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EL FUTURO DE LA ALIMENTACIÓN Y RETOS DE LA AGRICULTURA PARA EL SIGLO XXI:

Debates sobre quién, cómo y con qué implicaciones sociales, económicas y ecológicas alimentará el mundo.

THE FUTURE OF FOOD AND CHALLENGES FOR AGRICULTURE IN THE 21st CENTURY:

Debates about who, how and with what social, economic and ecological implications we will feed the world.

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Sovereignty, Human Security and Globalisation: The Case of Seed Sovereignty in Sub-Saharan Africa (not for citation)

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Abstract

Globalisation has challenged traditional, state-centred, domestic-oriented notions of sovereignty. New actors, such as international organisations, transnational actors, multi-national corporations, non-governmental organisations, and philanthrocapitalists have emerged to challenge the traditional conception of state sovereignty over domestic policy making. How can we best understand the challenges posed by these new actors to the traditional ways of thinking about domestic state sovereignty? I use three dominant and competing interpretations of sovereignty in the contemporary globalised world – hyperglobalism, realism, and transformationalism as a heuristic device to examine which, if any, of these interpretations best captures domestic decision-making processes. To do so, I examine seed sovereignty in Sub-Saharan Africa. Using in-depth unstructured interviews and a comparative case-study method, I trace the development of the most recent seeds law in Ethiopia (Seed Proclamation 782/2013) and Kenya (Seed and Plant Varieties (Amendment) Act 2012). These laws vary in the degree to which they enshrine domestic state sovereignty over seed policy. What explains the differences between them? What were the motivations of the different actors (State, IOs, TNAs, NGOs and farmers) in each case in bringing forward a new seed law? I find that domestic sovereignty is increasingly shared between local, national, regional, and global authorities, but in different ways in different countries and different localities. My research suggests that transformationalism is a useful framework for assessing changes in seed practices in sub-Saharan Africa and that it has the potential to be applied more generally.

Introduction

The food sovereignty movement, despite its ambiguous etymological heritage (Grey and Patel 2014; Edelman 2014), and concerns regarding the contested 'binary nature' of the distinction between food security and food sovereignty (Clapp 2014; Jarosz 2014; Murphy 2014), has made significant inroads in recent years in politicising the discourse around food control and governance (LVC; McKeon 2015, Patel 2009; De Schutter 2009; Mc Michael and Schneider 2011). This has focussed attention back on the central issues of power, control, risks and benefits (Tansey 2011, Scoones and Thompson 2011) in the seed/food political space. It occurs amidst calls for the reassertion of citizen, farmer and ecological rights for sovereign spaces of repossession and recovery (Kloppenburger 2013; Shiva 2013; IAASTD 2009; UN Special Rapporteur on Food Olivier De Schutter 2009; LVC Nyeleni Declaration 2007) as a counter-hegemonic force to the neo-liberal globalising effects (McKeon 2015) of 'shadow sovereigns' (George 2015) in the agribusiness sector. While a considerable amount of work has been conducted, there are cross-disciplinary calls for empirical studies of food/seed politics, (De Jonge 2014; Murphy 2014; Rahmato 2014; Kloppenburger 2013; Scoones and Thompson 2011, Alemu 2011, Di Falco 2009; Abay et al, 2009, 2011). My work provides an empirical study of this sort.

I have chosen to focus on one key aspect of food sovereignty, namely seed sovereignty, recognised as the 'fourth resource' by LVC in 2001, alongside land, air and water (LVC 2001). For Kloppenburger (2010), "Seed is the critical nexus where contemporary battles over the technical, social and environmental conditions of production and consumption converge and are made manifest. Who controls the seed gains a substantial control over the shape of the entire food system" (Kloppenburger 2010, p, 368). UN Special Rapporteur for food, Olivier de Shutter (2009) sharpened the focus on the direct relationship between seed policies and food security especially in vulnerable communities in the Global South, when he pointedly raised concerns about the 'risk of Intellectual Property (IP) related monopoly rights neglecting poor farmers' needs, undermining traditional systems of seed saving and exchange, and losing biodiversity to the "uniformisation encouraged by the spread of commercial varieties" (De Schutter 2009, p.2 quoted in The Berne Declaration 2014, p.14). Many authors and organisations, including (Munyi et al 2016; Munyi 2015; ACB 2015; Grain 2015; World Bank 2013; Louwaars et al 2013; Alemu 2011; McMichael and Schneider 2011; IAASTD 2009; Altieri 2009) added their voice to concerns regarding the risk attached to jeopardising farmers' seed systems.

However, seed, as the 'irreducible core of agriculture' (Kloppenburger 2013), had become a transworld mobile technological 'artefact' with the onslaught of the Agreement on Agriculture (AoA) in the Uruguay round in the mid-1990s and a heretofore unmoveable sector (Murphy 2010)³ was 'deterritorialised' (Scholte 2008) and opened to the vagaries of a global market. This effectively

¹ <https://nyeleni.org/spip.php?article290> [accessed online 10th April 2017]

² http://siteresources.worldbank.org/EXTNWDR2013/Resources/8258024-1352909193861/8936935-1356011448215/8986901-1380046989056/WDR-2014_Complete_Report.pdf

³ Murphy quoted in Magdoff and Tokhar, 2010. Free Trade in Agriculture: A Bad Idea Whose Time is Done. Chapter 5, pp.103-121.

“institutionalised the process of agricultural liberalisation on a global scale by restricting the rights of sovereign states to regulate food and agriculture” (Holt Gimenez & Shattuck 2011, p.111). Seed sovereignty was now directly challenged by this global agreement as seed TNCs prepared for corporate capture and enclosure of their plant genetic resources (PGRs)/seeds. These TNCs now backed by globalising law, which they successfully lobbied for (Downes 2004), through the intellectual property regimes of the ‘Union Internationale pour la protection des obtentions végétales’ (UPOV 91)⁴ and the TRIPs agreement of WTO (Dutfield 2011; Tansey 2011; Downes 2004) benefitted enormously from the new legislative regime, enjoying huge profits and increasing concentration of power through mergers and acquisitions since (APBREBES 20175; ETC 2010; ACB 2017, 2015; Grain 2015).

