

CONSTITUTIONAL AMENDMENT N. 90 AND POSSIBLE DEVELOPMENTS ABOUT THE SOCIAL RIGHT TO TRANSPORT IN BRAZILIAN ARTIFICIAL ENVIRONMENTS

Luigi Bonizzato

Doctor of Laws at the University of the State of Rio de Janeiro (UERJ).
Master of Laws at Fama Filho University (UGF).
Professor in the Post-Graduation Program at the Federal University of Rio de Janeiro (UFRJ).
Email: bonizzato@bonizzato.com.br

Alice Ribas Dias Bonizzato

Master of Laws at Veiga de Almeida University (UVA)
Lawyer
Email: aribasdias@gmail.com

ABSTRACT

This Article is about Constitutional Amendment n. 90 dated 2015 and its possible theoretical and factual developments. Since the actions to be taken by the Powers of the Federative Republic of Brazil, until the most varied interpretations that can arise from different sectors and social groups, the above mentioned Amendment, which places transportation in the list of social rights provided in Art. 6 of the 1988 Constitution, brings with it the need to pay attention to its consequences. It is true that the right to transportation, essential and closely linked to several other rights and without which many cannot live, covers the need for an interdisciplinary study, which ends up demanding the examination of institutes from various law branches and areas of knowledge. Thus, in two chapters, starting with an examination of transportation in Brazilian urban and built environments an getting, in a subsequent chapter, to the analysis of the legality of this social right, the qualitative methodology, from rich literature sources and directly focused to the covered themes, determined the thematic direction for the study of the proposed and raised research in this short article.

Keywords: Transportation; Social rights; Constitutional Amendment n. 90.

*A EMENDA CONSTITUCIONAL Nº 90 E POSSÍVEIS
DESDOBRAMENTOS SOBRE O DIREITO SOCIAL AO TRANSPORTE
EM AMBIENTES ARTIFICIAIS BRASILEIROS*

RESUMO

O presente Artigo versa sobre a Emenda Constitucional nº 90 de 2015 e seus possíveis desdobramentos teóricos e fáticos. Desde o comportamento a ser tomado pelos Poderes da República Federativa do Brasil, até as mais variadas interpretações que podem surgir de diversos setores e grupos sociais, a referida Emenda, que inseriu o transporte no rol dos direitos sociais previstos no Art. 6º da Constituição de 1988, traz consigo a necessidade de se atentar para suas consequências. É certo que o direito ao transporte, essencial e intimamente ligado a vários outros direitos e dos quais muitos destes não podem prescindir, engloba a necessidade de um estudo interdisciplinar, que finda por exigir o exame de institutos de vários ramos do Direito e áreas do saber. Nesse rumo, em dois capítulos, partindo-se de um exame dos transportes nos ambientes urbanos e artificiais brasileiros, até se chegar, em capítulo subsequente, à própria análise da juridicidade desse direito social, a metodologia qualitativa, a partir de fontes bibliográficas ricas e diretamente voltadas aos temas abordados, determinou o recorte temático para o enfrentamento do que se propôs pesquisar e levantar neste breve Artigo.

Palavras-Chave: *Transporte; Direito social; Emenda Constitucional nº 90.*

INTRODUCTION

In artificially built environments, inserting in this brief study, as the main example, the so-called urban area¹, uncountable social rights end up being made indispensable provision and protection, although an increasingly reduced, diminished and restricted State is considered. In the midst of these social rights, the right to transportation is undoubtedly of crucial importance, not only isolatedly, but also as the guiding principle for the provision and protection of other social rights.

In this context, the brief lines that follow, after turning specifically to the figure of transportation especially in urban environments, with special attention to large Brazilian cities, large urban agglomerations and therefore real Metropolitan areas, in the constitutional and legal sense already conferred to the expression, begin to face the constituent phenomenon of inserting transportation in the list of Art. 6 of the Constitution of the Republic.

Among many consequences, it is true that most of them are yet to come up and emerge. But, at the same time, questions can be raised and, above all, the first legal impressions on the express provision of the right to transportation as a social and fundamental right.

