
LAW N. 13. 123/2015 AND THE SETBACK IN THE TRADITIONAL KNOWLEDGE PROTECTION

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ABSTRACT

This article proposes an analysis of the Law n. 13. 123/15 that disposes, among other aspects, about the rules of access, use and partition of the benefit sharing from the genetic resources of biodiversity and traditional knowledge associated. Initially the article narrates the brief history of the regulation about the theme in the national legal order. Then, it exposes the relationship of traditional knowledge associated with the culture of traditional peoples and communities and identifies the setbacks conducted by the new legal regime by drawing a comparison with the national legislation which, previously, disposed about the subject and the international legal outline. Ahead the law setbacks that reached the traditional knowledge associated are evaluated from the perspective of the progressiveness principle and its interface with the principle of prohibition of retrogression, demonstrating the violation of these principles. At the end, we concluded that the rules of Law n. 13. 123/15 are considered unconventional, and its application should be removed from the practical legal order. The research is conducted descriptively, using bibliographic and documentary material as research techniques.

Keywords: Biodiversity; Traditional Knowledge Associated; Culture; Human Rights; Progressivity.

A LEI N. 13. 123/2015 E O RETROCESSO NA PROTEÇÃO DOS CONHECIMENTOS TRADICIONAIS

RESUMO

Este artigo propõe uma análise da Lei n. 13. 123, de 21 de maio de 2015, que dispõe, entre outros aspectos, sobre regras de acesso, uso e repartição de benefícios decorrentes do patrimônio genético da biodiversidade e dos conhecimentos tradicionais associados. Inicialmente, o artigo narra breve histórico da regulamentação sobre a temática no ordenamento jurídico nacional. Em seguida, expõe a relação dos conhecimentos tradicionais associados à cultura dos povos e de comunidades tradicionais e identifica os retrocessos aportados pelo novo regime jurídico, traçando um paralelo comparativo com a legislação nacional que, anteriormente, dispunha sobre o assunto, e com o arcabouço jurídico internacional. Mais à frente, são avaliados os retrocessos da lei que atingiram os conhecimentos tradicionais associados, sob a ótica do princípio da progressividade, e a sua interface com o princípio do não retrocesso, demonstrando-se a violação desses princípios. Ao final, conclui-se que as regras da Lei n. 13. 123/15 analisadas são inconventionais, devendo sua aplicação ser afastada do ordenamento jurídico pátrio. A pesquisa é abordada de forma descritiva, utilizando, como técnica de pesquisa, material bibliográfico e documental.

Palavras-chave: *Biodiversidade; Conhecimentos Tradicionais Associados; Cultura; Direitos Humanos; Progressividade.*

INTRODUCTION

This article proposes an analysis of Law no. 13. 123, dated May 21, 2015, which regulates access, use and distribution of benefits arising from the genetic heritage of biodiversity and associated traditional knowledge (CTA), among other aspects.

In this study, an assessment of the aforementioned legislative instrument regarding the protection of the traditional knowledge associated with biodiversity is carried out, with indigenous peoples, traditional communities and traditional farmers as holders of rights. The assessment of these provisions will be carried out in the light of the principle of progressive human rights and its interface with the principle of non-retrocession, provided by the article 26 of the American Convention on Human Rights (ACHR) and Art. 1 of the Protocol of San Salvador.

From this analysis, it will be proposed a demonstration that Law no. 13. 123/15 made a setback on the legal standards that were ensured in the normative instrument that preceded it. The new law has gone back on the protection of associated traditional knowledge, especially regarding the cultural rights of traditional peoples and communities, which constitutes the non-compliance with the fundamental right to culture, provided for in art. 14 of the Protocol of San Salvador.

In the end, it is concluded that the application of the norms analyzed should be removed because of the serious violations of human rights that it provides, through the exercise of control of convention, which, in turn, according to Sarlet,

seeks to highlight the distinction between the control of constitutionality, because independently of its constitutional hierarchy, it is a matter of affirming that the treaties (here referred to by the term conventions) operate as a parameter for the control of other normative acts that are - hierarchically inferior (CONJUR, 2015).

1 BRIEF HISTORY OF THE REGULATION OF ACCESS AND USE OF GENETIC RESOURCES OF BIODIVERSITY AND ASSOCIATED TRADITIONAL KNOWLEDGE WITHIN BRAZIL

The issue of access to and use of genetic resources of biodiversity, as well as access to traditional knowledge and its use, has been discussed for many years in Brazil.

The first attempt at regulation was proposed through the Bill - PL - n. 306, in 1995, by the then senator Marina Silva, then affiliated to the Workers' Party (PT). Other bills on this theme were presented until the theme was first regulated in Brazil, with the edition of Provisional Measure no. 2. 186-16 of August 23, 2001, the first edition of which was issued under No. 2,052/00.

The provisional measure no. 2. 186-16/01 raised controversy throughout its term, because industrial and scientific sectors claimed it to be an excessively bureaucratic law and complained of the imposition of sanctions in the face of their non-compliance. It was “in this context of industrial sector dissatisfaction with the previous regulations that, in 2014, the discussion of biopiracy will gain momentum” (DALLAGNOL, 2015, p. 4), motivating the presentation of a bill on June 24, 2014, by the Executive Branch, and initiating a legislative process that culminated in the publication of Law no. 13. 123/15.

In the same year that the Government sent the above-mentioned bill to Congress, the Nagoya Protocol, one of the most anticipated international instruments on the subject, received the minimum number of ratifications and entered into force in October 2014 during the Twelfth Conference of the Parties. Brazil, however, has not ratified this protocol so far.

In fact, the text of MP (provisional protective measure) no. 2. 186-16/01 presents several points that merit improvement, in order to ensure, in a broad way, the rights of traditional peoples and communities. However, these points were not subject to the modifications required by Law no. 13. 123/15.

As a result of a long process of many visits to drafting bills in the sphere of the federal government, this new law did not result from a broad and participatory process, and even less allowed for effective debate and prior consultation with the peoples and communities. It is possible to affirm that this is a legislative process that is flawed by the requirements of Convention 169 of the International Labor Organization (ILO), which provides for compulsory prior consultation whenever there are legislative proposals that affect the rights that it ensures.

