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MEMORABLE INTERNATIONAL CASES AND FRIENDSHIPS WITH JOHN LORD O'BRIAN

John G. Laylin*

Few men have had so many friends as John Lord O'Brian and seldom have so many had such a friend. He practiced law not to make friends but to win the cases he undertook, and though he did not win every case he never failed to win a new friend.

It was a joy to work with O'Brian. The atmosphere was one of highmindedness, clarity of perception, gentleness and humor at the expense only of stuffiness or hypocrisy.

A former colleague now teaching law has a photograph of O'Brian facing his desk chair. "Whenever I wonder whether a course of action would be right, I look at that photograph," this professor said. "He set a standard of integrity." If one wondered whether O'Brian would go along with a course of action that involved, say, a little lack of candor, he did not need to ask him.

Though an embodiment of courtesy, O'Brian could be curt when the occasion required. One time when a Congressman approached him with outstretched hand, O'Brian put his hand behind his back. Later I remarked that that was the only time I had seen him acting uncourteously. "That man voted against the draft when it passed the House by only one vote," he replied.

The delight that came from working with O'Brian fostered the growth of admiring friendship. On his part, O'Brian offered more than he asked. He remarked to me one day that more was accomplished in the law through friendship than any other factor—not, let me hasten to add, by way of favoritism. Mr. O'Brian's career was predicated on a regard for the virtue of an argument, a confidence in the pertinence of a cited case, and a reliance upon the accuracy of a stated fact. If O'Brian said a thing was so, it was so.

It was his past friendships which induced O'Brian, after leaving the War Production Board, to take up the private practice of law in Washington. The story can be told in O'Brian's own words. It is pure O'Brian:

I may as well admit to you at once that from the time I entered the legal profession I have been guilty of an exalted view of the profession of law. I like Elihu Root's phrase, that Frankfurter used to quote, about the law being the "public profession of the law" and I came into it with the idea that the lawyers were the

* Member, District of Columbia and New York Bars. A.B., Cornell University, 1925; LL.B., Harvard University, 1928.

useful people in the community, and therefore there was an obligation on the part of the lawyer to do something besides try cases in court and advise clients. I came in with the old-fashioned idea of the lawyer as a counselor and that a lawyer ought to take some part in the life of his time, either in his neighborhood or in his community or possibly in public life, although my only experience can't lead me to recommend that. But I've held that view always. I came in with a great deal of feeling and reverence for the courts, for the judiciary, some of which I still retain, and I have no regrets. I've had a strange career. I met Mr. Burling, as he said in his speech, in 1917 at the Cosmos Club at one of Judge Hitz' Saturday luncheons; I met him with Rublee and Judge Covington and Joe Cotton. Cotton and Hitz were classmates of mine and had a good part in shaping my own life in those early days. I little knew when I met Uncle Ned that I was tangling with a thread of destiny that would lead me as a pilgrim in the land of his friendship for many years and end up by finding me a refuge in Covington & Burling.

In 1919 Judge J. Harry Covington and Mr. Edward B. Burling formed the partnership that continues under their names. They were joined in 1921 by Mr. George Rublee. Following the death of the Judge and upon the retirement of Mr. Rublee and Mr. O'Brian's retirement from the general counselship of the War Production Board, "Uncle Ned" Burling and George Rublee persuaded Mr. O'Brian to stay in Washington as counsel¹ to the firm. Thus in 1944, at an age when most lawyers retire, he renewed the active practice in Washington of antitrust and constitutional law which led to a number of interesting cases in the international law area.

Out of his long line of cases and years of public service the number of O'Brian's distinguished friends grew to the point that the walls of his office were not large enough to carry all of the autographed photographs. From the cases on which I worked with him grew a number of great international friendships. Among the foreign clients who became lasting friends were Henrik de Kauffmann, the brave Danish Ambassador, Hussein Ala, the courageous Iranian Ambassador, Constantine Tsaldaris, the unheralded Prime Minister of Greece, and Sir Zafrulla Khan, the talented Foreign Minister of Pakistan, later President of the International Court of Justice.

The story of the cases involving these clients and the characterization of these notable friends should have been written by O'Brian. Each case posed a challenge requiring the counsel of a lawyer of his calibre and each tested the stamina of the client.