If branches of Law go hand in hand, with the always necessary support of the Brazilian legal theory, such inter-disciplinarity is also going to be shown in this article, in which constitutional, environmental, urban and administrative issues are going to be dealt with jointly or separately. And, in parallel, given the very nature of the theme chosen, multi-disciplinarity is also present, albeit somewhat timidly, but from specific points of support sought in other branches of knowledge. The methodology adopted is qualitative and based on bibliographic sources linked to each area of knowledge, reinforces the only highlighted characteristics of this research, noted and fundamentally focused on the final legality of the right to transportation.

¹ For the purposes of this brief article and in view of its natural limitations and thematic clipping, between possible and classic definitions commonly given to the environment (natural, cultural, artificial, etc.), the idea of urban environment is often going to be associated to the idea of artificial environment, without any major concern with the extension of the definition, which can, according to the moments mentioned in the text, even extend to rural areas.

1 URBAN PLANNING AND PUBLIC TRANSPORTATION IN ARTIFICIAL ENVIRONMENTS

The theme of public transportation, especially the collective one, has always occupied a prominent place among the main problems experienced in the large Brazilian cities and, consequently, in the artificial and urban environments, where need for it becomes much more present. Transportation is directly related to the idea of locomotion and, mainly, to the most relevant movement for the operation of an urban environment: the one related to the movement from home to work and all the way round. In a country of huge dimensions such as Brazil and, above all, possessing several metropolitan areas consisting of several contiguous cities, with a large population density², the subject “transportation” becomes of an unequal magnitude within the varied list of matters that end up closely linked to the classic and well-known “urban issue”³. Based on the assumption that Urban Law and Environmental Law, as well as issues related to artificial and natural environments, must walk, most of the time, hand in hand, the subject becomes fertile ground for study and research⁴ within the two

² The term “metropolitan regions” is expressly provided for in Paragraph 3 of Article 25 of the Constitution of the Republic, which states: “Art. 25. (...) Paragraph 3. States may, by means of a complementary law, establish metropolitan regions, urban agglomerations and micro-regions, constituted by groups of neighboring municipalities, to integrate the organization, planning and execution of public functions of common interest”. In January 2015, that is, almost 27 years after the promulgation of the 1988 Constitution, Law 13.089, January 12, called Statute of the City, was published. It is imperative to emphasize, right from the outset, that this law aimed to strengthen a figure that has been weakened in recent times, that is, the metropolitan area, establishing new possibilities, interpretations and ways for its management, development and planning. In this sense, the attempt was, according to his art. 2, to clearly define institutes such as “urban agglomeration”, “full management”, “interdepartmental governance”, “metropolis”, “metropolitan region” and, inter alia, by said law called “integrated urban development plan”, which will be hierarchically (Article 10, § 3) reviewed, as well as the Executive Plans, at least every ten years (article 11), and shall have the participation of the public in the municipalities that make up the respective metropolitan region. The process of its creation (article 12, § 2), and, in addition, it may initiate the process of supplying a large gap in the national urban scenario: the lack of urban plans, above and beyond the Master Plan, capable to apply and implement the principle of the articulation between local plans, with respect to another fundamental principle of urban plans, studied in the subsequent chapter, that is, the principle of hierarchy. In view of the purposes of this Article and in order not to escape the directions proposed here, in order to delve into the principles of urban plans and also in the figure of the Master Plan, check the work of Luigi Bonizzato (BONIZZATO, 2014) entitled “Constitution, democracy and the Law: under the influence of social rights and freedom, state and institutional policies”. Throughout the text, bibliographic indications are going to be avoided except those directly and immediately linked to the content of this Article, except in specific cases, when it is understood that there is relevance in the relationship between the researcher and what is indicated and recommended for purposes of consultation and, consequently, scientific deepening.

³ Regarding the so-called urban issue, inside of which any approach, confrontation and problem involving the figure of transportation is totally safe, this article will not be applied, especially for its pre-emptive purposes and, therefore, natural limitations. On the purpose of research, however, check the classic “The Urban Issue”, Manuel Castells (CASTELLS, 2000).

