

A lawyer in quest of rule of law

MAHMUDUL ISLAM

WITHOUT lawyers, the law might have remained essentially the servant of those in power. In the English speaking world, society could not have progressed without professional lawyers, any more than it could have progressed industrially and commercially without the entrepreneurs. Almost every bit of progress in achieving rule of law originated in a lawyer's brief. The same can be said of the legal profession in our country.

Speaking about the role of lawyers, Alfred H Knight in his book, *The Life of the Law*, said, "The twentieth century's most important constitutional idea -- that separation of the races is incompatible with legal equality -- was introduced by lawyer Thurgood Marshall, to a Supreme Court that came late and reluctantly to the idea. The revolution of press law that began in 1964 with *New York Times v. Sullivan* might never have occurred but for the brilliant impetus provided by the *New York Times*' lawyer Herbert Wechsler. None of the above were governmental gifts, and if people had waited for the government to confer them, they might still be waiting, in patience and ignorance."

Syed Ishtiaq Ahmed during his life time argued many important cases. Constraint of space prevents me from discussing all of them. On the first death anniversary of Syed Ishtiaq Ahmed, I recount only a few to say here in this land we had a lawyer who was the Thurgood Marshall and Herbert Wechsler of Bangladesh.

Professor Nurul Islam is a renowned physician. In 1979 he was both Professor of Medicine and Director of the Institute of Post-Graduate Medicine and Research. Somehow, he came in for some rough treatment from the government, which issued an order that would not allow him to remain as a Professor of Medicine and Director of the institute at the same time.

Seriously aggrieved, Professor Islam came to the Chamber of Syed Ishtiaq. Syed Ishtiaq argued the case and the High Court Division declared the order of the government to be without lawful authority. Having failed to dislodge Professor Islam, the government issued an order compulsorily retiring him.

Previously some six or seven

government servants unsuccessfully challenged the order of compulsory retirement passed against them, the court taking the view that the government had the discretion to retire any public servant who completed twenty-five years of service. Syed Ishtiaq led a two-pronged attack on the law relating to compulsory retirement. He argued that the Constitution seeking to establish rule of law, the government cannot claim unfettered discretion which is not informed by reason. He further argued that discretion given by law

tenacity with which Syed Ishtiaq argued the case resulting in so great an effect on our constitutional jurisprudence. He had long discussions with me on how to proceed, what decisions to be cited, what facts were to be emphasised and so many other ticklish matters. Syed Ishtiaq decided to go for the larger constitutional issue of rule of law involved in conferment of discretion and violation of the equality clause of the Constitution. We were particularly concerned with the problem of showing the law relating to compulsory retirement to

Samity v. Bangladesh, the Appellate Division overruled a long line of decisions handed down by the superior courts to hold that writ petition would lie where the contract entered into in exercise of statutory or sovereign power and the Supreme Court will have power and jurisdiction to scrutinise the exercise of sovereign and statutory power. The emphasis is on the justiciability of statutory and sovereign powers of the governmental authorities. Today, wherever there is a prima facie case of arbitrary or wrongful use of the

Case No 1 of 1995 and made his submissions against the doctrine of political question barring judicial review of governmental action in certain fields. The Appellate Division in answering the reference refused to apply the doctrine of political question in matters involving legal and constitutional issues. Resultantly, the judiciary is performing an activist role in judicial review of the governmental actions to an extent which was totally unthought of three decades before.

We may now deal with the famous

Syed Ishtiaq worked for the development of law for public good in a difficult time when the country was under martial law. The role of the judiciary was almost in the negative. Martial law was proclaimed to be supra-constitutional. Lawyers like Syed Ishtiaq worked untiringly, and at a great risk succeeded in overturning the scales with the help of equally courageous judges. We still have a long way to go to establish true rule of law. Syed Ishtiaq and his like started the work and paved the way and it is for us to carry on their good work to shape the law for the benefit of the people.

to any public functionary without providing any guideline for the exercise of discretion creates a situation where the public functionary can discriminate between citizens with impunity, and therefore any law giving unfettered discretion on a public functionary is itself discriminatory and violative of the equality clause of the Constitution. He failed in the High Court Division, but on appeal, the Appellate Division accepted both of his contentions.

In *Dr Nurul Islam v. Bangladesh*, the Appellate Division held that in our constitutional dispensation, no authority has unfettered discretion. The Appellate Division further held that grant of discretion to any public authority without any guideline renders the law granting such discretion itself liable to be declared void as violative of the equality clause of Article 27 of the Constitution.

