and control over ERA's development just at the time when it was indispensable to

open the Foundation to much broader European sponsorship and to allow it to pursue its way autonomously. It took us another year to get there, but it was above all thanks to John Toulmin's continuous support and political talent that eventually in March 2000 the Foundation Statute was substantially amended, separating management from political control and shifting strategic perspectives from external politics to the Foundation itself.

This change of perspective was a decisive factor in convincing other EU Member States of the added value of becoming institutionally involved. From 2000 to 2009, 20 further EU Member States became patrons of ERA, as well as Scotland and the present candidate country Croatia. Needless to say, John Toulmin was a key player in bringing the United Kingdom on board. The formal accession agreement was signed on 30 October 2002 at the chambers of the Lord Chancellor, Lord Irvine of Lairg, in the House of Lords.

John Toulmin never ceased to stimulate ERA's development and always considered consolidation as step back. Besides his constant availability as adviser and admonisher, he was involved in numerous ERA events at a conceptual and implementation stage. To give a flavour: In 1998, he chaired the symposium inaugurating ERA's new conference centre on "The Euro – New Impulses for European Integration", with speakers including Pierre Werner, Lord Howe, Alain Lamassoure MEP and Piotr Nowina-Konopka. He was a member of various working parties preparing for example the 1998 annual congress on "Creating a European Judicial Space" or the congress on the occasion of ERA's Ten Years in 2002 (with sessions on "The European Constitution", "Judicial Architecture and Access to Justice in the EU" and "Judicial Cooperation – Preparing the National Judges for their European Role". In 1999, he inspired the English Bar European Group to hold their "Annual Overseas Conference" at the ERA premises; in 2007, he persuaded the "Chartered Institute of Arbitrators" to set up a joint conference with ERA in Trier. He spoke in numerous ERA conferences, in particular on mediation and arbitration and recently at a conference on legal aid in Brussels which ERA co-sponsored to mark the CCBE's 50<sup>th</sup> anniversary.

## 4 Profession

*The first thing we do, let's kill all the lawyers.*

Shakespeare, Henry the Sixth, Part 2 Act 4, Scene 2

John Toulmin studied law at Trinity Hall, Cambridge, and at the University of Michigan. He was called to the Bar at Middle Temple in 1965 and practiced as a barrister from 1965 to 1997. He took Silk in 1980, was called to the Bar of Northern Ireland in 1989 and to the Irish Bar in 1991. John Toulmin was a member of the Council of Legal Education of the Bar of England & Wales from 1981–83. In 1986 he was elected Bencher of Middle Temple and in 2008 he served as Reader and took advantage of his speech at his "Reader's Feast" to remind his fellow lawyers of the international and European challenges for the legal profession.

Between 1971 and 1993, John Toulmin served on various boards and committees of the English and European Bar. He led the UK delegation at the Council of the

CCBE from 1982 until 1990, when he was elected Vice President (1991–92) and President in 1993. He was particularly involved in drafting what later became the “Lawyers’ Establishment Directive”<sup>3</sup> and negotiated in the WTO Uruguay Round on behalf of the European legal profession. In 1994, he was made a Companion of the Order of St Michael and St George for his services to European law and in 1995 he was awarded the *Große Ehrenzeichen für Verdienste um die Republik Österreich*.

In 1981, he started his judicial career as an Assistant Recorder and in 1984 became a part-time Recorder of the Crown Court. He was appointed Official Referee in 1997 and Judge of the Technology and Construction Court (TCC) of the High Court in 1998, where he dealt with domestic and international construction disputes. One of his most famous cases was *Factortame*, the case which in 1989 launched a cascade of decisions by the European Court of Justice and the English courts until it ended in John Toulmin’s court on 27 November 2000. In its first judgment of 19 June 1990<sup>4</sup> the ECJ held that a national court has a duty to grant interim relief to safeguard alleged Community rights even if such relief is not foreseen under national law. In its second judgment of 25 July 1991<sup>5</sup> the ECJ made clear that national registration rules for vessels must not constitute obstacles for nationals of one Member State to establish themselves in the territory of another Member State and found the nationality requirements in the UK Merchant Shipping Act 1988 discriminatory and contrary to Article 43 EC as a restriction on the freedom of establishment. Finally, in its third judgment of 5 March 1996<sup>6</sup> the ECJ re-emphasised the principle of state liability in case of a breach of Community law, irrespective of which organ of the State was responsible for the breach, so even a breach of Community law by legislative acts (or omission) would trigger state liability if the breach was “manifest” and sufficiently “grave”. The TCC, in the person of John Toulmin, was then called to decide on the substance of the tort liability claim brought forward by *Factortame* (which he found partly justified but, more essentially, managed to settle).

Furthermore, John Toulmin has remained engaged in academic activities, in particular at Michigan University Law School where he was a member of the Board of Visitors from 1996 to 2006, and at King’s College, London, where he has served as Chairman of the Governance Committee since 1997 and which made him a Fellow in 2006. Arguably, his strongest professional and academic interests lie in alternative dispute resolution, where he was instrumental in setting up an innovative mediation process within the TCC, the Court Settlement Process.

## 5 Leisure

*Now go we in content  
To liberty, and not to banishment.  
Shakespeare, As You Like It, Act 1, Scene 3*

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<sup>3</sup>Directive 98/5/EC of 16.2.1998, OJ L77/36 of 14.3.98.

<sup>4</sup>C213/89, ECR 1990, I-2433.

<sup>5</sup>C221/89, ECR 1991, I-3905.

<sup>6</sup>C46/93, ECR 1996, I-1029.

Thankfully, John Toulmin's intellectual and cultural interests are not limited to law. He has always been a lover of ancient and modern classical music, from Georg Friedrich Händel to Sir John Taverner, and one of our favourite disputes has long been whether the former should be considered a German, an English, or an Anglo-German composer. (Funnily enough, we never had the same discussion about Hans Holbein *den Jüngeren*. The obvious answer is that both were genuine Europeans. . . ) Among many other non-legal activities John Toulmin was also a Trustee of the National Association of Young String Players *Pro Corda* from 1992 to 1997 and since 1992 has been a Trustee and then Chairman of the Temple Music Trust. He is a fervent cricket enthusiast, a pastime to which I have not yet been admitted, a lover of good cuisine and an excellent connoisseur of wines and vineyards between Bordeaux and the Mosel.

While delicious cooking has always been provided by the *cuisine* of his wife Carolyn, who is also a Barrister and a Law Reporter, John had to wait until the late 90s to be able to produce his own quality wine. *Clos Toulmin* in Auxey-Duresses on the Côte de Beaune in Burgundy is an estate that is not only the source of an excellent pinot noir but also a wonderful residence, a resort to gather strength and ideas. We wish John Toulmin many years to come, to enjoy life, work and leisure, and we hope still to be able to count on his advice and support.

*There is a tide in the affairs of men,  
Which, taken at the flood, leads on to fortune.*  
Shakespeare, Julius Caesar, Act 4, Scene 3