CHAPTER FIVE

LEGAL PLURALISM

What Is Legal Pluralism?

The term legal pluralism is difficult to define in a precise manner. Legal pluralism is an expression of tolerating the existence an operation of multiple legal orders in a given legal system at the same time. It is the way in which several groups handle some of their legal problems differently.

It is concerned with what a legal system does with its several communities having their own method of solving legal problems.

In another ways **legal centralism**, however, works in the opposite way. Legal centralism either silences multiple legal orders or denies their existence. It rests on the assumption that law comes only from the central government. Laws coming from other sources should not have a place at all.

Essence of Legal Pluralism

The concept of legal pluralism implies the inclusion of different orders, which co-exist with the state law, although maintaining a level of autonomy. The existence of multiple legal orders in any one particular community is a manifestation of legal pluralism.

It also concerned with the relation between state law and indigenous law. State or government law is only one of the types of law that apply. In practice there is co-existence and interaction between multiple legal orders i.e. international, state, customary, religious and local law.

Legal pluralism refers to a situation in which not all law is the state law nor administered by a single set of state legal institutions and in which law is therefore neither systematic nor uniform. But in its weaker sense it can refer within the ideology of legal centralism, to a particular sub-type of the sort of phenomena.

In case of legal pluralism, more than one law must be present. This cannot be conceived of a situation in which more than one rule is applicable to the same situation. Legal pluralism identifies a situation in which law is non-uniform not one of legal pluralism. It deals with the fact that within any field, law of various communities may be operative.

Legal pluralism bases itself on cultural relativism.

Legal Centralism (Legal Singularism):- Law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions.

- To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.
- Law is an exclusive, systematic and unified hierarchical ordering of normative propositions, which can either be looked at either from the top down wards as descending from a sovereign command or from the bottom upward.
- A criticism directed against legal centralism is that it fails to see the other side of the legal world.
- Legal centralism disregards the factual situations on the ground. The failure to see the factual world leads legal centralism not to accept that law in modern society is plural rather than monolithic, that law is private as well as public in character and that the national (official) legal system is often a secondary rather than a primary base of regulation.
- Legal centralism bases itself on a number of fallacies. Like the following wrong assumptions: that law is neutral, and above society, that law and justice are related, that decision-making is rational, that legal norms are universal, that law is centralized in the state etc.

Importance of Legal Pluralism

Legal pluralism appears to advocate for popular justice. Popular justice means justice that is popular in form, in that its language is open and accessible; popular in its functioning in that its proceeding, are based essentially on active community participation; and popular in its substance, in that judges drawn directly from the people are to give judgment in interests of the people.

Distinctions: Formal and Informal legal pluralism. Professor Andre Hoekema makes distinctions between a formal and informal legal pluralism. He calls formal legal pluralism as official or state legal pluralism and informal as unofficial or empirical legal pluralism. Accordingly Formal Legal Pluralism refers to the inclusion within the national legal order of a principle of recognizing other law. Here the state picks certain customary rules and practices and gives them the status of the law. The state does this in the process of incorporation.

- A legal system is pluralistic when the sovereign commands different bodies of law for different groups in the population.
- Formal legal pluralism is primarily associated with colonial and post-colonial societies. Formal legal pluralism is written under the sign of unification: unification is inevitable, necessary, normal, modern and good.
- Formal legal pluralism in the weaker sense is the designation of a possible legal policy within the internal discourse of state law.

Informal Legal Pluralism: Informal legal pluralism suggests that there are a number of institutions, practices and customary rules governing the society. But the state does not give recognition to these institutions, practices and customary rules. These institutions, practices and customary rules are outside the formal legal system.

Yet, in many occasions, those non-recognized customary practices control the behavior of members of a given community. Legal pluralism in an informal sense covers any situation in which within the jurisdiction of a

state a variety of differently organized systems of norms and patterns of enforcement effectively and legitimately control the behavior of specific parts of the community. This concept of informal legal pluralism concerns factual social practice.

Informal legal pluralism does not address the legal question whether or not this plurality has any official legal recognition within the legal order of society at large.

Approaches to Formal Legal Pluralism: There are several possible approaches to formal legal pluralism such as; unitary, dual, integration and legal pluralism approaches.

1. **The unitary approach to pluralism:** It exists the case where government-made laws abolish all existing customary practices and traditional institutions and replace them a single system. Ethiopia in 1960`s did adopt this approach.

2. The second approach is the dualist approach: A dual system attempts to undertake a compilation of customary rules subject to repugnancy test. It also recognizes the operation of customary courts side by side with state-established courts. So, the dual system permits traditional institutions and customary rules to survive on certain matters parallel to the state created institutions. The dual system shows greater tolerance to customary institutions than the unitary system. Botswana has adopted this approach.

3. The integration approach: Like the dual approach, tries to make compromise between pluralism and legal uniformity. The integration approach, as the name indicates, tries to synthesize uniformity and diversity.

It seeks to conduct the inventory of customary rules and examines if there are any common ground with the state-made laws. In the process conflicts

among customary practices are removed and again conflicts between customary rules and the state-made laws are again attempted and finally, the two systems are blended in a single system.

4. The final approach is legal pluralism. This is theoretically leaving the diverse practices as they are. No repeal is made. No integration is attempted. The parallel systems are there to operate within their own jurisdiction. Some say that there should not be such approach as there should be a limit to official recognition of the other legal order. The basis of the limitation should be the identity of the distinct community whose customary practice is to be recognized or human rights values.

Formal Legal Pluralism in the Ethiopian Legal System

Art 9 (1) of the FDRE Constitution states that,… any law… customary practices that are inconsistent with this constitution shall be invalid. This provision assumes that there are several customary practices in the country and some of those customary practices may not be in harmony with the provision of the constitution. Further, the constitution assumes that some of the customary practices prevalent in the country may be consistent with the constitution.

The key message of this provision is that those customary practices that do not offend the constitution would be given space and application. That means Article 9 of the FDRE Constitution does accommodate some customary practices while it rejects others. Art. 9 (1) is the key provision in the FDRE Constitution that allows the operation of customary practices.

However, there are other provisions that also permit custom.

- Article 34 (4) giving recognition to marriage concluded under systems of religious or customary laws
- Article 34 (5) give recognition adjudication of disputes relating to personal and family matters in accordance with religious or customary laws, with the consent of the parties to the dispute.
- Article 78 (5) provides that State Councils can establish or give official recognition to religious and customary courts.

The proper criteria to reject a given customary practice: **the human right approach and the identity approach**.

A legal system should adopt a customary practice if such practice is associated with the identity of the community practicing it. Or a customary practice should be abolished if it clashes with a basic human right principle. The two tests may be incompatible, that they may not go together. The FDRE Constitution seems to adopt the human right approach; customary practices in Ethiopia will not be given a place if they do not go with the human rights the constitution recognizes.