This decision, passed in 1981, has been relied on in innumerable cases as an authority on the above two propositions. No other case in our judicial arena has established constitutionalism in our country so firmly on its pedestal, and no other case had a greater impact on constitutional jurisprudence in our country. It is easier to narrate the impact of the decision than to describe the guile, agility, and

be discriminatory when it was non-discriminatory on its face. He worked hard, read out to the Bench a large number of decisions from foreign jurisdictions and argued the case with courage and conviction and we had from the majority of the learned judges a decision of far-reaching impact on the constitutional law of our country. Today this decision enables us to test the validity of any law or governmental action on the anvil of the rule of law.

In our country, contractual matters were outside the pale of writ jurisdiction. For most of the cases, the ordinary civil jurisdiction did not provide any real remedy against arbitrary actions of the governmental authorities in contractual matters, though the government and the statutory authorities play a vital role in doling out contracts and administering them. When the government most arbitrarily cancelled a contract of lease of fishery, Syed Ishtiaq challenged the action. The High Court Division declined to interfere on a view that no writ petition lay in the matter of entering into contracts and contract administration.

Undaunted by the rebuff of the High Court Division, he went in appeal before the Appellate Division and argued the case with great facility of an astute lawyer, and in *Sharping Matshajibi Samabaya*

governmental power in contractual and other matters, the Supreme Court issues a rule upon the governmental authorities to show cause why the challenged order should not be set aside.

Sharping Matshajibi opened the door for judicial review of contracts which form a large chunk of governmental activity. This expanded role of judiciary in judicial review of the governmental activities had its impact on the question of public interest litigation and this decision together with *Dr Nurul Islam v. Bangladesh* facilitated Dr Mohiuddin Farooque to sustain, in the leading case of *Dr Mohiuddin Farooque v. Bangladesh*, the standing of public spirited persons, without being personally aggrieved, to litigate important questions of constitutional and administrative law.

Again, in *Hyundai Corporation v. Sumikin Busan Corporation*, Syed Ishtiaq's forceful argument led the Appellate Division to reiterate the power of judicial review in contractual matters and the authority of the Supreme Court to interfere with the activities of the executive authority on the ground of lack of transparency. This decision paved the way for establishment of another emerging principle of legitimate expectation. Syed Ishtiaq appeared in the Special Reference

case of *Anwar Hossain Chowdhury v. Bangladesh* involving the power of Parliament in making amendment to the Constitution, popularly known as the Eighth Amendment case. The case was argued in the Appellate Division mainly by Dr Kamal Hossain and Syed Ishtiaq. Dr Kamal Hossain argued generally on the principle of rule of law, the power of judicial review of any enactment passed by Parliament, and the inviolability of the basic structure of the Constitution. It was a beautiful argument heard with rapt attention by the Bench as also by the lawyers and students of law. Then Syed Ishtiaq made an anatomy of the constitutional provisions and offered compelling reasons in favour of the doctrine of basic structure of the Constitution and the power of judiciary as a basic feature of the Constitution which cannot be altered by Parliament even with two-third majority.

Day in and day out, we had long sessions in the chambers deliberating the issues involved, and read a wide range of decisions and authorities. It took us quite some time in planning and deciding upon the sequence in which the argument was to be advanced. He analysed before the court the paramount clause of Article 7 of the Constitution, and submitted that Article 7, being basic and fundamental, is

unalterable and it is an express limitation on the amending power of Parliament. He argued that when a power is granted under the Constitution, it is presumed that it will be exercised for good government and for promoting public good and not for evil design or destructive purpose, but under our constitution this is no longer a matter of presumption; it is spelt out in Article 8 of the Constitution. He went on submitting that construing the amending power under Article 142 in proper perspective it cannot be said that basic structure of essential features of the Constitution can be altered or affected in exercise of the amending power. So compelling were the reasons advanced that even the dissenting judge had to say that whatever meaning the words 'amend' and 'amendment', it cannot be disputed that they never mean 'to destroy', 'abrogate', or 'destruction' or 'abrogation'; in exercise of the power of amendment, the Constitution cannot be destroyed, abrogated, or emasculated.

Syed Ishtiaq together with Dr Kamal Hossain and other lawyers succeeded in giving a content to what is meant by limited government in which the Constitution is supreme, and not Parliament or any other institution. The decision also placed on firm footing the guardianship of the Constitution by the Supreme Court.