⁴ In strict sense, the two branches logically keep their natural and essential characteristics and research

branches of Law mentioned above and, in parallel, sometimes secondarily, in many other branches, one of which is Constitutional Law itself, as confirmed in the following.

In the line of what is now specifically intended to be said, transportation is a vital organ within any urban structure and its good or bad operation interferes relentlessly in the quality of life in a city. Adequate urban planning, taking into account transportation structure, is a fundamental pillar for the promotion of a balanced urban development and social welfare, bases to be used by the legislator, interpreters and Law operators, as well as the civil society in a broad sense, to exercise their more precise public and/or private functions and to practice their daily routine. This is what the original constituent legislator wished to bear in mind for such urban development - Art. 21, item XX, Art. 182, caption, Art. 30, item VIII, when worrying about land planning and urban land occupation - , as well as for social welfare - the same Art. 182, caput, Art. 23, sole paragraph, among others⁵ - all of the Constitution of the Republic.

In fact, planning is essential and many of the problems that today bother several Brazilian cities have arisen from misconceptions, with strong political and ideological influence or even total lack⁶.

Thus, in this initial moment of confrontation of the selected theme, it is essential to approach the relationship urban planning/public transportation.

reserves. But here it is fundamental to face several environmental issues and problems, with the support of both Urban Law and Environmental Law. And in the field of transportation itself, chosen as the central point of this article, there are varied examples of the need for joint analysis of issues. By way of illustration, then, if a new means of transportation is installed in a city, how can one not think that its operation is generating noise, air, sea, rain pollution, among others? Transport by bus, boats, trains and subways are means of locomotion whose operation can simultaneously lead to deterioration of the urban and natural environment.

⁵ “Art. 21. It is incumbent upon the Federal Government: (...) XX - to establish guidelines for urban development, including housing, basic sanitation and urban transportation”; “Art. 182. The urban development policy, implemented by the municipal government, according to general guidelines established by law, aims to organize the full development of the social functions of the city and guarantee the well-being of its inhabitants”; “Art. 30. It is the responsibility of the Cities: (...) VIII - to promote, as appropriate, adequate territorial planning, through planning and control of the use, urbanization and occupation of urban land”; “Art. 23. It is the common competence of the Federal Government, the States, the Federal District and the Municipalities: (...) Sole paragraph. Complementary laws shall establish standards for cooperation between the Federal Government and the States, the Federal District and the Cities, with a view to the balance of development and well-being at the national level”, as amended by Constitutional Amendment n. 53/2006;

⁶ In a constitutional-urban analysis, with a parallel legal approach in the issue related to urban planning, Luigi Bonizzato mentions: “As far as planning is concerned, it is important to emphasize, under a legally focused approach, that one can be faced with at least two different categories: causal and consequential planning” (BONIZZATO, 2010). Based on the aforementioned categorization, the author examines situations in which planning takes place during the formation itself, for example, of a certain artificial environment or, on the other hand, when it arises to focus on the negative or positive consequences of previous planning or even existing in the life of a given environment.

It is not uncommon to try to replace the word planning with the word management. However, the understanding now outlined is that such words are completely different, but complementary.

According to Marcelo Lopes de Souza (SOUZA, 2002, p. 46):

Even intuitively, planning always refers to the future: planning means trying to predict the evolution of a phenomenon or, to say it less committed to conventional thinking, to try to simulate the unfolding of a process in order to better guard against probable problems or, conversely, for taking advantage of probable benefits. For its part, management refers to the present: to manage means to manage a situation within the limits of resources presently available and in view of immediate needs.

Planning, for the same author, is the preparation for future management, while management is the fulfillment of the conditions that planning done in the past helped build. And, concluding, it reaches the main point of analysis, asserting that planning is something that cannot be relinquished. In this sense, he maintains that (SOUZA, 2002, p. 46-47):

Not less than management itself, that is, the administration of resources and power relations here and now, planning - some sort of planning - is something that cannot be relinquished. To give it up would be to welcome an erratic path, incompatible with organized social life, regardless of the model and degree of material complexity of society (for even tribal societies and groups of hunters and gatherers “plan” their life and activities).