The proceedings began in the Chamber of Deputies (CD), with the proposal of PL n. 7.735/14, authored by the federal government, which submitted it on request of constitutional urgency. “Consequently, pursuant to § 2º of art. 64 of the Federal Constitution, both the Chamber of Deputies

and the Federal Senate (SF) have each, in succession, up to 45 days to manifest on the proposition” (TÁVORA, F. L. *et al*, 2015, p. 20).

Due to the provisions of item II of art. 34 of the Internal Regulations of the CD, a Special Committee was formed to evaluate PL n. 7.735/14; however, as has been reported,

The Special Committee set up on the CD for evaluation of the bill did not meet, which resulted in the vote in the matter by the plenary of the CD. This fact, undoubtedly, caused greater complexity in the analysis of the project, since the matter was not previously instructed, especially with more discussion, through public hearings in the Special Commission (TÁVORA, F. L. *et al*, 2015, p. 20).

Nevertheless, the bill no. 7.735/14 was approved on February 4th, 2015.

In the case of the Federal Senate, this bill of the House of Representatives was received under number 2 of 2015. In this Legislative House, “two public hearings were held with the purpose of instructing PLC no. 2, 2015” (TÁVORA, F. L. *et al*, 2015, p. 22).

During the course of the two houses of the National Congress, “394 amendments to the project were presented” (TÁVORA, F. L. *et al*, 2015, p. 22). In the end, “12 approved amendments” (TÁVORA, F. L. *et al*, 2015, p. 27).

The Presidency of the Republic vetoed four matters, and Congress maintained vetoes. “Since the vetoes were kept in the Chamber of Deputies, it was not necessary to send the Federal Senate to the evaluation” (TÁVORA, F. L. *et al*, 2015, p. 30) and, after the 180 days’ vacancy period, in force on November 15, 2015, with the number 13. 123/15, being regulated by Decree n. 8. 772, dated May 11, 2016.

Among the four issues vetoed by the Presidency of the Republic, the reasons for vetoes to paragraphs 3 and 4 of art. 13 of Law no. 13. 123/15, which provided, respectively, the need for prior authorization by the Ministry of Science, Technology and Innovation for research activities; and by the Genetic Heritage Management Council (CGEN), for technological development activities. According to the Veto Message n. 417, dated May 20, 2015, vetoes occurred for the following reasons:

The devices referred to another context in the original Bill. Thus, the text approved by the National Congress, § 3 would remain unsystematic, and § 4 would be in conflict

with section I of the content of the *caput* of the article. Moreover, such procedures could result in mere bureaucratic hindrance, contrary to the logic of the measure (Veto Message No. 417, of May 20, 2015).

Throughout this process, traditional peoples and communities expressed their nonconformity with the legislative and regulatory process, which, in general, excluded the effective participation of these actors, giving priority to the industrial sector.

In effect, the *Instituto Socioambiental* (ISA) reported on its website that

Indigenous peoples, traditional communities and family farmers have decided to boycott the public hearing in protest of how the government has been leading the formulation and regulation of the law. They also issued an open letter in which they repudiate and call for repeal of the law, because it violates constitutional principles and their basic rights (ISA, 2016).

2 THE SETBACK OF LAW N. 13. 123/15 IN RELATION TO THE PROTECTION OF THE ASSOCIATED TRADITIONAL KNOWLEDGE

The traditional knowledge associated with the genetic heritage of biodiversity (CTA) is part of Brazilian cultural heritage and collective rights and are specially protected by the Constitution of the Federative Republic of Brazil of 1988 - CR/88, as can be seen from the reading of its arts. 215 and 216, which deal with the fundamental right to culture.

Cunha Filho (2000, p. 34) conceptualizes cultural rights as

Those affections to the arts, the collective memory and the transfer of knowledge that assure their holders the past knowledge, active interference in the present and possibility of prediction and decision of options referring in the future, always aiming at the dignity of the human person.

This view is in line with the provisions of the Universal Declaration on Cultural Diversity, which, in its preamble, emphasizes:

Culture should be considered as the set of distinctive spiritual and material, intellectual and affective traits that characterize a society or a social group and which encompasses, in addition to arts and letters, ways of life, ways of living together, systems values, traditions and beliefs

Thus, traditional knowledge forms a categorization of human cultural rights necessary for the free development of traditional peoples and communities, intending to build a life worthy and intrinsically linked to the right to cultural identity.

According to Santilli, *apud* Barros *et al.* (2007, p. 284).

The so-called traditional knowledge is closely related to the way that community sees the world, and may even have a sacred character, something that has symbolic value but is priceless. Clearly, they are processes, practices, activities, knowledge and habits, passed down through the years, from generation to generation, belonging to a community highly related to the environment.

Regarding the associated traditional knowledge, Santilli (2005, p. 136) teaches that “it includes all information useful to the identification of active principles of biomolecules or functional characteristics of cells and microorganisms, regardless of whether the traditional use coincides or not with biotechnological use”.

From the perspective of human rights applied to CTA, it is possible to glimpse the flaws intrinsic to the law under analysis, which reduced them to a mere input to the system of science, technology and innovation, marking its importance. Although the law declares rights aimed at the protection of CTAs, a closer reading of its text demonstrates that mechanisms have been created which have reduced the legal protection of traditional knowledge, reaching the point of establishing hypotheses in which access to CTA can take place without the requirement of prior and informed consent and without the obligation to distribute benefits.

In order to demonstrate the setbacks brought by the new law in relation to the protection of CTAs, the analysis of Law no. 13.123/15 with regard to this aspect. As proposed by this article, the assessment of the devices that deal with the protection of CTAs will be carried out by comparing their devices with the text of the then current MP 2.186-16/01 and with the rules set forth in the main international treaties that surround the theme.

A comparative parallel will be drawn between the legal framework that surrounds the theme, confronting the role of the State in the context of the access, use and distribution of benefits related to the CTA, foreseen in the current legislation in relation to the old prediction contained in said MP.

Despite the fact that both the old and the new national legislation provide for the Genetic Heritage Management Council as the central body in this scenario, it is notorious that its weakening, moving from the role of an organization that once checked the regularity of processes for paper of mere receiver of registers. In fact, the current model is based on mere statements of the user, who is a natural or legal person who performs the activity of access, use and/or economic exploitation of CTAs. Such declarations are made by completing an electronic form in the National System for the Management of Genetic Heritage and Associated Traditional Knowledge (*Sisgen*), which is the electronic system created for this purpose, regulated by art. 20 and following of Decree n. 8. 772/16.