Another landmark case was *Bangladesh v. Masdar Hossain* in which I had to appear for the appellant. The important question that arose was whether the judiciary is an organ of the government separate and distinct from the other two organs of the government, necessitating distinct and separate method of appointment of, and dealing with, other related matters involving, the members of the subordinate judiciary. Mr Amirul Islam led the main argument for the respondent, but Syed Ishtiaq and Dr Kamal Hossain made important contributions in their submission.

Syed Ishtiaq with his usual flamboyance and clarity about the constitutional dispensation dealt with the issues involved with cool composure, and I could hardly disagree with him even though I joined issue with the other two celebrated lawyers and partly succeeded in having some of my submissions accepted by the court. It is indeed sad that the government is dragging its feet in implementing the directives given by the Appellate Division in the case.

Syed Ishtiaq worked for the development of law for public good in a difficult time when the country was under martial law. The role of the judiciary was almost in the negative. Martial law was proclaimed to be supra-constitutional. Lawyers like Syed Ishtiaq worked untiringly, and at a great risk succeeded in overturning the scales with the help of equally courageous judges. We still have a long way to go to establish true rule of law. Syed Ishtiaq and his like started the work and paved the way and it is for us to carry on their good work to shape the law for the benefit of the people.

Mahmudul Islam is a former Attorney General.



A personal remembrance

PROFESSOR MESBAH-US-SALEHEEN

BARRISTER Syed Ishtiaq Ahmed said good bye to us and left for his heavenly abode on July 12, 2003. Barrister Ishtiaq was the husband of my first cousin National Professor Sufia Ahmed. I have many fond memories of him. A few days after his death, many organisations, and individuals, irrespective of their ideologies remembered him through deep condolences and memorial meetings. Barrister Ahmed was one of those rare people who managed to balance a strong judicial reputation with a respected career as a national figure, which was in many respects exceptional. He had to tread a long and arduous road to reach the apex that the ultimately scaled. His ancestral home was in Gazipur, Uttar Pradesh, India. He was born in the year 1932 and started his education at Hili, Dinajpur and Kolkata, West Bengal. He did his Bachelor of Honours and Master of Arts in Economics from the University of Dhaka in 1953 and 1954 respectively. With a brilliant academic record, he went to England to study Economics at the London School of Economics. While studying economics there, he joined the Honourable Society of Lincoln's Inn, London for the professional degree of Barrister-at-Law.

Because of his stature and intellectual prowess, the people who wished to misuse judicial interpretation to advance their own agenda considered Barrister Ishtiaq a threat. His knowledge of law and its explanation and narration was well known. As a lawyer, he rose to the pinnacle of the profession in our country. He was an independent person in all respects and wanted to do things in his own way. For that he did not join in the then East Pakistan High Court or in the Supreme Court of Bangladesh. He did not join any political party, although he was more politically conscious than many others. He used to laugh and refrain from making any comment whenever I asked him about his political colours. He was not a politician by profession but always a very much politically conscious man. For that he was a two-time Adviser to the non-party care-taker government in our country.

From head to toe, he was a true lawyer. Throughout his whole career, he tried to uphold the truth and implement it from his remarkable legal brain. His abiding interest was grassroots democracy, for which he considered the need for the bifurcation of the judicial system from the administration. In his later years of life, it was probably his last ambition to see the separation of the judiciary from the executive. It was Barrister Syed Ishtiaq Ahmed who started the process during his sojourn stay as an adviser to the government of Bangladesh in 2001. Although the matter now lies in its final stage, it is pity that Barrister Ishtiaq could not see the materialisation of this during his lifetime. Before his demise he was very much upset about the sordid political scenarios of our country.

He was articulate and assertive and was always surrounded by people, which he used to love very much. His humility, gentility, hospitality, and cordiality constantly amazed those who knew Barrister Ishtiaq. He was a gentleman *par excellence*. His dealings with public as well as with relatives were immaculate. He used to cut jokes with us as brother-in-law and was always very humorous with us all in private conversations. In public he was kind and gentle. He could relate to people of all ages at a party or in a function. He could communicate with people with ease. He was a very witty and charming person. His passion for roses is well known. He used to cultivate a rose garden in front of the veranda of his house and to nourish it was his immense passion.

He is remembered by his loving wife National Professor Sufia Ahmed, children Justice Rifaat Ahmed and Dr. Raina Ahmed Fateh and grandchildren as a loving husband, father and grandfather. Barrister Syed Ishtiaq Ahmed will be sadly missed but will live in the hearts and thoughts of the millions of our country in the future. Many relatives, friends and admirers will miss Barrister Syed Ishtiaq Ahmed for years to come. May Allah grant him eternal peace in Heaven.