In recent times there has been an intensification, and further concentration through a concerted agenda for ‘harmonisation’ of seed laws and policy, particularly in the Global South (Munyi et al 2015; Grain 2005, 2015; ACB 2015; The Berne Declaration 2014; ETC 2010). Africa’s ‘development crisis’ is considered to be at the heart of a market-led globalisation, characterised by ‘massive inequalities in power, skewed regulative processes of state systems, economic fragility and spatial differentiation’ (Harrison 2010, p.6), where poor countries are mandated to further liberalise their policies on trade and free flow of capital (Mathaai 2010), despite being home to some of the world’s most vulnerable people (UNDP Report 2007-2008), and despite considerable genetic resource wealth, amongst other coveted ‘commodities’.

In some cases African structures are facilitating these changes, such as The African Union and the Pan-African Parliament, while at a sub-regional level COMESA, SADC, ARIPO and OAPI are also working to create new rules for the exchange and trade of seeds (ACB 2015; Grain 2015, p.3), while national Parliaments are passing new seed laws, oftentimes without consultation with the people most affected. African countries have been experiencing varying degrees of change in their indigenous seed systems, seed bodies and seed organisations, with the advent of a plethora of new seed-related bodies and enterprises emerging and a number of significant new ‘key actors’ arising both internally and externally across the continent (Grain 2015; McKeon 2015; Munyi 2015; The Berne Declaration 2014; Scoones and Thompson 2011; McMichael & Schneider 2011; Odame & Muange 2011; Chisinga 2011; Alemu 2011; McCann 2011; Tansey 2011). The region is experiencing a significant and rapid juridification in the seed space, with the potential to change agricultural practices in a profound way, with profound consequences for seed sovereignty.

This raises the vexed question of the state as a key ‘actor’ in our deliberations about sovereignty as elucidated by Murphy (2014), when she opines that “the state is not an easy or obvious champion of the seven pillars food sovereignty activists promote” (Murphy 2014, p.227), stressing the need for research to problematise its role more. This was the context in which I chose to construct a

⁴ Formed in 1961 ‘it was conceived and designed by European commercial breeding interests’ and instituted intellectual property rights for plants and plant breeders (Berne Declaration 2014, p.11).

⁵ http://www.apbrebes.org/news/bayer-monsanto-merger-implications-south-africa%E2%80%99s-agricultural-future-and-its-smallholder?pk_campaign=NL27

study, focusing on the most recent seed laws in two Sub-Saharan African countries, Ethiopia Seed Proclamation (782/2013)⁶ and Kenya Seed and Plant Varieties Amendment Act (SPVAA 2012) ⁷, to identify and examine the relationship between the key actors in the seed space and their role and motivation in determinations affecting domestic seed policy sovereignty in distinct locales.

Testing Competing Theories using a Comparative Method

I adapt and test Held and McGrew's (2007, McGrew 2011) three competing theories of globalisation, namely hyperglobalism, realism and transformationalism, at the key sites (seed laws and seed policy), where this interpenetration of the processes of globalisation can be unpacked and analysed – Sub-Saharan Africa. Here, it becomes possible to identify the actors involved, the coercive/persuasive nature of power at play, the winners and losers (Scoones and Thompson 2011), and the patterns of inclusion and exclusion. Crucially, it allows us to assess the degree of agency of the actors, particularly in relation to seed policy sovereignty in the face of global forces.

In this context, I constructed my research design to facilitate testing the three competing theories of globalisation, using the theories as a lens to formulate broad questions such as - does seed sovereignty lie at the domestic level or is seed sovereignty determined at the global level?

I chose to adopt a comparative method in order to examine different outcomes under different conditions. Using a combination of qualitative methods to ensure that my comparative case studies were as robust as possible, I carried out extensive unstructured interviews with all relevant seed actors during my fieldwork in both Ethiopia and Kenya, combined with extensive data sourcing of all available legal and policy documents, parliamentary records and related material.

I am predominantly interested in actors and who ends up making the decisions in relation to seed sovereignty. I choose examples where there have been different outcomes. I also needed to control for certain factors, such as climate, time period, geography, agroecological conditions, rainfall, culture, ethnicity, institutions and colonial history. In keeping with this I needed to choose countries which were as closely matched as possible, with many similarities, but with differing outcomes in terms of seed sovereignty, where the research is best able to explain the variation.

Context is important to my research design. Forces within and outside countries are relevant in determining the complexities of the process of seed sovereignty. That is why it is important to go beyond what some scholars call the myth of 'methodological nationalism' – the assumption that commonality of origin creates 'common individuals', ignoring the 'particular, local articulations of renegotiation that can occur, in reconceptualised notions of territory' (Nowicka and Cieslik, 2014). This is particularly important to my research where contested theories of globalisation are central and where territoriality is considered a key and defining

⁶ Federal Negarit Gazette, No. 27, 15th February 2013, p.6808-6825)

⁷ The Seed and Plant Varieties Act, 1972 (as amended in 2002)
Act No.2 of 2002 (Cap 326)

element of this period. It also simultaneously serves as a buffer against possible researcher bias, given the inherent need for contrasting cases within the comparative method.

Discussion

This paper explores the extent to which domestic states can formulate sovereign domestic policy in the face of globalisation, focussing on seed laws and policies in Kenya and Ethiopia. It addresses the motivations of national and local-level actors as well as transnational actors in determining domestic seed policy sovereignty in the context of intensifying global forces.

Various writers have tried to summarise the different positions in the globalisation debate over the past number of decades. Held and McGrew's (2007) book *Globalisation /Anti-Globalisation, Beyond the Great Divide* (2007) is the first detailed academic work which organises the scholarship on globalisation. They identify three main theoretical positions on globalisation, namely hyperglobalist, realist/sceptical, and post-sceptical/transformationalist positions.

I simplify their theoretical configuration into a simple linear spectrum, which facilitates the identification of the three different theories/interpretations of globalisation and seed policy sovereignty (See Figure 1).