Depending on the activity that the user intends to develop, the new law imposes the need for one or more declaratory acts to be fulfilled. In general terms, for the access activity, it is only necessary that the user perform the registration in *Sisgen*, declaring the access. If the access intended by the user is in an area indispensable to national security or in Brazilian jurisdictional waters, the continental shelf and the exclusive economic zone, it is also necessary to demonstrate, in addition to registration, the authorization of the Union; and if the activity is for economic exploitation, it is necessary that the user also perform, after registration, a product notification, which consists of the declaratory instrument that precedes the beginning of the economic exploration activity in which the user declares the fulfillment of the requirements of this law.

For the purposes of access to CTAs and economic exploitation of CTAs, the law - as will be seen later in this study - requires, surprisingly, only in exceptional cases, demonstration of obtaining prior and informed consent and the presentation of the benefits, which are the two most important instruments for the protection of ATC.

The legal framework that is the object of this article brings to mind the concept of these two instruments. In section VI of art. 2 of the law in question, prior informed consent as “formal consent, previously granted by indigenous population or traditional community, according to their uses, customs and traditions or community protocols”, which allows access to

CTAs; and in clause ?? of the same article, the benefit-sharing agreement is defined as the “legal instrument that qualifies the parties, the object and the conditions for benefit sharing” from the CTA operation accessed.

The management structure of traditional knowledge, provided for in art. 11 of MP n. 2.186-16/01 gave Cgen the power to decide on the authorization of access and remittance activities, upon prior consent of the holder of the CTA or genetic heritage, as well as to give consent to the Contracts for the Utilization of Genetic Heritage and Distribution of Benefits (CURB). In the current model, in the terms of subsection IV of art. 6 of Decree n. 8.772/16, Cgen has competence only to attest to the regularity of access to the CTA combined with art. 12 of Law no. 13.123/15 and with articles no 22 and 23 of Decree n. 8.772/16, by means of the automatic issuance of proof of registration, after completing the electronic form available in the National System for Management of Genetic Heritage and Traditional Associated Knowledge (*SisGen*), an electronic system implemented and operationalized by the CGEN Executive Secretariat.

In the same way, in the case of economic exploitation of the CTA, under the terms of arts. 34 and 35 of Decree n. 8. 772/16, CGEN only automatically generates the proof of notification after the mere declaratory act of notification of the product, that is, to support the associated traditional knowledge management structure, based on user self-declarations, Law no 13. 123/15 weakened the police power of the Union and undermined the obligation imposed in arts. 23 and 225 of the CR/88, that is, the protection of socio-environmental patrimony.

Thus, the management structure of genetic heritage and associated traditional knowledge, created by Law no. 13.123/15, represents a step backwards to the CTA's rights of protection, since in previous legislation there was broader state control over access to, use and economic exploitation of such assets and therefore less vulnerable, biopiracy and the irregular use of patents, since state control occurred before access.

Both MP n. 2.186-16/01 regarding the new law deal with Chapter III of the CTA. However, while the name of the title conferred by the MP on this chapter was “FROM PROTECTION TO ASSOCIATED TRADITIONAL KNOWLEDGE”, the Law renamed it only “FROM TRADITIONAL ASSOCIATED KNOWLEDGE”. In effect, the withdrawal of the expression “PROTECTION” denotes the mitigation of the legal guarantees previously assured to the CTA by the MP.

In the provisions of Chapter III of Law no. 13.125/15, it is found

in arts. 8 and 10, that the law establishes rights to traditional peoples and communities for the protection of ATC against the illicit use and exploitation of traditional knowledge; however, these rights do not reveal advances in the legal protection of traditional peoples and communities.

Paragraph 2 of art. 8 of Law no. 13.123/15, as well as MP no. 2.186-16/01, provides that “traditional knowledge associated with the genetic heritage referred to in this law integrates Brazilian cultural heritage and may be deposited in a database, as provided for in the *CGen* or specific legislation”, such as, for example, Decree n. 3.551/00, which established the Register of Cultural Goods of Intangible Nature that constitute Brazilian cultural heritage and which enables the CTA to be registered in the Book of Knowledge.

However, in addition to the new Biodiversity Law not linking the activity of access to the register, Cunha Filho (2000, p. 125) affirms that register is “a symbolic perennialization of cultural assets. This perennation is given through different means, which enable future generations to know the various stages through which the cultural good has passed.”

Thus, the right established in § 2 of art. 8 of Law no. 13. 123/15 has no practical effect for the purpose of protecting CTAs and protecting the cultural rights of traditional peoples and communities in relation to, for example, the right to grant patents for invention.

Likewise, the new law, in paragraph 4 of its art. 8, which reproduces part of the text of MP n 2. 186-16/01 in relation to the right of exchange and dissemination of CTAs, where it is provided that “the exchange and dissemination of genetic heritage and associated traditional knowledge practiced among themselves by indigenous populations¹ by traditional community or traditional farmer, for their own benefit, based on their uses, customs and traditions, are exempt from obligations”, eg benefit sharing and prior informed consultation - exchange. The difference between the § 4 of art. 8 of Law no. 13. 123/15 and the wording of the repealed MP is that this law, by making the exemption of traditional peoples and communities from the obligations provided for in the legal text conditional on the need for the exchange and dissemination of traditional knowledge practiced only between indigenous populations, a traditional community or traditional farmer; and that the exchange and dissemination of knowledge

¹ The law, unfortunately, adopted the terminology “indigenous populations” rather than adopting the terminology “indigenous peoples” enshrined in ILO Convention 169. As this paper intends to make a comparison of the legal text, the terminology adopted in Law n. 13. 123 / 1 5, highlighting its inadequacy.

is only for the benefit of these peoples and based on their uses, customs and traditions, reveals that the new legal framework in this respect has restricted the rights of traditional peoples and communities, since the MP does not require such a condition.

The new legal framework, Law no. 13. 123/15, recognizes rights to indigenous peoples, traditional communities and traditional farmers - that create, develop, hold or preserve traditional knowledge - to “have recognized their contribution to sustainable development and the preservation of genetic heritage” (Article 10, items I and II), as well as the right to “indicate the origin of access to associated traditional knowledge in all publications, uses, holdings and disclosures”. In items V and VI of its art. 10, Law no 13. 123/15 provides for the right of CTA providers to freely use or sell products containing associated traditional knowledge; provides for the right to preserve, manage, store, reproduce, exchange, develop and improve reproductive material containing associated traditional knowledge. However, in regards to the right to free use and sale of products, the new law, once again, restricts rights in relation to the revoked MP, when it disposes, in item V of its art. 10, that the peoples and traditional communities can “use it or freely sell products containing genetic resources or associated traditional knowledge, subject to the devices laws no. 9456 of April 25, 1997, and 10.711 of August 5, 2003”, which deal with the protection of cultivars and the seed system.