Mesbah-us-Saleheen is Professor of Geography and Environment, Jahangirnagar University.



Lest we forget a patriot

"The ideals of a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic, and social, for all citizens continue to be our dream and vision for the future. It is our belief that we prosper only under rule of law and in freedom."

JUSTICE LATIFUR RAHMAN

SITTING in the home of my second daughter, who lives in the city of Troy, Michigan, USA, suddenly, the face of the late Syed Ishtiaq Ahmed flashed at the back of my mind. In a land far away from home, I thought of the person who loved his country and the people. He was a man who always dreamt of an independent and people oriented judiciary for the good of the common man in Bangladesh.

Ishtiaq was senior to me by two years at the University of Dhaka. I had no personal acquaintance with him during our university days. Those were the days when the junior students used to maintain a distance from the senior students. Very often, I used to see him delivering speeches under the mango tree of the old premises of the University of Dhaka. Normally he used to deliver his speeches in English. The thought-provoking utterances of the young handsome Ishtiaq used to attract us all. I still remember that I along with my friends used to listen to him with rapt attention as his speeches used to inspire the young minds.

After leaving the university, I saw Ishtiaq at the High Court of Dhaka where I joined in 1960. Within a very short span of time, he made his mark as a good lawyer. I mainly found him conducting constitutional and civil cases in the Supreme Court. It appeared to me that he had little interest in criminal cases. He appeared in many important constitutional cases and tried to help the judges in arriving at a correct interpretation of our constitutional provisions. As a lawyer he never tried to mislead the court. His fairness, argumentative ability, and knowledge of law are indeed praiseworthy. Ishtiaq could have adorned the seat of justice as a judge of the Supreme Court, but he never aspired to that; yet I am happy to see that his only son has been elevated to the High Court Division. I am confident that he would follow the footsteps of his late father in keeping the flag of judiciary high.

Although I have not found Ishtiaq to be actively associated in the politics of Bangladesh, yet he always spoke of healthy politics in the country. Ishtiaq truly believed that in a democracy, the courts are vital institutions for upholding the rule of law, protecting the rights of individuals, to live, work and enjoy without fear or favour. For ensuring meaningful independence and neutrality of the judiciary he fought against the decentralisation of the High Court Division during the autocratic rule of General Ershad and gladly went behind the prison along with many other lawyers of the country.

As Attorney General of Bangladesh, I had found him in conducting cases on behalf of the government with utmost fairness. The honesty, dedication, and thoroughness with which he conducted the cases at the Bar were worth emulating by lawyers of today. As a lawyer, he appeared before me in many cases and I always found him to be respectful towards the judges. He had a nice way of presenting his cases and to win over the hearts of the judges. Even in disagreement with the viewpoints of the judges he always accepted the judgment in good grace. Today, this is a rare virtue in many lawyers.

While writing this excerpt, suddenly I remembered a little event, which reflected a basic quality in the man. When in 1979, I was elevated to be a judge in the High Court Division, I had to transfer a case for final hearing to his chamber. After final disposal of the case, on receipt of the final fees, I sent it to him, but instead of accepting the money he returned the same to me by saying that he could not take the money for doing a case of a friend who had become a judge. Money was no consideration in his professional career, though he earned a lot as a lawyer of good reputation. I also know of some instances when he conducted cases without any fees at all.

Ishtiaq was an advisor in the Caretaker Government of Justice Shahabuddin Ahmed in 1991. In the Caretaker Government of 2001, I also inducted him as an Advisor in the Council of Advisors. Justice Shahabuddin Ahmed's advice helped me in choosing him at that time. I must state very candidly that soon after formation of Caretaker Government, Ishtiaq reminded me of the case of Masdar Hossain (200 BLD AD 104), in which I also wrote a concurring judgment with the main judgment of the Chief Justice. His intention of mentioning the case to me was to get the approval from me to proceed with the implementation of the judgment of Masdar Hossain, thereby to separate the judiciary from the executive organs of the state as per Article 22 of the Constitution. Initially, I was a little reluctant to consider his proposal as I thought that one might argue that the broad question of the separation of judiciary might be one of policy-decision, which is beyond the jurisdiction of the caretaker government. Ishtiaq's persuasive argument that our judgment fixed a time limit to implement the judgment and the time having expired, the executive government could act in aid of the Supreme Court. Strictly speaking in that perspective it was not a policy decision at all. Ultimately I agreed with him. And by his able guidance, within a short span of time relevant rules and ordinances were framed for approval of the Council of Advisors and finally of the President of the Republic in his ordinance-making power. He also took personal pains in convincing the President to agree to our efforts to exercise his ordinance making power in this regard. To be frank and honest it was due to all his efforts that we could take steps in this matter.

