

Book Review

Maintainability of Writ Petition: An Appraisal

(published by Universal Book House, March 2020)

Ehsan Siddiq¹

It is not often that a Judge of the Supreme Court writes a book. The absence of publications by members of the higher judiciary has meant that the legal community has been unable to draw upon their experience and benefit from their views on legal issues on which they were perhaps unable to comment whilst in their robes. In 2020, Mr. Justice Moyeenul Islam Chowdhury added to the small collection of judicial publications with his own book, “Maintainability of Writ Petition: An Appraisal”. This was a subject that the author was eminently suited to comment on. Prior to his retirement, Mr. Justice Chowdhury had presided over a Division Bench of the High Court Division which dealt with judicial review applications (known in Bangladesh and the rest of the sub-continent as writ petitions). His bench was one of the more revered benches of the High Court Division and over the course of his judicial career Mr. Justice Chowdhury delivered landmarks judgments on a number of important issues, including the constitutionality of the 16th Amendment. Mr. Justice Chowdhury was confirmed as a Judge of the High Court Division on 23 August 2006. He laid down his robes in January 2020. His departure from the bench has been widely considered as a great loss to the judiciary.

“Maintainability of Writ Petition: An Appraisal” was published in March 2020. The book, as the author informs us was in fact a lecture delivered at the Supreme Court Bar Association auditorium on 26 February 2019. The first chapter begins with a description of the position of the judiciary as one of the three co-equal organs of the state and the importance of the power of judicial review in this arrangement. However, as a book on maintainability of writs, it lacks a discussion of what judges and lawyers understand by the concept of maintainability. Over the years, the Courts have developed a vast array of rules which govern whether a writ petition may or may not be heard by the Court, i.e. its maintainability. Without being satisfied on the issue of maintainability, the Courts will not enter into the merits of a litigant’s case. Yet, there is no account as to why the study of maintainability is so important as to warrant a book of its own or why the Courts have fashioned a set of rules or tests for determining which application for

¹ The author is a lawyer at the Supreme Court of Bangladesh. He completed his LLB (Hons) from the London School of Economics and Political Science, UK and was called to the Bar of England and Wales from the Hon’ble Society of Grays Inn. The author can be reached at: ehsan.siddiq@hotmail.com

judicial remedy will be entertained. The rationale for limiting this extraordinary remedy is not discussed at all.

The book broadly covers most of the important areas of maintainability of judicial review applications. And as is expected Mr. Justice Chowdhury provides a thorough account of most of these areas. He begins rightly with the issue of locus standi and devotes a considerable number of pages to its importance in public interest litigation (PIL). Since there has been a proliferation of PILs in recent years, such a discussion is warranted. What is lacking however is his personal views on the subject – why and how have the courts have restricted the scope of PILs in recent times. A mere exposition of the existing laws without any commentary does little to encourage legal debate and develop the law.

The importance of the availability of an equally efficacious alternative remedy in determining maintainability has only been given perfunctory consideration by the author. There is no discussion as to the tests that the courts have developed to determine whether a remedy is equally efficacious. For instance, there could have been some discussion as to how the courts have developed case law whereby the imposition of a non-relaxable statutory precondition to preferring an appeal, renders the appeal not equally efficacious. A discussion could have been made in this context to the appeals under section 32(2) of the Waqf Ordinance, 1962 which are not treated as being equally efficacious.

Another important issue that ought to have been discussed was whether arbitration constitutes an alternative efficacious remedy. There are conflicting judgments of the Appellate Division on this issue. Although *PDB V. Md. Asaduzzaman Sikder* (reported in 8 MLR (AD) 241) appears to hold that arbitration is not an alternative efficacious remedy, this is contrary to the much better reasoned judgment of *Bangladesh Telecom (Pvt.) Ltd v. BTTB* (reported in 48 DLR (AD) 20). There are also conflicting decisions of the High Court Division on this point. It would have been both helpful and interesting to note Mr. Justice Chowdhury's views on these judgments. This book could also have dealt with the misconception of some benches that civil suits are an alternative efficacious remedy.

While discussing the maintainability of judicial review applications against private bodies, there is no discussion of the seminal cases of *Zakir Hossain Munshi v. Bangladesh* (reported in 55 DLR 130) where a writ petition was held to be maintainable against the mobile phone company, GrameenPhone as it was found to be performing sovereign functions. There is also no discussion of the case of *Abdus Sabur v. REB* (10 BLC 503) where a writ petition was held to be maintainable against a private power generation company, Rural Power Company Limited. The author does however discuss at length the recent case of *Moulana Md. Abdul Hakim v. Bangladesh* reported in 34 BLD 129 where a writ petition against an order issued by the

Chairman of the Managing Committee of a madrasah was found to be maintainable. The author explains that the High Court Division used a functional test to expand the scope of judicial review to cover actions of private bodies where it was performing a public function. However there was no discussion of the cases, where the Supreme Court has held that judicial review applications are not maintainable against 100% state owned companies (as in *New Dacca Industries v. Qumrul Huda* reported in 31 DLR (AD) 234, where the corporate character of the company was preserved despite the nationalisation). Further, there is no account of the criteria applied by the Courts to determine when a 100% state owned company could be described as an instrumentality of the state, so as to render it amenable to the writ jurisdiction (as in *Arif Sultan v. DESA* reported in 60 DLR 431(FB)).

The issue of martial law is discussed at length by Mr. Justice Chowdhury. It is now accepted that extra-constitutional take-overs and impositions of martial law are justiciable. Over the last decade, the Supreme Court has set aside many constitutional amendments and laws because they had been passed by martial law regimes. But these judgments were passed well after the martial law regimes had collapsed. In fact during the martial law regimes, relying explicitly or implicitly on Kelsen's doctrine of revolutionary legality and the judgment of *State v. Dosso* (reported in PLD 1958 SC 533) the courts had upheld the validity of these regimes. It is only after these regimes crumble however that the courts stridently proclaim the supremacy of the Constitution. This was an area on which Mr. Justice Chowdhury could have shared his views.

Other important areas not touched by the book include maintainability of writs challenging tenders and government contracts. The issue of maintainability of writ petitions in relation to government tenders is discussed in the decision of *PDB V. Md. Asaduzzaman Sikder* reported in 8 MLR (AD) 241 and is an important development that merited some discussion. Another area that the book could have touched upon is the issue of premature writs. Each year a large number of judicial review applications are rejected as they are not "final orders", i.e. because they were only a preliminary or an intermediate step in the decision making process. Also not discussed is the use of writ petitions to challenge criminal proceedings. Although the High Court Division made a promising start in this area with the case of *Jahangir Hossain Howlader v. CMM, Dhaka* reported in 58 DLR 106, the Courts have now unfortunately restricted the use of writ petitions in criminal proceedings solely where the vires of a law has been challenged. This position is now reflected in *Begum Khaleda Zia v. ACC* reported in 69 DLR (AD) 181.

The book provides a summary of the law relating to maintainability of writ petition. This will be helpful for practitioners as it will enable them to understand this important area of law which is often misunderstood.