In relation to the right of decision of the traditional peoples and communities on the use of their CTA, a considerable retrogression is identified, with reference to the repealed legislation. Although the current law provides, in art. 6, the right of participation of traditional peoples and communities in the composition of *Cgen*, in a level of equality with the business and academic sectors, which did not occur in the MP, and also to provide, in paragraph 1 art. 8 and in section IV of art. 10, respectively, the right of these peoples to participate in decision-making on issues related to conservation, sustainable use and access to their knowledge, the new legislation does not provide for the right of traditional peoples and communities to decide on the use of their CTA, as provided by MP in §1 of its art. 8, and the permanence of this right should be extracted from the dictates of Convention 169 of the International Labor Organization.

Convention 169 of the International Labor Organization, approved in Brazil by Legislative Decree no. 143/02 and promulgated by Decree n. 5. 051/04. In its preamble, it recognizes the right of self-

determination of the peoples and international communities, recalling the “aspirations of these peoples to take control of their own institutions and ways of life and their economic development, and to maintain and strengthen their identities, languages and religions within the state where they live. “

In any case, the omission on the right of traditional peoples and communities to decide on the use of their CTA violates rights that should be clearly stated; for example, in respect to the right to prevent unauthorized third parties from using, testing, researching, exploring, relating to CTAs, as well as disseminating, transmitting or retransmitting data or information that are or constitute a CTA, formerly provided for in item II of art. 9 of the MP and not reproduced in Law no. 13.123/15.

In this context, it is evident that the new legislation has regressed in the defense of socio-environmental rights, hampering the development of social groups holding CTAs, affecting their dignity and, by way of reflection, withdrawing the freedom of traditional peoples and communities.

Above all, together with the conditionalities imposed for purposes of benefit sharing that will be analyzed at the outset, in Chapter III of Law no. 13.123/15, where traditional knowledge associated with the biodiversity of indigenous populations, traditional communities and traditional farmers is protected, one of the major setbacks in relation to MP n. 2.186-16/01, repealed. The new law negatively innovates in relation to this MP, creating the system of classification of traditional knowledge without parallel with the previous regime or with any other international treaty on the subject. This system works as a selection mechanism that determines the obligation of obtaining the prior informed consent of the CTA providers to the fact that the associated traditional knowledge is, according to the law in question, of identifiable origin or not.

In art. 9 of Law no. 13.12 /15 there is only the provision of mandatory consent for access to associated traditional knowledge classified as of identifiable origin. In relation to traditional associated knowledge of non-identifiable origin, that law defines, in item III, of art. 2, such as the one in which “there is no possibility of linking its origin to at least one indigenous population, traditional community or traditional farmer”, access is not dependent on obtaining prior informed consent.

In this respect, the new legal framework, in order to identify the traditional knowledge associated with hitherto unidentifiable origin, should have created at least instruments that would condition access to

consultation on such knowledge, like the Book of Knowledge, discussed above. In the absence of the record of this knowledge in this Book, the law should bind access to the registry, so that a next access activity would be subject to the consent of the traditional population that provided such knowledge before without an identifiable origin.

Thus, the law would obey the provisions of §1 of art. 216, which assigns to the public power, with the collaboration of the community, the promotion and protection of the Brazilian cultural heritage, through inventories, records, surveillance, registration and expropriation, and other forms of precaution and preservation.

From this perspective, it is an eloquent observation that Law no. 13.123/15 not only regressed but stopped progressing in the defense of the CTA.

In implementing the classification system for CTAs, the new legal regime established rules, in relation to prior informed consent, that conflict with the provisions of ILO Convention 169, such as foreseen in art. 6. 1, “a”, which requires governments to:

consult with the peoples concerned, through appropriate procedures and, in particular, through their representative institutions, whenever legislative or administrative measures are envisaged that may affect them directly.

In this context, the Working Group on Traditional Knowledge of the 6th Chamber of Coordination and Revision of the Federal Public Ministry (MPF), in the Technical Note that had as its object the bill and law that culminated with the publication of Law no. 13.123/15, when dealing with the affectation of rights and legal interests relevant to traditional peoples and communities, stated that

The right to self-determination of peoples is closely related to the right that such peoples have over their material and immaterial heritage. The peoples have the right to enjoy autonomy (territorial, cultural, intellectual, moral and economic, etc.), without being violated by acts of the states or even private agents (MPF, 2014, p. 5).

In addition, due to the Convention on Biological Diversity (CBD) - ratified by Brazil with the approval of Legislative Decree n. 02/94 and promulgated in 1998, with Presidential Decree n. 2. 519/98 - impose,

in art. 8, “j”, the participation of the traditional peoples and communities in the hypotheses of access, the provision of exemption from prior and informed consultation found in the new legal framework is incompatible with this international agreement.

The new law subordinated the right to prior and informed consultation to the mentioned classification system of the CTA, while in the MP the consent of the peoples and traditional communities was absolute condition for the access to the traditional knowledge indistinctly.

It should be noted that the new legislation does not make clear who is responsible for obtaining prior consent. However, it is worth remembering that the Inter-American Court of Human Rights (ICHR), when judging the Kichwa Indigenous Peoples Case of Sarayaku v. Ecuador, has already established that the duty to carry out prior consultations and obtain consent is a state, and therefore, such a burden cannot be delegated to third parties outside the public structure, and it is incumbent upon the State to demonstrate that this right has been guaranteed in all its dimensions:

Convention No. 169 applies inter alia to “los pueblos tribales en países independientes, cuyas condiciones sociales, culturales y económicas les distinguen de otros sectores de la colectividad nacional, y que estén regidos total o parcialmente por sus propias costumbres o tradiciones o por una legislación especial”¹⁸⁸, y por el cual los Estados “deberán asumir la responsabilidad de desarrollar, con la participación de los pueblos interesados, una acción coordinada y sistemática con miras a proteger los derechos de esos pueblos y a garantizar el respeto de su integridad (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2012, p. 44).