1. Two years later he became a senior partner.

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The Danish Ship Case

In the spring of 1941, after Denmark was occupied by the Nazis, 39 Danish vessels in United States ports were taken into custody, although the United States was not yet at war. The Danish Minister, Henrik de Kauffmann, consented to the requisitioning of these vessels for use, not for title, on the understanding that the vessels would be returned to their owners who would be paid during the period of use charter hire an amount equal to that paid for American vessels used by the government under voluntary charter hire. The United States government took the vessels not for use but for title and offered compensation 50 percent below that offered for American vessels taken for title. The offer to Americans was below the market value at the time of taking. For instance, the War Shipping Board offered \$137 a ton for a Danish vessel, the African Reefer, assuming its value, if American owned, to be \$274. This vessel had sailed to the United States relying on the promise to de Kauffmann that Danish vessels would enjoy treatment equal to that accorded American vessels. That the \$274 American value was understated was shown by a contemporaneous sale of a sister ship to the Argentine government for \$564 a ton.

Mr. Rublee was retained by the Danish Minister to advise as to his government's rights. Beginning in 1945, O'Brian was in charge. He appeared before an Advisory Board established to lay down rules to be followed in providing just compensation. Later, when the issue went to the Supreme Court for decision on the propriety of the government's contention that it need not pay the full value of property taken for war purposes, even to Americans, O'Brian argued the case without fee.² He won affirmation of the classic rule that the taking government must pay full value of expropriated property at the time of taking.³

The 50 percent deduction established by the War Shipping Administration was finally restored by act of Congress in 1958. Henrik de Kauffmann was named ambassador in 1946 and continued to work with O'Brian and me until the case was successfully closed.

For 17 years there was one disappointment after another. The case called for unflinching perseverance on the part of the Ambassador. He and O'Brian were regular Sunday lunch guests at Uncle Ned Burling's log cabin. The conversation⁴ and comradery of those sessions, de Kauffmann often remarked, helped sustain him during the 17-year ordeal.

2. The government chose to test its contentions against the owner of a small tugboat.

3. *Cors v. United States*, 337 U.S. 325 (1949).

4. The lunches were strictly stag. Some have said O'Brian "hated" women. He did not, although he generally preferred the conversation of men. While we were in New York City on the Azerbaijan case [see p. 42 *infra*] he told me at breakfast he had arranged a dinner with "the Hands," Learned and Augustus, and Judge Thacher. "We'll have good conversation," he promised. Just then Mrs. O'Brian joined us. "I've called their wives," she began

The Azerbaijan Case

Of the international law cases we worked on, one of the most challenging involved the dispute between Iran and the Soviet Union over the continued presence of Russian troops in Azerbaijan. It gave full scope for exercise of O'Brian's talent and taught many lessons—not the least of which was to focus on the main issue and state it simply. "Copey"⁵ was his model. O'Brian became mine.

At the end of World War II, the United States, Great Britain and Russia agreed to withdraw their occupying troops from Azerbaijan within six months. However, only the British and ourselves had withdrawn. Hussein Ala, the Iranian Ambassador in Washington, was instructed by Prime Minister Gavam to request the Security Council to call for the withdrawal of the Russian troops. We were retained as counsel.

Andrei Andreivich Gromyko asked for a postponement. Ala, O'Brian and I worked diligently on the reply. At last O'Brian remarked that this is as "pithy" as we can make it.

The following was dispatched to the United Nations Secretary General:

I have the honour to acknowledge receipt of your note enclosing a copy of a letter from the USSR Ambassador requesting on behalf of his Government a delay in the meeting of the Security Council until 10 April 1946.

In reply may I respectfully ask that you inform the members of the Council of the earnest hope of the Government of Iran that consideration of this matter will not be delayed. At the conference in London decision was postponed upon the merits of the earlier dispute pending negotiations between the parties. These negotiations have failed. Meanwhile, 2 March, the date fixed by the Tri-Partite Treaty, has passed and the Soviet troops have not been withdrawn. The obligation of the Government of the Union of Soviet Socialist Republics to withdraw its forces from Iran is not a proper subject for negotiation under the Charter of the United Nations or the constitution of Iran.

with elation, "and all can come." "Then there will be no dinner," he reacted. And the dinner did not take place.