Thus, what we want to demonstrate is the fact that, in spite of the fact that there are many diverted plans, committed to specific and generative interests, and consequently of great exclusion parallel to inclusion, the act of planning remains essential for cities, metropolitan regions, states and regions gradually of a larger scale, either for the correction of urban and environmental problems, many of which come from previous poorly-prepared plans, or for the opening of new directions for the development of urban and non-urban environments, although the central and natural focus of this article turns to the study of the urban environment, its virtues and its ills, of a strictly urban or environmental nature, even in its strictest sense.

In the course now followed, it is also important to point out the

emergence of the notion of strategic city planning, by many exalted, and by others so rejected and placed constantly in check. Frederico Lustosa da Costa and Augusto Paulo Guimarães Cunha, in a text titled “*Thinking of development from the local: a new challenge for public managers*”, are being followed by those who prefer and defend this strategic planning (CORRÊA; VERGARA, 2003, p. 75-76):

The political side of the development project needs to be complemented by the economic one, and here the strategic planning lesson of large private companies can and should be used, as it has happened in Barcelona and that has been applied, with different degrees of success, in other cities. (...) Strategic development planning, understood as continuous, systematic and permanent activity, must be participatory and upward, regionalized, decentralized and integrated.

And, concluding:

It is vital for the success of their actions to involve all the most significant social groups in the planning process, so as to facilitate the integration of existing initiatives and better achieve the goals of the community. (...) The development plan is going to be integrated or is not going to be planning. The problems involved are inherently integrated and cannot be examined or treated from a sectorial perspective. Therefore, planning must integrate demands, interests, resources, actions of different areas, levels and organizations.

However, in a more critical approach to strategic planning as a solution and ideal for Brazilian cities, Ermínia Maricato says that (MARICATO, 2002, p. 68-69):

If modernist Urbanism turned out to be “out of place ideas” in relation to the unplanned path that the growth of Brazilian cities took, the candidate to replace it, as is the case with the Barcelona Strategic Plan, is perhaps even more displaced, as it does not assume, not even in speech, the city as a whole. It only elects the globalizing, full of meanings and highly visible centralities, as the object of intervention. The strategic plan assumes fragmentation in the approach of the city, prioritizing the locations with more potential for real estate profitability and symbolic load (...).

However, despite the criticism, the same author does not rule out urban city planning: she only proposes a path of planning and management that runs counter to the socially and environmentally predatory course followed by Brazilian cities⁷.

Whatever the point of view and the direction taken, therefore, it is clear that planning is considered essential for the proper development of cities. In fact, in this regard, in urban areas, planning is not only possible and desirable, but fundamentally necessary. A deficient transportation system, including not only the road organization, but also several other factors such as accessibility, time, distances and means, is an indisputable cause of numerous urban and environmental problems, such as housing, pollution, among others, sound and atmospheric, deterioration of environmental⁸ protection areas etc., as already slightly outlined earlier.

Therefore, when dealing with and caring for urban transportation, some specific points of analysis deserve special attention. The old tendencies to investigate and approach transportation only technically and technologically have given way to new perspectives, through which a sociological - and now even more legal - approach to transport has been

7 Taking as an example the city of Rio de Janeiro, how not to make evident hundreds and hundreds of urban and environmental problems? Pollution of Guanabara Bay waters; highly exclusionary real estate speculation, making housing and housing a chronic complication in the city, with remoteness and, even, isolation of the working class, in general, to places extremely far from their workplaces; and, among others, the deficit, insufficient and still reputed poor quality, including quantitative, public, individual and collective transportation. And with regard to this last example, it is not by chance that varied options, over the last years and decades, ended up coming up in the capital city of Rio de Janeiro - a fact equally seen in the main cities of Brazil - as a resource to all who sought and seek for a more efficient and even decent transportation. Thus, in the case of collective transportation, the first advent of the so-called Vans and, in times of advanced technology and at an individual level, UBER (in short, so that it does not deviate from the central objective of this study, it is private passenger transportation service, which appeared in the United States, more precisely in the city of San Francisco, and which ended up becoming a Multinational Corporation, with functionality driven by applications accessed via internet), are clear demonstrations that there is huge demand for transportation in the big Brazilian cities, especially when they offer, albeit minimally, a bit more quality for the passengers (just remember, when the Vans came, many offered air-conditioned services and much more, although without offering those services, they simply got where public and official public transportation could never arrive). Once again, the city of Rio de Janeiro as an example, the Olympic Games in 2016 brought with it massive investment in the area of transportation, most of which are criticized by the Authors for preferring transportation on wheels, rather than metropolitan, railroad and, in a seaside and geographically cut off, maritime.