Another setback in the law regarding the matter of prior consent is the provision in § 1 of the 9th art. The law considers as evidence of obtaining prior informed consent: the signature of a prior consent term; the audiovisual record of consent; the opinion of the competent official body; or accession in the form provided for in the Community Protocol. In this respect, it was not observed that consent is only the result of a more complex process, in which the broad participation of the affected communities must be guaranteed. For this reason, mere documentary evidence consists of a formality which does not serve as a means of full proof of that process, nor even of proof of compliance with the internationally established parameters for that process, such as good faith, transparency, the awareness of risks and benefits and the broad provision of information to support decision

making.

With regard to the provisions of item III of paragraph 1 of art. 9 of the law in question, which gives proof of prior consultation to the competent official body, once again it violates the right to self-determination of traditional peoples and communities enshrined in ILO Convention 169. It should be emphasized that an opinion and meaning can be complementary to prior consent, but it can never supplant it or provide full proof. Hence the great importance of the Community protocol. The subsection VII of art. 2 of Law no. 13.123/15 defines this instrument as a “procedural standard for indigenous peoples, traditional communities or traditional farmers, establishing, according to their uses, customs and traditions, the mechanisms for access to associated traditional knowledge and the sharing of benefits in the scope of this Law.”

In effect, it is concluded that, if the Community protocol establishes a type of proof of prior and informed consultation other than the evidence provided for in § 1 of art. 9, the type provided in the procedural standard of traditional communities overlaps with legal forms, since they express legal pluralism and self-determination of traditional peoples and communities.

Therefore, Law no. 13.123/15, in Chapter III, which protects the CTA, contradictorily applies a system that exempts the right to prior and informed consultation, which constitutes a serious setback to the rights of traditional peoples and communities, since it gives the interested parties the allowance for access, use and exploitation of traditional knowledge as well as the use of a good of cultural value without the need to require any permission from its holders.

However, apart from Chapter III of the new legal regime, there are still other devices that also represent a serious setback to the rights previously guaranteed by the MP to the CTA providers. In this respect, we can highlight the creation of another negatively innovative system, which immediately affects the peoples and traditional communities. This other system is linked to the right of distribution of benefits resulting from the economic exploitation derived from access to the CTA.

Although the new law, like the provisional measure in question, continues to be linked to the allocation of benefits to a possible economic result, the new legislation restricted that right and, in several cases, suppressed it. The new legal instrument, as well as the right to prior and informed consent, treats the benefit-sharing obligation as an exception,

hampering the development and freedom of holders of associated traditional knowledge.

Law no. 13.123/15 created a benefit-sharing exemption system that conditions this right to the user's purpose within the production chain, to the preponderance of traditional knowledge for marketing purposes and to the legal nature of the user. This system, alongside the classification system or hierarchy of traditional knowledge, constitutes a flagrant setback related to the legal protection of traditional peoples, since it mitigates and, in some cases, suppresses the right to benefit sharing, which is one of the two pillars of sustainable development in this context.

In MP no. 2.186-16/01 there was no provision for a condition, mitigation, gap or exception to the fulfillment of this fundamental instrument for the protection of CTAs. On the contrary, recognizing the value of this instrument, the MP provided, in paragraph 4 of its art. 16, that there was enough prospect of commercial use of the associated traditional knowledge to have the obligation to sign, prior to access, Benefit Breakdown Agreement, which was called a Contract of Utilization of Genetic Heritage and Benefit Sharing (*Curb*).

The new law, in the first paragraph of its art. 17, subjected to the allocation of the economic benefits derived from the economic exploitation of CTAs only "the manufacturer of the finished product or the producer of the reproductive material, regardless of who has made the access", exempting from that obligation, according to §2, "manufacturers of intermediary products and process developers" from associated traditional knowledge, although they have made a profit for being part of the production chain, subverting the logic of environmental civil liability.

In the case of finished products, even if produced outside the country, the *caput* of the mentioned art. 17 states that there is only an obligation to distribute benefits if the associated traditional knowledge is one of the "main elements of value aggregation", which, in turn, as defined in item XVIII of art. 2 of the new law, are: "elements whose presence in the finished product is decisive for the existence of the functional characteristics or for the formation of the marketing appeal".

The decree n. 8772-16 / 01, §3 in the art. 43, defines marketing appeal as

Reference to the genetic heritage or associated traditional knowledge, its origin or differences arising therefrom, related to a product, product line or brand, in any visual

or aural communication media, including marketing campaigns or highlighting on the product label.

In this same device of the decree there is the prediction that functional characteristics are those that determine “the main purposes, improve the action of the product or extend its role of purposes. “

Paragraph 9 of art. 17 provides for the fulfillment of one more condition for the benefit-sharing right to be met in anticipating the need for the finished and exploited product, subject to distribution, to be included in the List of Classification of Benefit-Sharing. Decree No 8772-16/01 brought in its annex, the list which, in a logical question, certainly will not contain an innovative product launched by the market; and thus, for the most part, product manufacturers will not be obliged to distribute benefits, in a logic of unfair and unreasonable exclusion.

The need to comply with these requirements for the configuration of the benefit-sharing right, in addition to breaking again with the provisions of the CBD, the Nagoya Protocol, the FAO Agreement and ILO Convention 169, ends up transferring the risk of the “actual society” that is built between user and traditional peoples and communities, exclusively to CTA providers, so that if a user accesses such goods, develop products and never exploit them, due to economic problems, marketing inviability or strategy of competition, the distribution will never take place.

In paragraph 5 of art. 17, the law under analysis also provides for the possibility of legal entities with certain legal natures accessing and exploiting traditional knowledge without compelling the sharing of benefits. Paragraph I of this paragraph 5 provides for the exemption of benefit sharing between “micro-enterprises, small enterprises, individual micro-entrepreneurs, as provided in Complementary Law n. 123, of December 14, 2006 “. Section II provides for the exemption of “traditional farmers and their cooperatives, with gross annual income equal to or less than the maximum limit established in item II of art. 3 of Complementary Law n. 123, of December 14, 2006”.

They are also exempt from the obligation to distribute benefits. Pursuant to paragraph 4 of art. 17 of Law n. 13.123/15, persons who economically exploit the associated traditional knowledge and who have carried out operations of licensing, transfer or permission to use any form of intellectual property right on finished product, process or reproductive material arising from access to the traditional knowledge associated by

third parties.