The Globalisation Spectrum (adapted from Held & McGrew 2007)

FIGURE 1: THE GLOBALISATION SPECTRUM

This allowed me to differentiate between the authors in the seed space as follows:

- a) The authors who primarily regard globalisation as a distinctly 'new' phenomenon which is having considerable effect, particularly on state sovereignty, with a significantly increased role for international organisations and transnational actors in seed policy arenas, notably, the hyperglobalists
- b) Those authors who regard globalisation as not 'new', arguing that the state remains the primary actor - its sovereignty over its plant genetic resources remain central despite globalising forces – the sceptics/realists
- c) Authors who take a middle view arguing that there are varying effects of globalisation on states exercising seed policy sovereignty – the transformationalists.

Whilst it should be acknowledged that some authors overlap between positions on some issues and in some circumstances, this differentiation is a useful analytical heuristic device which makes it easier to access the varied positions

within the literature on globalisation, and greatly assists the comparative method. It is neither conclusive nor absolute.

Central to the debate about whether the state is being eroded or not is the increasing role of other players in global political arenas, namely international organisations (IOs), such as UPOV, the World Bank or the World Trade Organisation (WTO), or transnational actors (TNAs), such as transnational corporations (TNCs) or non-governmental organisations (NGOs). I examine each of the three perspectives, hyperglobalist, realist/sceptic and transformationalist with regard to these three aspects, namely 1) the domestic state 2) (IOs) 3) (TNAs). For each of the three basic positions, I identify the different stances taken on each of these three issues. See Figure 2.

	State	IOs	TNAs
Hyperglobalists	Deterritorialised	IOs set worldwide rules	They operate worldwide
Realists	State-centred	IOs operate by state-to-state bargaining	Vehicles for state interests?
Transformationalists	Some states are stronger than others – US hegemony, Chinese in Africa	In IOs some states are more important than others	Some are more dominant than others

FIGURE 2: COMPETING THEORIES OF GLOBALISATION

While international organisations obviously play a big part in all aspects of globalisation, not least in the seed space, it is important to stress that I am not trying to find out how or why these bodies make the decisions they do at the international level, rather how they influence seed practices at the domestic level.

In short, I am aiming to see whether the exercise of seed sovereignty at the national and local level corresponds to hyperglobalist, realist, or transformationalist views of the world.

I propose that on balance, it is more likely that state policy sovereignty is neither being eroded as hyperglobalists suggest, nor reasserting its power and dominance as the primary actor as proponents of the sceptical/realist school of thought claim. Rather, I suggest that the current period, may be best understood from a transformationalist perspective, which argues that globalisation has ‘no particular telos’ as Held and McGrew (2007) suggest, that it is transforming the state’s policy role, not eroding it, operating at multiple levels and not unidirectional, that it has positive and negative flows, and is contradictory, contingent and ambiguous, resulting in a multiplicity of new, highly differentiated, conflictual and

complex outcomes in different locales. There are indications of hyperglobalism, but this appears to be far from concrete and universal. The state is adapting to sharing the space of power and therefore sovereignty with other key transnational actors in a globalising world, leading to both integration and fragmentation occurring simultaneously and with mixed results in different jurisdictions. Transformationalist theory provides a practicable framework to address the contradictory elements of the interpenetrative processes which occur when global forces interact with local realities.

From Food Security to Seed Sovereignty

Patel (2009) noted that the introduction of food sovereignty into the definitional debate about food security has altered the dynamic of the discussion since, forcing a discussion about power, control and governance of food systems, stating that 'it is possible to be food secure in a prison or a dictatorship' (Patel 2009, p 665). Similarly the concept of seed sovereignty challenges the idea that freedom from seed want is sufficient by itself. It is possible to have seed security without exercising seed sovereignty.

A detailed definition of the term seed sovereignty has only entered the academic lexicon in recent years, with the publication of Kloppenburg's paper entitled *Seeds, Sovereignty, and the Via Campesina: Plants, Property, and the Promise of Open Source Biology* (2008), based on analysis of the historical work in the seed space, notably by LVC and Indian NGO, Navdanya⁸.

In a later publication entitled *Re-purposing the Master's Tools: The Open Source Seed Initiative and the Struggle for Seed Sovereignty* (2013), Kloppenburg condenses the four principal and constitutive elements of what he terms 'seed sovereignty' based on their work, as follows:

The right to save and replant seed

The right to share seed

The right to use seed to breed new varieties

The right to participate in shaping policies for seed (Kloppenburg 2013, p.13).

He goes on to identify four key areas, or what he calls 'foundational principles of seed sovereignty'. These are:

Community seed saving and exchange – 'in situ' - dynamic conservation of farmer cultivars

Agroecology and participatory plant breeding (PPB)

Legal sovereignty over the seed – a concrete juridical mandate

Openness to allies (ibid pp.15-17).

Seed sovereignty, therefore is not about how many are being fed or the nutrition levels of the food people are eating, though these are all important issues in their

⁸ Meaning Nine Seeds, Navdanya was established by Vandana Shiva in 1987 to protect and enhance indigenous seed and crop varieties from corporate capture in agriculture

own right. It is how those people are making choices in relation to the kind of seed/food they are sowing, reaping and eating – the degree of autonomy they have in that process, and why they are making the choices they do.

The implication of this for sovereignty is important not just conceptually, but also because, as we shall see, there are many threats to seed sovereignty now globally. It also highlights how interventions in the seed space, be it in the form of seed aid, or poverty reduction programmes or other interventions, where seeds are brought in from ‘outside’, have the potential to undermine the seed sovereignty of a host country.