8 Only on clarification purposes, since this work will not talk about the subject in detail, one of the causes of deterioration of environmental protection areas in Brazilian cities and, therefore, environments understood as urban, is irregular occupation by families, usually low-income, on housing purposes. And this phenomenon has as non-exclusive, but main cause, the high cost of housing in cities and places close to a concentration of employment, which causes low-income workers to risk and be encouraged to act in an irregular manner to settle in areas near their workplace. Logically, this is because living far from the workplace implies in being subject to deficient and/or insufficient public transportation, which serves as an incentive for the aforementioned irregular occupations, which ended up generating urban and environmental problems of great gravity in the scenario of Brazilian cities.

added. In this sense, besides quantitative factors, we began to consider qualitative characteristics, always collimating a more accurate study of the question under examination.

In the path now adduced, it is essential to analyze the relationship between production structure and transportation and between transportation and reproduction structure. As Eduardo A. Vasconcellos points out, “(...) the sociological approach to urban transport reconciles the analysis of production and reproduction processes with the specific forms of the use of the circulation space” (VASCONCELLOS, 2001, p. 26).

Thus, for a better understanding, the production structure would be the part of the built environment where most of the production process would occur. *Exempli gratia*, private industry, commerce and services, and public enterprises. The reproduction structure would be part of the built environment where the biological, social and cultural reproduction of people and social classes would occur. *Verbi gratia*, mainly, the residence, besides the school, places of leisure and spaces in which social and political activities take place. Finally, since sometimes mentioned, the circulation structure would also feature prominence, being considered the part of the built environment that would allow the physical circulation of people and goods. As an example, public roads, sidewalks, railways and passenger and cargo terminals. According to Eduardo A. Vasconcelos: “The structure of circulation is the physical support of the circulation itself, whether on foot or by means of vehicles (bicycles, cars, buses, trains) that are called means of circulation. The combination of the structure and the circulation means constitutes the circulation system” (VASCONCELLOS, 2001, p. 33-34).

For what is now praised, the quotation above is very important, since the circulation of people from their place of residence to work and from work this to their residence greatly influences the urban and environmental dynamics, and the operation of this system is final to define varying living configurations, among other. In other words, according to approaches already discussed here, means of transport that offer comfort, besides being fast and cheap, could establish the beginning of a new city panorama in the country⁹ and, therefore, start a chain process for minor deterioration of the natural and built environment. Instead of worrying about living close to workplaces, which implies time savings (here we mean all

⁹ And, as previously announced, it also means a reconfiguration in the very panorama of housing distribution in the city, strongly influencing housing and the right connected to it, present in Art. 6 of the 1988 Constitution, a provision to be better examined in the next Chapter, as well as the right to transportation, which is the main object of analysis in this article.

the benefits of time-saving: more time for leisure, for the family, to rest, etc.) and reducing displacement expenses, citizens could allow themselves to live further away from workplaces, certain that efficient (speedy and inexpensive) means of transport would supply for living further away.

From the perspective of production-reproduction-transport interconnection, it is not uncommon to observe peculiar situations. Often, newly built industries and plants provide, in the proximity, the construction of housing that is offered to their workers. The immediate goal is to save time and money because, in addition to spending a short time on commuting, the employees do not have any transportation costs to get to their workplace. This situation would only not be interesting due to an increase in the number of workers and the cost of construction. In this case, the private sector usually returns to the state the concern with transportation and housing.