Interestingly, to include Paragraph 4 of Art. 17, the legislator had to delete paragraphs a) and b) of item II of art. 9, which guaranteed the right of traditional peoples and communities to prevent unauthorized third parties from using, testing, researching, exploiting, disseminating, transmitting or retransmitting data or information that integrate or constitute associated traditional knowledge.

Paragraph 3 of art. 17 by providing that “where a single finished product or reproductive material is the result of separate accessions, they shall not be considered cumulatively for the purposes of calculating the benefit-sharing”, a hypothesis is proposed which encourages the exemption system. Since this device allows multiple accesses without cumulation for the purpose of calculation of distribution, and notification of the product occurs only after registration, a conglomerate of companies can perform several accesses at the same time, each access being made by an “arm” of that conglomerate; but the legal entity of the group that notifies and exploits the finished product or the reproductive material coming from the access is the one that has one of the legal nature provided for in § 5 of art. 17, enabling all conglomerates to be exempt from sharing benefits.

The new law, in its art. 18, deals with the distribution of benefits related to agricultural activities, defined in subsection XXIV of art. 2, as “activities of production, processing and commercialization of food, beverages, fiber, energy and planted forests”. This device follows the unfair business risk transfer premise for the traditional people and communities and the benefit sharing exemption system.

It should be emphasized that the new law, when including as an agricultural activity the processing and marketing activities, meets the definition found in Law n. 8.171/91, which deals with agricultural policy. Subsection I of art. Paragraph 2 of that law provides that

Agricultural activity comprises physical, chemical and biological processes, where the natural resources involved must be used and managed, subordinated to the norms and principles of public interest, so that the social and economic function of the property is fulfilled.

Indeed, when paragraph 2 of art. 18 of the Decree provides that “the concept of energy in §1 encompasses biofuels, such as ethanol, biodiesel, biogas and electricity cogeneration from biomass processing”, it

is clear that the law and the decree contextualize its rules related to CTAs and agricultural activities to favor activities developed by agribusiness, to the detriment of the protection of CTAs and biodiversity.

Another significant setback found in the new legislation outside Chapter III, with no provision in the repealed MP, that affects the protection of traditional knowledge, is the creation of a ceiling for the distribution of economic benefits resulting from the exploitation of CTAs of non-identifiable origin in the percentage of 1% of net annual revenue obtained from economic exploitation for benefit sharing, which can be reduced up to 0.1%, through the conclusion of a sectoral agreement.

In the final provisions, when regulating the granting of intellectual property rights obtained from access to CTA, the new regime, in art. 47, does not repeat in its text the obligation imposed in art. 31 of the MP, which established that prior consent and benefit-sharing should be observed for the granting of intellectual property rights; and that, where appropriate, the grantor should inform the origin of the genetic material and associated traditional knowledge. The law, instead of maintaining the wording of the MP that long based the Brazilian position with the international community, conditions the granting of intellectual property only to registration and, exceptionally, authorization, breaking the need to observe the social function of property. In this sense Juliana Santilli considers that

The registration does not offer any guarantee that the user obtained the prior consent of the respective community (required in the case of CTA of identifiable origin) or that the user has distributed benefits in any of the modalities provided for in the law itself (SANTILLI, 2015, pp. 278).

Thus, in the aspect related to intellectual property, the legislator sustained the incoherent Brazilian position before the international community not to ratify the Nagoya Protocol, even though Brazil led the bloc of the so-called “megadiverse” countries in the negotiation process of this protocol - an agreement that establishes instruments that provide greater legal certainty for both providers and CTA users.

In the words of Aubertin and Filoche (2011, p. 51) “In spite of some condemnation and some rather measured responses (for instance, that of the European Union), the Nagoya Protocol is a genuine compromise text, satisfying both supplier and user States”.

Therefore, Law no. 13.123/15 brought several provisions in its

text that mitigated and suppressed rights that were already guaranteed to the CTA providers in MP n. 2.186-16/01, violating the principles of environmental non-retrogression, progressive human rights and, consequently, the principle of the dignity of the human person.

According to Sarlet and Fensterseifer (2010, page 8),

The prohibition of retrogression, in this context, refers more specifically to a guarantee of the protection of fundamental rights (and of the dignity of the human person itself) against the action of the legislator, both in the constitutional and especially - infraconstitutional (when legislative measures involving the removal or restriction of guarantees and levels of protection of existing rights), but also protection in the face of public administration.

In this context, by restricting and suppressing CTA-related rights, the new legal framework also violates cultural rights of traditional peoples and communities, which are fundamental rights because they are inseparable from the principle of the dignity of the human person.

3 VIOLATION OF THE PRINCIPLE OF PROGRESSIVE HUMAN RIGHTS BY LAW N. 13. 123/15

The art. 26 of the American Convention on Human Rights (ACHR) deals with Economic, Social and Cultural Rights (ESCR) and provides that

The States Parties undertake to adopt measures, both internally and through international cooperation, especially economic and technical, in order to achieve progressively the full realization of rights deriving from economic, social and educational, scientific and cultural norms, contained in the Charter of the Organization of American States, as amended by the Buenos Aires Protocol, to the extent of available resources, by legislative or other appropriate means.

This forecast is complemented by art. 1 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, called the Protocol of San Salvador (PSS), which provides that

The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through cooperation between States, especially economic and technical, to the maximum extent of available resources and taking into account in order to achieve progressively and in accordance with domestic law, the full effectiveness of the rights recognized in this Protocol.

Analyzing writing of the above devices, it is verified that the content of art. 26 of the ACHR and art. 1 of the PSS reflect the so-called Principle of Progressivity of Human Rights. These provisions impose general clauses which must be observed by the State party in order to guarantee the progress towards the improvement of the protection of the dignity of the human person, without retreat.

The PSS, fulfilling the role of complementing the ACHR, after setting out the general clauses, enumerates the rights protected by imposing specific obligatory measures that must be fulfilled by the State party to ensure the enjoyment of these rights and, consequently, to reflect respect for the principle of progressivity.

Indeed, although the principle of progressivity envisaged in the ACHR and the PSS is linked to the DESC, this principle, because of the invisibility of Human Rights, permeates Human Rights as a whole based on the dignity of the human person.