But alas the dreams of Ishtiaq remain unfulfilled, as he could not see the separation of judiciary in his lifetime. Ishtiaq is no more in the world of living but I can say honestly that he was a man who loved the institution of the Supreme Court in particular and the subordinate judiciary of Bangladesh in general. He always dreamt and thought of a powerful, impartial, and independent judiciary of Bangladesh. He felt that in an independent country like Bangladesh where the sufferings of the common man know no bounds, the importance of an independent judiciary is of enormous and abiding value. He always advocated for the cause of an independent judiciary in his speeches and utterances before us all as originally conceived in the Constitution of 1972. Ishtiaq could visualize that Bangladesh started well with almost all the trappings of Westminster model of democracy with a fine Constitution, but due to lack of political commitment it fell prey to misgovernment.

Ishtiaq was basically a man of soft disposition and gentle nature. His friendly attitude towards all had earned him a large number of good friends and well-wishers in life. His tender and soft behaviour had always enamored me. As a man, I have great respect for the departed soul for his qualities of head and heart. May Allah in His infinite mercy rest his soul in peace in heaven. In his death we have lost a friend, philosopher and guide. In the midst of great personal loss for late Ishtiaq's wife and other members of the family, there is enough scope to feel proud for the departed soul with total resignation to the will of the Almighty.

Finally, I conclude with a passage from his writing entitled, "The Constitution -- A Vision for Bangladesh," wherein he wrote, "However, the ideals of a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic, and social, for all citizens continue to be our dream and vision for the future. It is our belief that we prosper only under rule of law and in freedom."

Justice Latifur Rahman is former Chief Justice of Bangladesh and former Head of the Caretaker Government of Bangladesh.

Memories of a good man

M. AZIZUL JALIL

I heard the news from Dhaka on July 12, 2003 morning (Washington time), within a few hours of the death of my dearest friend Syed Ishtiaq Ahmed. Just then, I felt a great need to share my grief with common friends and indeed, with whoever would listen. Being abroad, opportunities for sharing such a loss outside my own family were extremely limited. Consequently, I had the same day written about my heartache in a few pages of emotion and sentiments, which some Dhaka papers published soon thereafter.

A year has now passed and there has not been a single week when I did not remember him, miss him, or recollect our many conversations over more than a half-century. I believe that on this first anniversary of Ishtiaq's death, there would be many articles by more competent persons than me about his professional achievements and leadership role in the civil society. I would therefore, say only a few words about his personal qualities.

Ishtiaq was such a good friend and a good person that in all my years at home and abroad, I have not met many people with the unique qualities of head and heart that he possessed. He combined the refined manners and courtesy of a man from the United Provinces (where his family originated) and the liveliness, simplicity and quick wit of a person from Bangladesh (a country where he grew up and excelled). He was always sincere and forthright, otherwise he would refrain from speaking and intervening. He was always respectful of others, particularly his seniors. His affection and helpfulness to younger people and his juniors knew no bounds. With regard to his close friends, of which I was lucky to be one, he would go out of his way with his time, influence and resources to be of help.

He was very good company and loved to be among friends. He would not allow his busy professional schedule and social obligations to stand in the way of giving almost unlimited time to dear friends. I sometimes failed to understand how he was able to manage his affairs to accommodate such diverse demands on his time and energy. Yet, there was always a smile on his face; he would not laugh loudly, particularly if it was embarrassing to others. Consideration for others was uppermost in his mind. To all, he came across as a lovable and amiable personality.

Ishtiaq was not born with a silver spoon in his mouth. He was a self-made man; whatever he achieved, he earned it by his own merit and hard work. There was always a quiet dignity about him. He was modest and could never be arrogant or pompous. He would speak about the good things happening to him only with his close friends and in private. When he became successful in his profession, which was quite early in life, he maintained a generous lifestyle, readily sharing enjoyment with friends. Ishtiaq was well-known for his generous hospitality. He was also a good husband and loved his two children dearly. Towards the end, he would be overly protective and concerned about his family, particularly his grandchildren. When I teased him about it and said that it was too much, he would smile and tell me, "Wait, soon you will yourself appreciate the attachments and concerns of a grandfather."

M. Azizul Jalil, a former civil servant and retired World Bank staff member, writes from Washington.

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