Still in the above-mentioned direction, with regard to the structure of reproduction, it is worth mentioning that “reproduction strategies of lower-income social groups are based on a hierarchical decision-making process that involves housing, employment and transportation.” Thus, as Eduardo A. Vasconcellos himself concludes (VASCONCELLOS, 2001, p. 39):

Choosing a place to live in the face of economic constraints seems the first decision to be made, followed by decisions about where to work and how to get there. As emphasized by Trani, when confronted with the labor and housing markets, people need to respond to two logics that are not necessarily convergent: consequently, most people will suffer accessibility restrictions in order to meet the primary need to afford housing. In other situations, the strategy is reversed: the occupation of abandoned properties, such as tenements, or the occupation of areas such as slums, optimizes displacement time, reducing the transportation issue¹⁰.

Once again, we confront ourselves with problems inherent in housing and transportation, with an emphasis on the harmful practice of real estate speculation.

¹⁰ On clarification purposes, as *accessibility* is mentioned, it is worth highlighting the explanation offered by the author himself, for whom *mobility* would simply be the ability to move, due to physical and economic conditions. “In this sense, poor, elderly or physically handicapped people would be in the lower mobility range compared to people with higher incomes or without physical displacement problems.” In turn, accessibility would be understood as “mobility to meet the needs, that is, the mobility that allows the person to reach the desired destination”. (VASCONCELLOS, 2001, p. 40-41).

At the core of the reproduction structure and its relationship with transportation, it is worth emphasizing that improvements in the transportation system can mean a right and immediate increase in people's quality of life. This is because, in addition to what has previously been said, many previously impossible trips can become possible, representing a qualitative increase in the lives of each beneficiary of the change. That is, in addition to the intimate relationship with uncountable rights and issues, one of which is the housing issue, the provision of means of transportation can represent more quality for those who already have a minimally decent home and who aim at greater well-being, including leisure and rest itself. Therefore, for example, a resident of the Pavuna district in the city of Rio de Janeiro, who used to watch TV or to have fun at home on Sundays because he could not afford to get to the beach or to a park located downtown, was able to change habits on Sunday when the subway started operating from Monday to Monday. Such previously impossible trips became possible due to the expansion of the operation of a means of transport. Similarly, as an example, someone living in the district of Campo Grande in the same city of Rio de Janeiro could change his entire itinerary and a large part of his routine if he could also count on good quality subway transportation¹¹ that

¹¹ The subway transportation arose in Rio de Janeiro in March 1979, when the State was managed by then-governor Chagas Freitas. Soon after its inauguration, there were only five stations, namely, Praça Onze, Central, Presidente Vargas, Cinelândia and Glória. Long journey would be done until the current 33 stations were reached. In chronological order, with regard to Line 01 of the Subway that nowadays connects the District of Copacabana to the District of Tijuca, the other stations were inaugurated: Uruguaiana and Estácio (1980); Carioca, Catete, Morro Azul – currently Flamengo –, Botafogo and Largo do Machado (1981); Afonso Pena, São Francisco Xavier and Saens Peña (1982); Cardeal Arcoverde (1998); Siqueira Campos (2003), Cantagalo (2007), General Osório (2009) and Uruguay (2014). In turn, Line 02 has only 02 stations (São Cristóvão and Maracanã) inaugurated in November 1982, with the following chronological expansion order: Maria da Graça, Del Castilho, Inhaúma and Irajá (1983); Triagem (1988); Engenho da Rainha (1991); Tomás Coelho and Vicente de Carvalho (1996); and Irajá, Colégio, Coelho Neto, Engenheiro Rubens Paiva, Acari/Fazenda Botafogo and Pavuna (1998). The metro transportation in Rio de Janeiro, which began in 1979 carrying a daily average of 60 thousand passengers, registered a daily average of 450,664 passengers in December, 2013. After more than 10 years, in September 2014, the total number of passengers transported reached 60,4 million, with a huge increase in daily passenger transportation. Without forgetting, of course, that such increase was provided by the construction of new stations, by the creation of Line 1-A (stretch between São Cristóvão and Central Stations) and Cidade Nova Station, as well as by the gradual insertion of the so-called surface subway (road transport), operated by means of interconnected buses to the subway system. The change in the operation of the lines (also targeted by planning criteria, since reduced to almost two, which makes operational problems in any of them paralyze almost the entire service), also contributed to the increase in the number of passengers transported, and the present and brief analysis is based on predominantly technical and endogenous issues, since other and several external factors - line extension works and the construction of Line 04, which takes the subway to other points in the districts of Ipanema, Leblon, Gávea, São Conrado and finally Barra da Tijuca - also stimulated the greater demand for metro transportation in Rio de Janeiro. In any case, from what can be seen from the brief chronological analysis mentioned above, the largest and fastest investment were devoted to the construction of Line 01, which, from 1979 to 1982, would already be almost completed, undergoing new extensions only in 1998 with the arrival of the subway rails to the Copacabana District. On the other hand, the construction of Line 02 took place in a slower and gradual manner, taking approximately 17 years to get to its basic and current configuration. Such a finding would