Among the specific clauses of mandatory nature, the PSS provides, in its art. 14, the right to the benefits of culture as a human right subject to progressivity, establishing, in art. 14.1, that

The States Parties to this Protocol recognize the right of every person to: a. Participate in the cultural and artistic life of the community; b. Enjoy the benefits of scientific and technological progress; c. To benefit from the protection of the moral and material interests that fit him by virtue of the scientific, literary or artistic productions of which he authored.

The art. 14.2 of the PPS states that “among the measures which the States Parties to this Protocol shall adopt to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art. “In its turn, the art. 14.3 provides that “the States Parties to this Protocol undertake to respect the

freedom indispensable for scientific research and creative activity”.

Finally, art. 14.4 states that

The States Parties to this Protocol recognize the benefits arising from the promotion and development of international cooperation and relations in scientific, artistic and cultural matters and, in this regard, undertake to foster greater international cooperation in this field.

For Terezo (2014, p. 114), it is necessary to understand the principle of progressivity:

In view of the objectives proposed in the drafting and approval of *the International Covenant on Economic, Social and Cultural Rights*, whose essence of the constitution of the *International Bill of Rights* is directed towards the full realization of all human rights guaranteed by the *Universal Declaration of Human Rights*.

This perception is extremely relevant, while the vague wording of the provisions embodying the principle of progressivity, by providing only that States Parties undertake to adopt measures aimed at progressively ensuring the full exercise of ESCR, led to the debate on the of the ESCR. However, this discussion has been overcome and, currently, the most well-known doctrine understands that “it is possible (besides being legal) the actionability of rights that derive from social norms” (MAZZUOLI, 2015, p. 90). In this way, standards that reflect the principle of progressivity are imperative and of immediate application.

This view is endorsed by Abramovich and Courtis (2002, p. 93) when they state that

De esta obligación estatal de implementación progresiva de los derechos económicos, sociales e culturales, pueden extraerse algunas obligaciones concretas, pasibles de ser sometidas a revisión judicial em caso de incumplimiento.

The doctrine does not usually conceptualize objectively the principle of progressivity, but analyzes the concept and the unfolding of the term *progressivity* to interpret the scope of the norm. Abramovich and Courtis (2002, p. 93) stand in this direction:

La noción de progresividad abarca dos sentidos complementarios: por un lado, el reconocimiento de que la satisfacción plena de los derechos establecidos en el Pacto supone una cierta gradualidad. [...] De allí que la noción de progresividad implique un segundo sentido, es decir, el de *progreso*, consistente en la obligación estatal en mejorar las condiciones de goce y ejercicio de los derechos económicos, sociales y culturales.

From the conception presented above, there is an interface between the principle of progressive development and the principle of non-retrocession, which is the subject of this article's analysis in light of the provisions of the new legal regime dealing with associated traditional knowledge. In the words of Abramovich and Courtis (2002, p. 93-94),

La obligación mínima asumida por el Estado al respecto es la obligación de no regressividad, es decir, la prohibición de adoptar políticas y medidas, y por ende, de sancionar normas jurídicas, que empeoren la situación de los derechos económicos, sociales y culturales de los que gozaba la población al momento de adoptado el tratado internacional respectivo, o bien en cada mejora (progresiva).

In this same line, Meza Flores (2010, p. 1149), when analyzing the progressive development, considers that

Desde esa perspectiva, al existir como obligación primigenia el “desarrollo progresivo”, se debe entender que hay una prohibición correlativa de “no realización de medidas regresivas” sin justificación, las cuales, de llevarse a cabo, incumplirían con las obligaciones prescritas en el PIDESC y en el artículo 26 de la Convención Americana.

Piovesan (2015, p. 257) emphasizes the close relationship between the progressive application of the ESCRs and the prohibition of social retrogression, which is linked to the “prohibition of State inaction or omission, insofar as States are prohibited from retreat or inertia in the field of implementation of social rights.”

The General Assembly of the Organization of American States (OAS), in 2005, in approving Resolution n. 2. 074 (XXXV-O/05), in laying down the rules for drawing up Periodic Reports², in compliance with the

² In an attempt to reduce the difficulty of monitoring compliance with the principle of progressivity, the ISHR created the Periodic Reports, which is a document - one might say - search objectively

provisions of art. 19 of the Protocol of San Salvador, defined what are regressive measures: “Se recuerda que por medidas regresivas se entienden todas aquellas disposiciones o políticas cuya aplicación signifique un retroceso en el nivel del goce o ejercicio de un derecho protegido. “

In this way, it is possible to perceive that the principle of progressive development acts as a parameter for the application of the principle of the retrocession fence and vice versa, although this principle and principle is not absolute. According to Ramos (2015, p. 15), “the State may opt for less costly social policies or more efficient public policies, provided that the final result of greater effectiveness of protected rights is obtained. “Although this was not what occurred with the enactment of Law n. 13.123/15, especially with regard to the devices that protect the CTAs.

The Inter-American Court of Human Rights (IACHR) has, on some occasions, faced matters that involved the principle of progressivity, under the terms set forth in art. 26 of the ACHR, and the mandatory measures set out in the Protocol of San Salvador.

In 2003, in the case “Cinco Pensionistas” v. Peru, the IACHR, in sending the petition to the Inter-American Court, the Inter-American Commission on Human Rights (IACHR) requested the conviction of the State of Peru for non-compliance with art. 26 of the ACHR, noting that

La obligación establecida en el artículo 26 de la Convención implica que los Estados no pueden adoptar medidas regresivas respecto al grado de desarrollo alcanzado, sin perjuicio de que en supuestos excepcionales y por aplicación analógica del artículo 5 del Protocolo de San Salvador, pudieran justificarse leyes que impongan restricciones y limitaciones a los derechos económicos, sociales y culturales, siempre que hayan sido promulgadas con el objeto de preservar el bienestar general dentro de una sociedad democrática, y que no contradigan el propósito y razón de tales derechos (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2003, p. 62).

In this case, the Court, for the first time, pronounced itself directly on the right to progressive development, noting that

Los derechos económicos, sociales y culturales tienen una dimensión tanto individual como colectiva. Su desarrollo progresivo, sobre el cual ya se ha pronunciado el Comité de Derechos Económicos, Sociales y Culturales de las Naciones Unidas¹⁵⁸, se debe medir, en el criterio de este Tribunal, en función de la

demonstrate the degree of respect the obligations of San Protocol Savior.

creciente cobertura de los derechos económicos, sociales y culturales en general, y del derecho a la seguridad social y a la pensión en particular, sobre el conjunto de la población, teniendo presentes los imperativos de la equidad social, y no en función de las circunstancias de un muy limitado grupo de pensionistas no necesariamente representativos de la situación general prevaleciente (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2003, p. 64).