Theories of Globalisation and Seed Sovereignty

	State	IOs	TNAs
Hyperglobalists	Deterritorialisation – Transboundary nature of seed mobility Erosion of State/public role in seed policy/programme	UPOV, WTO, TRIPS, AoA set rules backed by World Bank, IMF. Harmonisation of laws	Core duties and functions derogated to others – especially. TNCs. Global penetration mergers and acquisitions Corporate control – Monsanto, Du Pont, Gates, AGRA and others
Realists	State still main driver of policy choices and policy implementation	IOs do what big states tell them –	TNAs still look to strong ‘Northern’ states who determine outcomes

Transformationalists	<p>'Multiple equilibria'</p> <p>State a disaggregated player but still has a role in certain aspects</p> <p>Glocalisation – local initiatives</p>	<p>Ambiguities within World Bank and FAO re IAASTD report</p> <p>Contradictions within UN role and substance</p> <p>CBD, IPCC</p>	<p>Multidimensional not unidirectional technological innovation can go either way</p> <p>Homogeneity and heterogeneity</p>
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FIGURE 3 THREE PERSPECTIVES ON GLOBALISATION AND SEED SOVEREIGNTY

Cross-national comparison of seed laws in Kenya and Ethiopia

Both Ethiopia and Kenya share certain potentially important characteristics, similarities which are critically important in getting the closest 'match' to increase causal inference in the findings. For example, agriculture is the backbone of both economies, with 83% of Ethiopians living in rural areas and engaged in agriculture (UNDAF 2011)⁹ and 61.1% for Kenya, (World Bank 2015)¹⁰. Both countries are largely dependent on output from small-scale rain-fed farming and livestock production. I tabulate some of the main similarities below.

	Kenya	Ethiopia
External Debt	\$US16.77bn	\$17.02bn
GDP (based on PPP)	\$139.4bn	\$134.7bn
Value of Exports	\$6.27bn	\$4.14bn
Agriculture as % GDP	28.9%	46%
Net ODA	\$3.236bn	\$3.8bn
Poverty level per head of Population	45.9%	38.9%
>25 years	61%	64%

TABLE 1

⁹ www.unfpa.org [accessed online april 10th 2017]

¹⁰ <http://kenya.opendataforafrica.org/ejiknndd/kenya-agriculture-sheet>

Statistics based on figures from: World Bank 2015, (World Bank 2013)¹¹, 2012; CIA 2014; OECD 2011; UNDP 2011

Geographically situated in Sub-Saharan Africa(SSA), they both have broadly similar climatic conditions, with the SSA region being significantly exposed to the increasing effects of climate change and forecasts for increased food insecurity, potentially affecting up to 250 million people by 2020, with women faring worst (IPCC 2014, 2007; UNFAO 2011; Toulmin 2009; UNHDP 2008).

Seed aid specifically has become a notable feature of the seed systems of many African countries over many decades. For example the UNFAO has implemented 400 seed relief projects in Africa between 2001 and 2003. Parts of Eastern Kenya have received seed aid almost continuously since the early 1990s, while areas of the central and northern highlands of Ethiopia are reported to have received some kind of seed aid since 1974 (Sperling et al 2008), which is in itself, a much contested aspect of the seed discourse (Scoones and Thompson 2011).

Both countries, in keeping with the 33 million subsistence farmers across SSA, maintain vibrant informal seed economies, which are presently largely reliant on open pollinated varieties (OPVs) of landrace (i.e. locally adapted genetically diverse) varieties of farmer selected seed, in-situ, non-commoditised agrarian systems of exchange, with figures as high as 97% for Ethiopian informal seed systems (Alemu 2011, Abay 2011, Di Falco and Chavas 2009). This is a centrally important point to this research and a fundamental issue in the much contested literature globally on seed and food sovereignty, particularly regarding intellectual property laws and rights as they are emerging, and as they are being applied in an African context. As Scoones and Thompson outline, quoting GRAIN, “So any talk of seeds today, if it is not specifically about local or farmer’ seeds, implies private seeds – seeds that farmers have to buy that come with tight restrictions on their use” (GRAIN 2008, quoted in Scoones and Thompson 2011, p. 6).

Both countries have recently initiated ambitious programmes for their agricultural sectors – Ethiopia’s Growth and Transformation Plan (GTP) 2011-2015 (now in stage 2 -GTP2 2015-2019), and the Government of Kenya ‘Vision 30’, Strategy for Revitalising Agriculture (SRA) - a ten year action plan 2004-2014, followed by the “Agricultural Sector Development Strategy (ASDS) 2010-2020”. New seed laws and regulations have become central to both countries drive to make changes within seed practices in their agricultural sectors, part of wider plans to move to middle income country status by 2025 in the case of Ethiopia (Ethiopian ATA 2013, 2015), and part of a market liberalising economic agenda already spanning many decades in the case of Kenya.

Ethiopia and Kenya are identified in the literature as important areas where changes currently happening in the seed space are central to an intensifying discourse regarding power, control, risks and benefits (Tansey 2011). In order to determine the extent of each country’s seed sovereignty I needed to construct a specific cross-country comparative study that would allow clearer insight into the empirical evidence of seed policy and practice. Therefore, choosing Kenya and Ethiopia allows me to control for a lot of economic, social, political, cultural and

¹¹ <http://data.worldbank.org/indicator/DT.ODA.ALLD.CD>.

environmental factors. In this context, I chose to study the two most recent important pieces of seed legislation, namely Kenya's Seeds and Plants Varieties (Amendment) Act (SPVAA) 2012 (Gazetted 4th January 2013)¹² and Ethiopia's Seed Proclamation 782/2013¹³.

The key questions informing my case study therefore became: Who wrote each law? How was it drafted? What was the motivation behind the content of the law? I am looking for the key actors involved in bringing each new law to fruition? Who was included in the process of determining its contents? Who was excluded from the process? I could then chart key actors and events that led to changes in seed legislation in each jurisdiction. Therefore in order to test the globalisation theories against the key actors I had identified I expected to find certain responses depending on whether the respondent could be considered largely a hyperglobalist, a realist or a transformationalist. Certain obvious criteria which fit each theoretical school would make observable implications easier to categorise and thus assess and interpret to what extent actors can exercise seed sovereignty in the face of a myriad of pressures in the seed space. I would expect hyperglobalists to identify where global corporate interests are taking precedence over state or other interests, realists would be able to identify key references to the state maintaining overriding power and control in decision making and transformationalists pointing to diverse multidirectional forces at work, where global and national interests inform outcomes as much as other actors such as TNAs of varying hues. This allowed me to tabulate and thereafter assess the extent of influence being exerted in the context of actual changes made to the different seed laws in this case.