But he counted interesting and loyal women such as Mrs. Eugene Meyer and Mrs. Edward Burling among his great friends and had a teasing relationship with certain of the wives of his partners. As he reached the age where one prefers to sit down at large receptions he did not seem to mind the court paid at his table by attractive young wives of the partners and associates.

At a dinner over which he presided the story was told that when the shapely roommate of a co-ed was introduced to her family, she ended: "And this is Grandfather. He's in his nineties." O'Brian's stand-in was quoted as correcting: "My early nineties."

5. Charles Townsend Copeland, a teacher of writing at Harvard, the roster of whose pupils reads like a Who's Who of American Literature.

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The delays thus far permitted have intensified the critical conditions in my country caused by the failure of the USSR to withdraw these troops. The state of affairs is very grave and further delays would inevitably result in increased harm to the interests of Iran.

I shall be greatly obliged if you will have the kindness to communicate these views immediately to the members of the Security Council.

The case was not postponed.

Our then Secretary of State, James Byrnes, was a master of compromise. Our problem was to draw an issue that precluded compromise. Here the Russians helped. Despite the explicit requirement of the Charter that a party to a dispute in the Security Council could sit with the members, Gromyko challenged Ala's right to take part.

O'Brian drew the issue narrowly—not on the merits of the dispute—but on the right of a member of the United Nations to argue for its right to be heard on a proposed postponement of its case. This admitted of no compromise and Byrnes supported us. Next morning the newspapers made the Secretary a hero for championing a small nation against aggression. From then on he was with us on the merits.

We had a notebook full of speeches. One was on the right to be heard. Another paraphrased a cable from Gavam stating the Russian conditions to withdrawal. This speech went to the heart of the dispute. We called it "the works." As Ala rose to speak on his right to be heard, he asked us which speech he should give. We suggested "the works."

Ala had practically completed "the works" when Byrnes interrupted and cautioned Ala he was to confine his remarks to his right to be heard on the question of postponement. We had an answer ready for that. Ala read:

The seriousness with which the people all over the world, as well as the people of Iran, regard this state of affairs is testimony to the fact that a delay in the settlement of this dispute is a threat to world peace. A delay is requested by the country that has most to gain by delay. It is resisted by Iran because, by the same token, Iran has most to lose. If it is the duty of the Council to consider a matter that is likely to endanger international peace, it would seem to be the duty of the Council not to delay the consideration of such a matter. For these reasons Iran views with grave concern any delay in the consideration by the Council of the merits of the case.

Through the Polish member of the Security Council the Russians sought to discredit Ala's authority to speak for his government, and through its Ambassador in Teheran they brought pressure to have the case withdrawn from the Council. We asked Prime Minister Gavam if he was considering withdrawal. His cable, decoded and translated, stated "under no circumstances." A few days

later he cabled again in code that a party to a dispute had no right to withdraw its complaint. But a few days later Ala received 25 cables in English instructing him to withdraw the case.

Ala told O'Brien and me that he was going to resign rather than be the messenger of such a surrender. He did not want advice on that. We asked him what alternatives to resigning he had considered. We submitted an alternative in the form of the following draft of letter:

On 9 April 1946, I had the honour to state, in accordance with the instructions of my Government, its position regarding the request of the representative of the Union of Soviet Socialist Republics on the Security Council that the Council remove from its agenda the matters relating to the continued presence of USSR troops in Iran and the interferences in the internal affairs of Iran.

In my letter, I informed the Council of the desire of my Government that these matters remain on its agenda as provided by the resolution adopted on 4 April 1946.

Yesterday, 14 April, my Government instructed me to make the following statement to the Security Council:

As a result of the signature of the agreement between the Iranian Government and the Government of the Union of Soviet Socialist Republics, it has been agreed that the Red Army evacuate all Persian territory by 6 May 1946. The Iranian Government has no doubt that this agreement will be carried out, but at the same time has not the right to fix the course the Security Council should take.