In a concurring vote in the annex to the judgment referring to the case referred to above, Judge Roux Rengifo, while agreeing with the judgment on non-violation of the principle of progressiveness, does so for reasons other than those set out in the judgment:

Sin embargo, el razonamiento según el cual solo sería procedente someter al test del artículo 26 las actuaciones de los Estados que afectan al conjunto de la población, no parece tener asidero en la Convención, entre otras razones porque la Corte Interamericana no puede ejercer -a diferencia de lo que ocurre con la Comisión- una labor de monitoreo general sobre la situación de los derechos humanos, ya sean los civiles y políticos, ya sean los económicos, sociales y culturales. El Tribunal solo puede actuar frente a casos de violación de derechos humanos de personas determinadas, sin que la Convención exija éstas tengan que alcanzar determinado número (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2003, p. 4).

In 2005, the *Yakye Axa Indigenous Community v. Paraguay*, treated the “communal” property of the Community, which had been expelled from its lands. The Court, following the position of the indivisibility of human rights and the individual and collective character of these rights, in assessing, in the light of the international legal order, whether the State of Paraguay has adopted the appropriate positive measures to satisfy an obligation, has used the duty of development provided for in art. 26 of the ACHR, as a benchmark for the trial:

En el presente caso, la Corte debe establecer si el Estado generó condiciones que agudizaron las dificultades de acceso a una vida digna de los miembros de la Comunidad Yakye Axa y si, en ese contexto, adoptó las medidas positivas apropiadas para satisfacer esa obligación, que tomen en cuenta la situación de especial vulnerabilidad a la que fueron llevados, afectando su forma de vida diferente (sistemas de comprensión del mundo diferentes de los de la cultura occidental, que comprende la estrecha relación que mantienen con la tierra) y su proyecto de vida, en

su dimensión individual y colectiva, a la luz del corpus juris internacional existente sobre la protección especial que requieren los miembros de las comunidades indígenas, a la luz de lo expuesto en el artículo 4 de la Convención, en relación con el deber general de garantía contenido en el artículo 1. 1 y con el deber de desarrollo progresivo contenido en el artículo 26 de la misma, y de los artículos 10 (Derecho a la Salud); 11 (Derecho a un Medio Ambiente Sano); 12 (Derecho a la Alimentación); 13 (Derecho a la Educación) y 14 (Derecho a los Beneficios de la Cultura) del Protocolo Adicional a la Convención Americana en materia de Derechos Económicos, Sociales y Culturales²⁰⁴, y las disposiciones pertinentes del Convenio No. 169 de la OIT (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2005, p. 88).

As we can see, the principle of progressiveness has been consolidated in inter-American jurisprudence to the extent that the Court, as well as carrying out an expansive interpretation of the right to life, give a transversal character to this principle, to use it to mark violations of the various dimensions of human rights, provided for in the ACHR and the PSS, whether individual or collective.

Considering this scenario, we turn our eyes to Law no. 13,133 / 15, and it is clear that the system of return that it brings in everything is in conflict with art. 26 of the ACHR, also meeting the jurisprudence of the Inter-American Court.

The system of classification or hierarchy of the CTA and the system of exemption of distribution of benefits of Law no. 13.133/15 do not reflect the “full effectiveness of rights derived from economic, social and educational, scientific and cultural norms”, as provided in art. 26 of the ACHR, making it clear that economic and technical measures were not taken internally to ensure the progressiveness of human rights, such as the right to culture of traditional CTA peoples and communities

The rules of the new law protecting CTAs violate not only the general clauses that reflect the principle of progressivity but also the mandatory measure set forth in art. 14 of the PSS, which requires States Parties to guarantee the right to the benefits of culture.

The new legislation does not grant traditional peoples and communities the right to “enjoy the benefits of scientific and technological progress”, do not benefit or protect these peoples “ from the moral and material interests they hold by virtue” of holding CTAs, do not reflect the adoption of measures to ensure the conservation and development of the culture of these peoples and do not respect the freedoms related to creative

activity, and not to provide international cooperation in the field of culture.

With this, Brazil, in approving Law no. 13.123/15, did not adopt the specific measures necessary to ensure to the peoples and traditional communities the right to the benefits of culture, violating arts. 14. 1, b), 14. 1, c) 14. 2, 14. 3 and 14. 4 of the Protocol of San Salvador.

It is important to emphasize that among the consequences of non-compliance with the international treaties under discussion is the possibility of Brazil being condemned to repair damages caused to the heritage and cultural identity of traditional peoples and communities, as well as being obliged, through control of the law, to adopt legislation appropriate to art. 26 of the ACHR and to arts. 1 and 14 of the Protocol of San Salvador.

Thus, certainly, the systems of classification of CTA and exemption of distribution of benefits implanted by Law n. 13.193/15, which have significantly reduced the legal protection of associated traditional knowledge, in violation of the principle of progressivity and which are already the subject of a wide range of criticism and questioning by civil society and the bodies that have a duty to uphold national legislation, must be the subject of lawsuits before the Brazilian Judiciary and the Inter-American Court, in order to subject this aspect of the new law to the control of convention.

CONCLUSION

According to the analysis, it is possible to observe the fatal inadequacy of Law no. 13.123/15 in the light of the American Convention on Human Rights, the Protocol of San Salvador and other international norms cited above.

In fact, the new legislation and its regulatory decree establish a serious framework of loss of CTA rights that cannot be admitted in the Democratic State of Law, which requires the constant progression of human rights measures and prohibits any retrocession towards strengthening human rights.

This circumstance is even more serious when it is perceived that the aforementioned legislation directly inflicts vulnerable groups, who should be given special protection, according to the current scenario of International Human Rights Law.

The circumstances here indicated lead to the forcible conclusion that it is possible to envisage a rule that contains unconventional provisions

whose application must be rejected in view of their restrictive nature of rights.

Therefore, in order for the new legal framework to be a legal instrument that can be controlled conventionally, it must at least reinstate the rights previously guaranteed to the CTA, especially the indiscriminate need for prior informed consent for access to knowledge and obligation of benefit sharing for the CTAs in an unconditional way, so that these two pillars of sustainable development are once again the norm, not exception, as seen in the current legislation.

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