1: Kenya SPVAA 2012

Kenya's Seed and Plant Varieties (Amendment) Act (SPVAA 2012) as enacted by the Parliament of Kenya on January 4th 2013. SPVAA 2012 marked the first amendment of Kenyan seed law in a decade. It is significant as it is the first seed law enacted by the State there following, first, the TRIPs Agreement of (2002), second, the establishment in 2006 of Alliance for a Green revolution in Africa (AGRA), with headquarters in Nairobi, it is an alliance between the giant transnational 'philanthrocapitalist' foundations, the Rockefeller Foundation and the Bill and Melinda Gates Foundations (BMGF), and, third, the enactment of a new Kenyan seed policy (2010)¹⁴. These three events encompass the three main categories of actor previously identified namely the international organisations, transnational actors, and domestic/state actors. An examination of Kenya, a recognised key interlocutor for the Global South in general and the African continent specifically, provides a good test of the theoretical premise underlying the different perspectives on globalisation in this period, allowing an assessment of the role and motivations of the different actors in determining outcomes affecting seed sovereignty.

¹² The Seed and Plant Varieties Act, 1972 (as amended in 2002)
Act No.2 of 2002 (Cap 326)

¹³ Federal Negarit Gazette, No. 27, 15th February 2013, p.6808-6825)

¹⁴ Republic of Kenya, Ministry of Agriculture, National Seed Policy, June 2010.

Beginning with an analysis of the key legal documents, laws and policies I identified the major changes in the final SPVAA (2012), which significantly altered seed policy sovereignty. I then traced the passage of the law through parliament and began a process of clarifying the road to the enactment of SPVAA 2012.

The new Kenyan law is an example of a hyperglobalised seed law.

There are three key areas which highlight the extent of how globalised this new seed law is.

1. It adheres to the strictest global commercially driven formal seed rules, namely UPOV 91, despite having no obligation under international law to do so.¹⁵
2. It grants proprietorial rights over 'improved' uniform seeds to transnational corporate interests.
3. It dislocates key domestic actors, notably Kephis, a government parastatal agency with responsibility for regulating seed, which was reconstituted in the process of the law being enacted.

SPVAA 2012 delivers a wide breadth of breeders' rights, while farmers' rights are greatly diminished. Specifically it is noted by Munyi et al (2016) that "remarkably, Kenya's 2012 SPVA Amendment, which was implemented with the aim to make Kenya's PBR law compliant with UPOV 1991 does not include the private and non-commercial use exemption as required by UPOV (Munyi and de Jonge 2015, p.170). Thus, the new law leaves little room for small-holder farmers to be allowed to freely use farm-saved seed of protected varieties" (ibid). All the core features of seed sovereignty as defined earlier, such as seed saving and exchanging across family and community, re-use of farm-saved seed and maintenance of informal supply and distribution channels, which is widely practiced throughout Kenya's vast subsistence farming population (80%), for many seed/crop varieties and which was previously allowable with no restrictions, now will be subject to some very explicit provisions and conditions. This part of SPVAA 2012 puts plant breeders' rights directly in conflict with farmers' rights, and unsurprisingly is the subject of protracted dispute now, not least because of its contradiction with the newly agreed National Constitution 2010 (Article 11 3 (b))¹⁶.

The dislocation of Kephis, the national seed regulator is important as it was first set up when the seed industry was liberalised in 1996 in Kenya. Now it is being given more power through SPVAA 2012 to enforce the Act, yet simultaneously some of its functions can now be privatised, where for the "purposes of enforcing the Act, the Service may authorise competent private or public persons to

¹⁵ Firstly, WTO Agreement on TRIPs (TRIPs, Article 27.3 (b) to which Kenya is a party requires Member States to provide IP protection for plant varieties, but allows Governments a wide latitude in its determination (Dutfield 2011, p.7). Secondly, Kenya is already a member of UPOV 78, which allows wider scope regarding PBRs and is considered a better option for African countries than the stricter UPOV91, which was designed with 'developed' agricultural systems in mind. Despite SPVAA 2012 being compliant with UPOV91, Kenya has yet to deposit an instrument of accession (Munyi et al 2016 <http://www.eupublishing.com/doi/10.3366/ajicl.2016.0142>) and so is still at time of writing bound only by UPOV78.

¹⁶ 11 (3) (b) provides that "Parliament shall enact legislation to recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics, and their use by the communities of Kenya" (The Constitution of Kenya 2010).

perform specified functions under this Act on its behalf” (SPVAA 2012, Section 5 3B 1 a) b). In this way Kephis, whilst it is being promoted as the national designated authority, it is nonetheless being divested of power, through this opening up to private interests in key areas signalling a loosening of direct state involvement in key seed regulatory functions, which was keenly sought by private sector interests (USDA 2008, STAK 2007). Its enactment is an indication of the ambiguity surrounding Kenya’s public sector role in negotiating a dilution of its own power and control.

SPVAA also introduces stricter plant variety protection (PVP) rules for commercially-driven certification purposes as well as the legislative framework legitimising the opening up of national seed systems to corporate and genetically engineered seeds and ‘research’, as well as the deletion of any reference to agroecology in the new seed law (Section 6 of SPVAA 2012 amending Section 8 of Cap 326).

Between 2005 and 2011, when the final Bill was published which would become the new Seed and Plant Varieties Act (SPVAA 2012), two task forces (2005 and 2006) were established by the Ministry of Agriculture, two subsidiary pieces of legislation (2009) were passed by the Minister for Agriculture, which included the setting up of four important statutory committees (2009), and a National Seed Policy (2010) was published following the deliberations of a select Seed Policy Committee, all of which influenced the final outcome.