This morning I received a further telegram from my Government reading as follows:

In view of the fact that the USSR Ambassador has again today, 14 April, categorically reiterated that the unconditional evacuation of Iranian territory by the Red Army will be completed by 6 May 1946, it is necessary that you immediately inform the Security Council that the Iranian Government has complete confidence in the word and pledge of the USSR Government and for this reason withdraws its complaint from the Security Council.

The draft was adopted and delivered. The Security Council is still seized of the case.

The Shah decided to hold elections in Azerbaijan and send troops there. The Russian Ambassador threatened Prime Minister Gavam with disturbances and danger to his own life. Ala was authorized to report this to the Security Council but was required to keep the tone friendly. The result was the following "friendly admonition" letter sent December 5, 1946:

My Government has instructed me to submit this report in connection with the complaints previously made to the Security Council against interferences in the internal affairs of Iran. It will be

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recalled that a result of these interferences is that the Central Government has been denied the exercise of effective control in the Province of Azerbaijan. Unfortunately, in spite of every effort to remove by conciliatory means the consequences of these interferences, the Central Government has not yet been able to re-establish its authority in that Province.

Elections to provide for the selection of the Madjless, our National Legislature, have been called to take place throughout Iran beginning December 7th. In order to assure that the election procedures are duly followed, it has been arranged that military forces shall be stationed in all the provinces of Iran. Those in control of affairs in Azerbaijan have objected to the entry of such Government forces into that Province. The Soviet Ambassador at Teheran, acting under instructions from his Government, has given friendly admonition that the movement of Government forces into this part of Iran may result in disturbance within that Province and on the Persian borders adjacent to Russia, and advised that the Government's plans be abandoned.

.....
The decision of the Security Council to remain seized of the questions raised by the complaints of Iran has demonstrated its concern regarding the consequences of the interferences that have occurred in the past. My Government has, therefore, felt it to be its duty to furnish the information contained in this report in order that the Council may be in a position to interpret the course of events in the Northwestern portion of my Country.

A commentator on the Azerbaijan case credits the success in no small part to the felicitous phrasing of Ala's submissions. The case was, of course, won not by words or skillful advocacy but by the farsightedness and determination of officers in our State Department, notably Loy W. Henderson, then Director of the division of Near Eastern and African Affairs, and in the Foreign Offices of the democratic countries. Hussein Ala deserves the most credit for his wisdom in following the advice of John Lord O'Brian.

The Balkan Case

Soon after the resolution of the Azerbaijan case, O'Brian was visited by a group of Greek residents of Buffalo who urged him to advise the Greek Government in a case it had before the Security Council. On December 3, 1946 the Security Council received a third complaint of the chairman of the Greek delegation to the General Assembly concerning "a situation which is leading to friction between Greece and her neighbors, by reason of the fact that the latter are lending their support to the violent guerrilla warfare now being waged in northern Greece against public order and the territorial integrity of my country."

At the end of December, Prime Minister Constantine Tsaldaris visited Washington and we were retained. This case resembled the Azerbaijan case to the extent that it involved another attempt to impose a communist regime by force

but differed in two important respects. In the former case the presence of Russian troops was an admitted fact, while in the Balkan case the assistance given to the guerrillas was denied by the Albanians, Bulgarians and Yugoslavs who were supported by the Soviet Union. A second and very important difference was that in the latter case the Soviet Union's participation was not direct.

A year after our retainer, the Security Council had established a Commission of Investigation, but had not reached a decision. Tsaldaris cabled O'Brian and me recalling that the Azerbaijan case had been resolved within a year and asking why we were taking so long. The answer was given in a memorandum which reveals so forcefully O'Brian's way of working that I shall quote it at some length:

March 27, 1947

We have given considerable thought to the cable of Mr. Tsaldaris asking what action we would recommend in working out a solution to the problem of the guerillas, having in mind the experience gained in connection with dealing with the Soviet support to its puppet regime in Azerbaijan. The success of the Iranians in solving the Azerbaijan question was attributable to three separate factors:

First was the unification of Iranian public opinion and governmental determination to defend Iran against dismemberment. The advance of the Iranian Army into Azerbaijan was not a bluff. It had the unanimous support of both the Persian Government and Persian people.

