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In favour of the principle of finality

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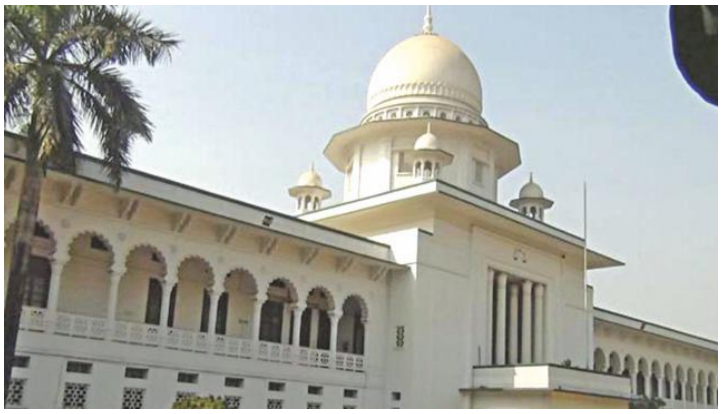

Lord Wilberforce commented, "any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book."

While sharing my article titled 'To introduce the principle of finality: An urge of a judge' published on last 24 January, on my Facebook page, I commented that it is a thought-provoking effort. A week after, I enjoyed a review article titled 'The Principle of Finality: Yes or No!' written by Mr. Muntasir Mahmud Rahman, an advocate of the Supreme Court of Bangladesh, admitting the article as thought provoking.

Before clarifying my position, it is desirable to explore the premises that were underpinned in the writer's debate on the matter. The writer argued against the proposed principle of finality explaining three phenomena. First, taking away the right to appeal and revision for the sake of reducing case backlog will invite the saying 'justice hurried, justice buried. Second, introducing finality would limit the fate of a dispute within the purview of Joint District Judge and the High Court Division. Third, 'admission hearing' and 'motion hearing' before the District Judge Court and High Court Division seem good to filter the

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process.

The writer, at first, apprehended that introducing the principle of finality would take away the litigants' right to appeal and revision. But in my article, total deprivation of the right of appeal or revision was not supported, rather, I argued for one or a limited number of appellate tiers restricting the existing unlimited opportunities to explore all of the higher fora of judicial hierarchy. The defeated litigants in any judicial system, naturally, assert that the court below has erroneously decided the matter. If such allegation of error becomes the criterion, there would never be an end to the disputes. The process should stop somewhere and every case cannot be continued to the exhaustion of the highest forum on the excuse of errors. Lord Wilberforce commented, “any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book.”

Consequently, the legal system of every civilised country recognises that Judges are fallible and therefore, the disappointed litigant is allowed to have 'a second bite at the cherry'. For example, New South Wales Criminal Appeal Act allows the defendant only one opportunity of appeal to the higher court. However, I am not convinced with the writer's assertion that it would invite 'hurried justice, buried justice' because, in our present system, exhausting one trial and one appeal consume considerable time sufficient to comment delayed justice. In 2010-11, while I was working as a civil judge, I personally, disposed of, on priority basis, hundreds of old cases which were instituted in between 1969 to 2005. I discovered that those cases were delayed for decades because of the opportunities to repeated appeal, revision and remand, and, I know, most of the parties would not take rest even after my judgements. They would exhaust the highest court consuming some more years.

Second, since I know the appeal before the District Judge may be decided by the Joint District Judge, I, consciously, used the term 'district appellate court' instead of 'district judge'. In such case, for mitigating justice concern raised by the writer, may I suggest the finality of the decisions of district appellate court in some low value and typical cases e.g. family suits of a certain amount, pre-emption cases under section 96 of SAT Act and more? Interestingly, a robust form of finality is present in our Family Court Ordinance where no appeal is possible against a decree of certain amount (section 17). Thus, I find no illegality limiting the fate of some cases within the district appellate court. However, I do not find any logical constraint in limiting the fate of some disputes within the

purview of a constitutionally respected forum i.e. the High Court Division too.

Third, it is true that the appeal and revision applications require qualifying in 'motion hearing' and 'admission hearing' to be considered finally. In practice, such hearings also add a volume of work to the total case backlog and contribute to dilatory tactics of case disposal. In England and Wales, leave to appeal from the lower court, against which appeal is being sought, is a requirement for seeking an appeal. In Tanfern Ltd v Cameron-MacDonald, the English Court of Appeal commented that imposing limitations on appeals is necessary to prevent the Court and its judges from becoming overburdened. In Bangladesh, we may think of such system as an alternative.

Last but not the least, I like to conclude quoting Australian Justice Kirby: "Just as in the law, we can love truth, like all other good things, unwisely; pursue it too keenly, and be willing to pay for it too high a price, so we can also love finality too much."

The writer is Joint District Judge at Bangladesh Judicial Service.