The mandate of the two separate, ‘shadow’ task forces constituted by the Kenyan Government’s Agricultural Ministry in 2005 and 2006¹⁷ 18, and championed by two key Ministers of Agriculture, Ruto and Kosgei, was to review the 2002 SPV law (Cap 326) and develop a new one, as outlined by one of the key actors involved in both processes, namely the Seed Trade Association of Kenya (STAK 2007). STAK was already a key actor in the Kenyan seed space, as the advocate for seed TNCs, Monsanto, Syngenta, Kenyan Seed Company (KSC) and other commercial seed players operating in the now burgeoning formal seed sector¹⁹ in Kenya as well as the Secretariat for EASCOM²⁰. Separate entirely from these ‘shadow’ task forces, an ‘official’ National Seed Policy Committee was formed, which included a wider group of actors, and produced the official National Seed Policy Document in June 2010. There is no indication that individual membership between the committee

¹⁷ In that period 2005-2012, three different Ministers for Agriculture oversaw the events that culminated in a new seed law SPVAA 2012. They were Kipruto Arap Kirwa (2003-2007), William Ruto (2008-2010) and Sally Kosgei (2010-2013).

¹⁸ Ruto and Sally Kosgei exchanged portfolios in April 2010, Ruto having been suspended by Prime Minister Raila Odinga on February 14th 2010 following a report by PricewaterhouseCoopers regarding a maize scam. Kosgei became Minister for Agriculture. A few months later Ruto was demoted to Minister for Higher Education, a post he held only until 19th October 2010, when he was finally relieved of his ministerial duties altogether, after a court ruled that he must stand trial over allegations of corruption, based on the new Kenyan Constitution 2010. This was separate to the ICC case against Ruto, who is now Deputy President of Kenya which was dropped on April 5th 2016 due to insufficient evidence.

¹⁹ The formal seed sector expanded at a rapid pace since liberalisation, going from just three seed companies in the 1980s, to 18 in the 1990s and post liberalisation escalating to 78 by 2010, 90 in 2012 (AFSTA Baseline Study on Seed Sector in Kenya, September 2010).

²⁰ USAID funded East Africa Seed Committee

and the shadow task forces overlapped, though we do know that STAK were on both task forces as well as the Seed Policy Committee (STAK 2007, p.2, NSP 2010, Annex 1, p.36).

The second task force was constituted by the Ministry of Agriculture in 2006, with a specific mandate to revise sections of the Seeds and Plant Varieties Act (Cap 326) “with a view to removing any clauses that prevent full liberalisation of the seed industry in Kenya” (STAK 2007), and with an underlying objective to bring in specific Plant Breeders Rights legislation also. This is a key feature of UPOV91 and is central to the agenda of the commercial/private sector, who were seeking to stimulate market liberalisation of Kenya and East Africa’s seed system, through ‘improved seed’, including GM technologies, a position now being championed by newly established giant ‘philanthrocapitalist’ organisation Alliance for a Green Revolution in Africa (AGRA), which had just established its headquarters in Nairobi on July 16th 2006, and immediately became a major seed player in Kenya.

This second Task force was steered by key personnel from the policy department within the Ministry of Agriculture, namely Paul Chepkwony, S.K. Angore and Mosoti Andama, backed by other Ministry personnel from various divisions, the Ministry’s legal officer, J.K Gichuru, the research and extension liaison and the horticulture department. The newly established (2004) cross-ministerial, inter-stakeholder, donor-funded body, the Agricultural Sector Co-ordination unit (ASCU), was represented by Gicheru Mucangi, while Kephis was represented by Gladys Maina. The other notable additions include Francis Ndambuki, Chairperson of PBAK21, and Obongo Nyachae, CEO of STAK, but who was also now head of regional seed harmonisation body and EASCOM as well as chair of the Africa Seed Trade Association (AFSTA) Seed Harmonisation Committee. Both Ndambuki (PBAK) and Nyachae (STAK) from this point on become two key influencing actors in the process, and are represented on every relevant body pertaining to the formulation of SPVAA 2012. The inclusion and exclusion of key actors at this critical juncture is clearly a notable determinant in later outcomes, given their stated objectives and their precise mandate to draft the new seed law. It is worth noting that one farmer organisation, The Kenyan National Federation of Agricultural Producers (KENFAP), was represented on the Seed Policy committee, which drafted the National Seed Policy document (2010), but was excluded from the second task force (STAK 2007, p.2), which had no farmer organisation and no civil society organisation represented at the table.

The 2006 task force meeting in Mombasa from September 25-28 2006 became a defining moment for changing Kenya’s seed legislation. The sole purpose of this meeting was to review Kenya’s Seed law (Cap 326), “including review and harmonisation of the Seeds Regulations and Plant Breeders Rights Regulations (STAK 2007, p.2). It was this grouping, according to STAK, that prepared the first draft of the Seeds and Plant Varieties (Amendment) Bill 2007 and The Seeds and Plant Varieties (Seeds and Plant Breeders’ Rights) Regulations 2007, containing ‘some of the recommendations of stakeholders’, and was thereafter ‘presented to the Minister for Agriculture for further action’ (ibid). STAK highlight key features in the Draft Seed Bill, where change was being called for which “would make Kenya’s

²¹ PBAK was formed out of a conference co-hosted by STAK and UPOV in 1993, and officially registered in 1996 to lobby for the enactment of Plant Breeders Rights/IPR provisions in Kenya

Plant Variety Protection legislation to be compliant with the International Union for Protection of New Varieties of Plants (UPOV) 1991 Convention” (ibid, p.3). Most significantly, no farmer group or civil society organisation was included on these ‘shadow’ task forces’. It was dominated by global seed forces through the representative bodies for commercial seed companies like Monsanto and Syngenta, with close links to a key state actor and geopolitical ally, the United States.

It is clear that SPVAA 2012 as enacted in January 2013, marked a critical moment of institutional and legal change for the Kenyan State which has altered the power structure and sovereign control of the country’s seed sector in favour of liberalisation and increased private sector engagement. It has created a more porous enabling environment, facilitating commercial intervention in opening up seed markets, and has introduced globalising legal instruments which inevitably affect the practice of seed sovereignty as constituted by the majority 80% of the smallholder farming population who rely on complex, dynamic and heterogeneous ‘farmer managed’ (ACB 2015) ‘informal’ seed systems.

2: Ethiopian Seed Proclamation 782/2013

Extending the study beyond one country provided essential variance at this critical stage. One could easily assume that all countries were experiencing similar levels of globalisation, particularly in Sub-Saharan Africa, where conditions are somewhat similar and external forces equally influential. However, turning to Ethiopia provided some unexpected responses, and different outcomes, albeit contradictory and in many cases highly problematic, but which provide important and useful insights which require further study and deeper analysis.