Second, it had become evident that so long as Iran was determined to defend her political independence, it would have the support of the United States, Great Britain and other non-totalitarian members of the United Nations.

Third, Iran's case before the Security Council and public opinion was narrowed down to a very simple issue. Constant efforts were made in all public utterances to confine attention to the simple issue of Russian interference. World public opinion understood this question and Iran won unanimous public support. The issue was kept so simple and drawn so sharply that Russia eventually had to choose between withdrawing support from Azerbaijan or being convicted in world opinion of flouting the United Nations.

Turning to the guerrilla problem in Greece, it is vitally important that the issue be confined to the simple point of the foreign support and encouragement to the guerrillas. . . .

True, there are minor issues (for instance, in the handling of the investigation) about which the Greek Government is justified in making complaint. We feel strongly, however, that in complaining now about those collateral issues the Greek case is weakened.

Prime Minister Tsaldaris acted on this advice. The day before the Security Council was to meet to debate the report of its Commission of Investigation he directed the Greek Ambassador in Washington to file a letter moving the dispute

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from Chapter VI to Chapter VII of the United Nations Charter. The former deals with "situations likely to endanger the maintenance of international peace" and empowers the Council only to make recommendations, whereas the latter deals with "threats to the peace, breaches of the peace and acts of aggression" and empowers the Council to "take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security." The Russians could and did prevent action by use of the veto. The case was then moved to the General Assembly. Tsaldaris himself represented his country and did his best to keep attention focused on the central issue. This was not easy as even members of his own delegation and the dispatches from Greece kept introducing extraneous issues.⁶

We came to admire Tsaldaris for his patriotism and constancy in the face of attacks from all sides. Few people ever appreciated the greatness of the man. One incident will give insight into his character. Speeches prepared in advance of the 1948 meeting of the General Assembly took a hard line. The Berlin Blockade was on but Philip C. Jessup was negotiating with the Russians to lift it. The Greek case was to be debated right after Jessup was to give his report. What course should Greece take if Jessup reported a conciliatory attitude on the part of the Russians?

Many people in the United States and some in the United States delegation were urging that Greece grant amnesty to all political prisoners and hold new elections. Tsaldaris decided to offer to do this if the Jessup report indicated the Russians were withdrawing from their hard line. When he announced this decision to his foreign minister in the presence of no one other than me, the minister objected, pointing out that Tsaldaris would probably win a majority but perhaps not. "So what," retorted Tsaldaris, "if it is good for Greece."

The threats to the peace and security of Greece were met by material aid under the Truman Doctrine, and by the training General de Witte gave the Greek army in dealing with bands of guerrillas. But the original hostility of the press towards Tsaldaris' government swung over to strong support for Greece⁷ thanks to hammering home by Tsaldaris of the "simple point of the foreign support and encouragement of the guerrillas."

6. The communists in Greece had an effective press service which handed out releases well written in English. The Greek Government's releases had to be translated by American correspondents and put into readable dispatches. A result was that many correspondents because of haste or laziness filed the communist releases.

7. The hostility of certain influential writers toward Tsaldaris continued to the point where it was feared further public support for continued aid to Greece might be jeopardized. It was decided to ask him to step down. Loy Henderson was sent to Greece to transmit the request. He has often remarked that never did he have so distressing an assignment. Henderson shared O'Brian's and my admiration for Tsaldaris. At Loy's request Tsaldaris did step down "for the good of Greece."

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A near life-size photograph of Tsaldaris with an admiring inscription to O'Brian occupied a prominent place in the entrance hall of his Washington apartment.

The Indus Basin Case

During the 1948 General Assembly meeting in Paris, the Pakistani Foreign Minister, Sir Zafrulla Khan, invited me to breakfast to get the names of the four best American practitioners of international law. I named three, one of whom was John Lord O'Brian. Sir Zafrulla called on O'Brian and Burling and our firm was retained to write a brief in support of Pakistan's claim, in the International Court of Justice, to the continued use of the irrigation supplies it had historically drawn from the Indus system of rivers.