would quickly take him to work and leisure locations in the city. He would often replace (or might have the option to do so) the TV by the beach, the monotonous rest by a walk in parks and museums¹².

Thus, as already well explained, efficient and comprehensive collective means of transportation are closely connected to decisions regarding housing, work, leisure, and, ultimately, to the quality of life of each inhabitant¹³. In fact, any government, executive or judicial measure

only corroborate the idea that some preferences would have guided the expansion of the subway transportation. Preferences somewhat related to political and economic factors. Once the absence of a single actor or claim from the population that could serve as the basis for the choice of one or other path has been identified, for the purpose of taking one or another decision, finally, for the allocation of larger and faster investments for the conclusion subway Lines 01 or 02, state action was probably determined by political and economic pressures, as already pointed out. According to Eduardo A. Vasconcellos, "it is necessary to overcome the mistaken view of transport and circulation policies as neutral intervention techniques. Traffic is, in reality, a dispute over space, made by political actors, who live transitory roles in time and space. In experiencing these roles, actors have conflicting interests and needs, which lead to varying and conflicting pressures on the state." In the following line, the author states that: "On the other hand, State agents and the private initiative also have specific interests and needs. Thus, intervention is never neutral, but on the contrary, it occurs in function of the set of interests and the relative capacity of groups and agents to influence decisions" (VASCONCELLOS, 2001, pp. 186-187). Indeed, there is a privilege granted to certain layers of society to the detriment of others, the State often forgetting uncountable duties of its own and various pressing needs of the lower income classes.

12 In a survey published by "O Globo" magazine a few years ago, asked about what the interviewee would do for Sundays in Rio de Janeiro to be even better, 13% answered the existence of more means of transportations. That is to say, supporting the sustained, it is irrefutable the relevance of the means of transportation in the daily life of people, among other things, for the choice of place of residence, or for the offer of leisure options (CLÉBICAR, Year 1, page 38). Lastly, one should not forget the huge investment made in the city of Rio de Janeiro in transportation, but unfortunately (with due respect for a judgment valued by the Authors here), favoring road transport. Bus corridors and the creation of the Bus Rapid Transit (BRTs) to connect great distances are examples of what is now stated.

13 With regard to the city of Rio de Janeiro, which has always been a fruitful example, given its national and world-wide exposure, as well as its serious urban problems, Janice Caiafa is still standing. The author affirms, first, that collective transportation expands the possibilities of circulation, which would lead to dispersion with consequent possibility of heterogenization. Truly, "by driving the population away from the neighborhoods and often creating, in their midst and throughout the journeys, a contact space for those who travel where the characteristically urban mix already takes place" is opening favorable spaces to heterogenization (CAIAFA, 2002, p.18). In fact, some of the revolutions and daring of the city, in the author's own conception, would be escape, dispersion and heterogenization, facilitated by the existence of collective transportation. However, the same scholar understands that uncountable problems have been faced by large Brazilian urban centers in terms of collective transportation. Using the example drawn from the city of Rio de Janeiro, the tendency to privatize the movement is a striking and inexorable characteristic: to the wealthy classes the possibility of using a car, with direction of the investment in its favor; to the least favored, collective transportation, which ends up succumbing to the dominant interests and, once again, privatization of the movement. According to the same author, "Not being able to move or to do so with difficulty is to be devoid of a city, it is to be deprived of the main password for urban life" (CAIAFA, 2002, 21). In conclusion, he emphasizes: "The strategy of ensuring good collective transportation is the first and strongest way to correct traffic problems and to deprivatize the city" (CAIAFA, 2002, p.25). Finally, concomitantly to the aforementioned, it is also worth highlighting the measures taken in several Brazilian cities, in an attempt to stimulate the use of public transportation and discourage the use of the private one. The car rotation in the city of São Paulo, having peculiarities and proportions of analysis, is an example, as well as other later ones, such as the creation of exclusive lanes for public transportation in various ways of circulation in the city of Rio de Janeiro and others in the country, with reduced space for the circulation of private cars. And in the midst of this theme, it is also worth pointing out some paradoxes, which lead not only to the lack