Ethiopia’s most recent Seed Proclamation 782/2013²², which was signed into law by President Girma Woldegiorgis on 15th February 2013²³, is the first domestic seed law in over a decade, replacing Seed Proclamation 206/2000. It is also, significantly, the first seed law since the establishment of the Agricultural Transformation Agency (ATA) in December 2010. The ATA emerged out of a “two-year extensive diagnostic study of Ethiopia’s agriculture sector, led by the Ministry of Agriculture and facilitated by the Bill and Melinda Gates Foundation (BMGF)” (ATA Progress Report 2015). This new body was subsequently funded predominantly by BMGF, alongside The World Bank, the Royal Netherlands Embassy, and the Department of Foreign Affairs, Trade and Development (DFATD) – Canada. This is also the first seed law since the World Bank’s proposal for a far-reaching Agricultural Growth Programme (AGP) in 2009, which was officially launched in 2011. This AGP was designed “specifically targeting the Ethiopian seed system through technical support and investment” (Alemu 2011, p.70) and was deeply connected with commanding a new direction for the multi-lateral donor

²² Federal Negarit Gazette, No. 27, 15th February 2013, p.6808-6825)

²³ In April 2015, the new Seed Regulations were submitted to the Council of Ministers, (Van den Broek 2015, p.16), which are now awaiting development and approval of directives and technical guidelines in order to fully implement Seed Proclamation 782/2013 and the Council of Ministers Seed Regulation (AGRA 2016).

agencies in tandem with the Ethiopian Government's own new Growth and Transformation Plan (GTP)²⁴. Through AGP the World Bank delineated USAID as the acknowledged partner operating in a 'parallel mechanism' with responsibility for strategic interventions in the seed space (World Bank 2010)²⁵. These key players all quickly established close collaboration with the newly established ATA²⁶ and its Transformation Agenda, considerably altering the landscape for policy intervention in Ethiopia's seed sector.

However, the new Ethiopian seed law is distinctly less globalised on three key counts.

Firstly, there is clear recognition of differentiated seed practices, where three distinctly different levels of seed quality are recognised, namely certified seed for the formal seed system, quality declared seed for the commercial but less stringent seed system, and a total exemption for its small holder farming population allowing their informal seed system of exchange and sale to continue without deference to plant breeders' royalties and the restrictions imposed in other jurisdictions on the continent at this time.

Secondly, giving direct recognition to the small holder farmers, by way of a critical exemption from compliance with other certification requirements of the new seed law signals a reluctance to forego all sovereignty over Ethiopia's seed heritage to a globalising rule systems, despite considerable intent by key global players to do otherwise. It states

"This Proclamation may not be applicable to:

The use of farm-saved seed by any person;

The exchange or sale of farm-saved seed among smallholder farmers or agro-pastoralists;

Seed to be used for research purposes; and

Forestry seed." (Part 1, Section 3. 2 of 782/2013)

The new Seed Proclamation 782/2013 thereby exempts the majority smallholder farming population (97%) (Alemu 2011), from compliance with the strict globalised UPOV 91 rules system which is being applied for selected commercial crop varieties, and central tenets of seed sovereignty as defined earlier are

²⁴ GTP is the successor to previous government programmes Sustainable Development and Poverty Reduction Programme (2002-2007) and Plan for Accelerated and Sustainable Development to End Poverty (PASDEP) (2006-2010), which indicated a shift towards a market-economy and private sector inclusion.

²⁵ World Bank 2010 AGP Proposal:

<http://documents.worldbank.org/curated/en/634931468036896288/pdf/532900PAD0REPL1Official0Use0Only191.pdf> (accessed online August 16 2016)

²⁶ ATA is governed by an Agricultural Transformation Council with an Executive Committee chaired by the Prime Minister and including amongst others 5 members of the Ethiopian Council of Ministers, and former Gates Foundation Executive Khalid Bomba. The ATA acts as the Secretariat to the new Council with a key objective "to identify systemic constraints of agricultural development." (Part Three, Article 9, Regulation No.198/2010).

allowed to continue amongst Ethiopia's majority farming population. The inclusion of a much clearer exemption in the revised Seed Proclamation 782/2013 is unusual in the present tranche of 'enabling' legislative seed changes occurring on the continent, and is in stark contrast to the more stringent contemporaneous Kenyan law SPVAA 2012, which invoked the so-called farmers' privilege, a UPOV 2009 derivative term, with its inclusion of the term "within reasonable limits and subject to safeguarding the legitimate interests of the breeder..." (Section 17.1(E) SPVAA 2012) which was designed to protect breeders by restricting farmers' rights to sell a commercial seed without recompense through royalty payment to the breeder. 782/2013 uses no such terminology and the exemption appears unequivocally in favour of the informal seed system and the farmers who rely on it for food security and income generation. This signals a stronger role for the Government of Ethiopia, or at least the ruling Ethiopian Peoples' Revolutionary Democratic Front (EPRDF)²⁷ party in Government, in establishing itself as a more powerful domestic/State actor in relation to its sovereignty over its seed during the formulation of the new seed law.

Tracing the passage of the new seed law, from 2006 with the establishment of AGRA and its Programme for Africa's Seed System (PASS) in the region, through to its endorsement by the House of People's Representatives in 2013, reveals the main actors who influenced the new law. It became clear that the entire process was led and driven by a select seed regulatory division within the Ministry of Agriculture (MoA), (Interview with MoA 11th November 2015) with constant referral to the office of the Prime Minister²⁸ and the experts in his office.