We first checked whether Pakistan could require India to accept the jurisdiction of the World Court and found that India's acceptance of compulsory jurisdiction excluded disputes with other members of the British Commonwealth of Nations. Nevertheless, Sir Zafrulla asked us to go ahead for he needed to know the controlling legal principles. Prime Minister Jawaharlal Nehru had refused to negotiate unless Pakistan acknowledged it had no legal rights. India's lawyer contended that an upper riparian was entitled under customary international law to do as it chose with the supplies of an international river so long as its acts were confined to its own territory.

O'Brian's part in the case was to counsel the team working on it. Since Nehru was not willing to accept the World Court or any other tribunal as arbiter and because he insisted that negotiations come only after Pakistan acknowledged that it had no legal rights, our task was to find a "good officer" to understand the needs of the other side and to encourage a third party proposal that both sides could live with.

A good officer was found in the person of David Lilienthal, O'Brian's friend from the days when he won Supreme Court approval of the Tennessee Valley Act. Nehru had invited Lilienthal to visit India to study its water system. When Lilienthal came to O'Brian to have his will updated, O'Brian mentioned that he and I were involved in the question of the distribution of the irrigation waters. Together we asked Lilienthal if he would accept from the Prime Minister of Pakistan an invitation similar to that extended by Nehru. He said he would and he did. He asked for a brief of the Pakistani position which we quickly readied for him.

The brief, after stating the Pakistani position, acknowledged that India needed more water from the Indus system of rivers and inquired into ways that the needs and aspirations of both countries could be met. This procedure

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followed a basic tenet of O'Brian's—study your opponent's case. A successful negotiator must understand what the other side can and cannot accept and be prepared to tender constructive solutions.⁸

To our suggestions Lilienthal added conclusions. The result was a proposal for engineering works to be financed through the World Bank. This loan would enable Pakistan's historic requirements for water to be met while permitting India to realize its ambitions for increased uses.

The bank tendered its good offices, and after extensive engineering studies were prepared and discussed, and after the International Law Association had debated and promulgated rules for the distribution of the waters of international rivers, a treaty was hammered out.

When in 1948 the Indian government denied Pakistan's right to continued irrigation supplies from the Indus system of rivers, a Washington Post editorial stated it would take a miracle to resolve the dispute that ensued. In 1960, when a treaty resolving the dispute was signed, a second editorial stated that a miracle had been performed. The key to the miracle was Lilienthal's adaptation of O'Brian's basic tenet plus the great contribution of officers of the World Bank and the Committee on International Rivers of the International Law Association.

Sir Zafrulla enjoyed calling O'Brian, Lord John O'Brian. The friendship engendered during Sir Zafrulla's tenure as Foreign Minister continued through Zafrulla's service on the International Court of Justice.

The legal principles developed in the brief we wrote for him were stated in the proposals of the World Bank which led to the agreement between India and Pakistan. They were further elaborated by the International Law Association and adopted at its 1966 conference in Helsinki. They are today cited as the "Helsinki Rules on the Uses of International Rivers."

It must be remembered that the foregoing cases were under O'Brian's active guidance after he had passed the age when most men have retired. Memorable as they were, they played a minor role in O'Brian's career. The Supreme Court case⁹ described here is only one of fifty he argued before the Court; and, of course, O'Brian did much more than argue cases.

The honors bestowed upon John Lord O'Brian would have turned an ordinary man's head but he bore them with real, not pretended, modesty. He admired genuine modesty in others. In the course of a speech in honor of one of our friends who played a decisive role in both the Azerbaijan and Balkan cases, Mr. O'Brian said:

I can't think of his modesty though, without recalling Plutarch's story of the elder Cato. When I was a boy with the old

8. Prof. Roger Fisher participated in the preparation of the brief. He has since developed the basic tenet in a book. R. Fisher, *International Conflict for Beginners* (1969).

9. See notes 2-3 *supra* and accompanying text.

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pronunciation we called him Cato Major, but that's long forgotten pronunciation.

When he was asked why he had no monument, he simply answered, "Well, I'd rather be asked why I had no monument than to be asked why I have one."

A prophet, it is said, is not without honor save in his own country. It is especially gratifying to the friends of John Lord O'Brian who live outside Buffalo to learn that the new building of the State University of New York at Buffalo Faculty of Law and Jurisprudence is to carry his name.