Significantly, in the Ethiopian case, they first sought advice from their own domestic experts, notably the Ethiopian Institute of Agricultural Research (EIAR), Institute of Biodiversity Conservation (IBC/(EBI)²⁹, Ethiopian Standards Agency (ESA) and Ethiopian Seed Enterprise (ESE), all public institutions with pivotal roles as stakeholders in the seed space at a federal level (Interview with EBI, 12 November 2015). Though they are not consulted again and farmers and civil society groups are not consulted at all, nevertheless it is at this point that the 'emphasis' on smallholder farmers and their seed/agricultural practices emerges and remained a defining feature of the subsequent Seed Proclamation, despite globalising pressure from varied Dutch interests and the involvement of a key Intergovernmental Organisation (IGO) the International Development Law organisation (IDLO) during the central period of drafting between November 2009 and September 2010³⁰. SP 782/2013 provides a most differentiated if not

²⁷ Following the election in 2010, EPRDF controls 99.6% of the House of People's Representatives (HoPRs), the highest legislative authority, which allowed them to form and lead the executive, the Council of Ministers and the Prime Minister, thereby allowing EPRDF to control both the executive and legislative wings of government (Lefort 2013 in Hassena et al 2016, p.93)

²⁸ Meles Zenawi and after his death in 2012 his successor Hailemariam Dessalegn

²⁹ IBC now known as EBI had itself been established by Proclamation No. 120/1998 and was the brainchild of internationally acclaimed Ethiopian scientist and geneticist at MoA, Melaku Worede. It houses Africa's oldest gene bank with more than 73,000 accessions of different seed species and continues a practice of 'conservation through use', germplasm exchange between the bank and farmers throughout all regions of Ethiopia.

³⁰ IDLO describes itself as "the only intergovernmental organisation exclusively devoted to promoting the rule of law" Based in Rome since its formation in 1988, IDLO "enables governments and empowers people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity" (ibid). It counts among its funders the Bill and Melinda Gates Foundation as well as listing William Gates Senior, co-chair of BMGF as a member of its five strong International Advisory Council. <http://www.idlo.int/> [accessed online November 11th 2015]

‘peculiar’ (Alemu 2011) seed law in an African context in this period. It gives something and simultaneously takes something away from most actors involved in the process, except the executive and ‘US interests’ (Clapham 2009)³¹. It appears that the Ethiopian Government at this time sought to allow the strictest rule system to apply for the commercial seed sector, namely IO UPOV 91 and in the critical period following their own disputed landslide electoral victory in 2010³² finalised the seed law choosing to embark on an almost exclusive collaboration with US dominated interests, curiously excluding other actors at this juncture (Hassena et al 2016), whilst at the same time orchestrating the process to ensure a differentiated seed system would be enshrined in the Ethiopian law, insisting on an unequivocal exemption for the farmers’ seeds as well as a laxer certification route for Quality Declared Seed. The Ethiopian State ‘adroitly’ administered and managed their own exit from certain areas of sovereign seed control, conceding power to a transnational actor (BMGF) through ATA (which is dominated by the executive on the Transformation Council), its key state ally, namely USA, and its main IO funder, the World Bank. Nevertheless certain alternative and pluralistic outcomes in terms of seed sovereignty were realised in this case, albeit by an authoritarian Government in a less than transparent fashion and without full public consultation. However, a differentiated law will inevitably lead to a differentiated practice of seed sovereignty in distinct locales throughout the regions of Ethiopia, which gives cause for further empirical study. Such ‘overlapping sovereignties’ (Patel 2009), and plural pathways (Scoones and Thompson 2011) give some ground to the theoretical premise that transformationalists assert is the nature of an emergent, contingent paradoxical globalisation, which appears to find a home in the ambiguous ‘developmental’³³ authoritarian State of Ethiopia.

Conclusion

In conclusion, this paper highlights that differentiated seed practices are emerging in the face of global pressures in different locations. The new Kenyan seed law is highly globalised, but the neighbouring Ethiopian seed law is less so. Transformationalists say that Globalisation is essentially multi-dimensional and not unidirectional. The transformationalist perspective asserts that national sovereignty remains the ‘principal juridical attribute’ but is increasingly divided and shared between local, national, regional and global authorities. This is borne out by the research in this case. What emerges are ‘overlapping sovereignties’ in complex new arrangements and heightened conflict and insecurity at all levels accompanying these new ‘transgovernmental relations’. The evidence points to

³¹ Christopher Clapham highlights how Ethiopia’s swift backing of the US ‘global war on terror’ gave it ‘scope to promote its own agenda, effectively presented itself as a force for stability in the region and insulated it against possible loss of US support which it required for military protection of its border interests to the north in Eritrea and to the South in Somalia, all of which fed into US interests also to neutralise Islamist elements (Clapham 2009, pp181-192)

³² There has been much concern regarding the 2005 and 2010 elections. EU claimed the 2010 election failed to meet international standards (EU 2010 quoted in Fiseha 2014, p.84-85)

³³ “Developmental State is an institutional, political cum ideological arrangement that evolved from Japan’s, post war economic recovery and was later adopted by some East Asian countries”. EPRDF started to articulate this concept in the early 2000s and is clearly laid out in a key speech by Meles Zenawi in 2006 (Fiseha 2014, pp.69-71).

the kind of ambiguity and contradiction that transformationalist scholarship asserts is the central hallmark of this period, with accompanying dislocation and destabilisation of key institutional coordinates in a highly paradoxical globalisation. However, because it is not fixed or concrete as hyperglobalists would suggest, nor stuck within the rigid boundaries of the state, as realists would think, it contains the capacity for counter-hegemonic responses and possibility for a multiplicity of radical responses, even reform. The fate of seed sovereignty in distinct locations, has become an important lens providing us with essential information on how power and control is being organised over our food system, whilst also indicating some possible avenues for future action.

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Nazioarteko Hizketaldia

ELIKADURAREN ETORKIZUNA ETA NEKAZARITZAREN ERRONKAK XXI. MENDERAKO:

Mundua nork, nola eta zer-nolako inplikazio sozial, ekonomiko eta ekologikorekin elikatuko duen izango da eztabaidagaia

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April 24th - 26th. Europa Congress Palace. Vitoria Gasteiz. Álava. Basque Country/Europe

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EL FUTURO DE LA ALIMENTACIÓN Y RETOS DE LA AGRICULTURA PARA EL SIGLO XXI:

Debates sobre quién, cómo y con qué implicaciones sociales, económicas y ecológicas alimentará el mundo.

24 / 26 de Abril, 2017. Palacio de Congresos Europa. Vitoria-Gasteiz. Álava. País Vasco. Europa.

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