aimed at providing, safeguarding and guaranteeing a social right such as leisure, housing and transportation, among others that could be mentioned here, must take into account the structure in which the citizen is immersed, paying special attention to all the above in terms of movement, location and displacement in the big cities, important issues when wishing to offer minimum quality of life and well-being to a person.

Therefore, it is clear that regarding the issue of transportation, closely linked to the already mentioned urban issues and other issues also mentioned above such as those directly related to the natural environment, all - public and private authorities and civil society (through their lobby and organized groups) – must give special attention and a priority to it above all once it has long been relegated to the background and greater focus has always been put on issues that are politically more interesting and economically more favorable to the aspirations of certain pressure groups, usually with prominent social status and distinct political and economic powers. Changing such a tradition is a complex task, but on which the success of social rules with urban-environmental bias depend.

2 CONSTITUCIONAL AMENDMENT N. 90 AND THE SOCIAL RIGHT TO TRANSPORTATION

Having concluded the preliminary, although essential, considerations about transportation and its role in an urban environment, that is, predominantly artificial, we are going to move on to the final approach, following the directions outlined from the outset for this brief Article. Thus, we are finally moving on to confronting what is here understood as the first consequences of transportation insertion in the list of Art. 6 of the 1988 Constitution. That list has already been added before and it now undergoes a new intervention from the constituent power to, through Constitutional Amendment n. 90, dated September 15, 2015, start forecasting transportation as a social and fundamental right.

Before that Amendment, could the right to transportation also be

of planned and organized measures in the country, but also to the fact that the attempt to solve them is always very complex. To the already mentioned example of UBER, a demonstration of the trend of searching for alternatives, however, aimed at individual and even reputed private transportation, as the partners and administrators of the application and means of transportation defend, it is also worth mentioning, the national incentive for the purchase of motor vehicles as one of the locomotives of the Brazilian economy, with a parallel trend in many large Brazilian cities to encourage the abandonment of private transportation, especially by own vehicles, in favor of collective transportation, as described above. A cruel and symbolic paradox of the lack of planned and coordinated management with regard to the multiple policies adopted in Brazil.

understood as a social and fundamental right? In the opinion of the Authors, yes. But a social and fundamental right around which interpretive doubts could be more constant; a right that is subject to different understandings of its validity¹⁴; in fact, a right to transportation, prior to Amendment n. 90, more limited to the idea of the city's social function, exported from the caption of Article 182 of the Constitution of the Republic to the State Constitutions and Municipal Organic Laws¹⁵.

Certainly, transportation is also foreseen - and since the enactment of the Constitution - in several other articles of the Brazilian Constitution in force. For example, in Art. 21, item XX, Art. 22, item IX, Art. 30, item V etc.¹⁶, some of which have already been mentioned before, the term "transports" comes, now more directly aimed at transportation in the urban environment, or also directed to transportation that aims at wider displacements, besides urban spaces, between the latter or even between urban areas, formally referred to as rural or any other¹⁷. But as a

¹⁴ More accurate explanations about force and validity are seen below.

¹⁵ Transcribing, once again, the caption of Art. 182 of the 1988 Constitution: "Art. 182. The policy of urban development, implemented by the municipal government, according to general guidelines established by law, aims to order the full development of the social functions of the city and ensure the well-being of its inhabitants." And, by way of an example, one can see how transportation, among other rights, is considered a social function of the city. Maintaining the constitutional line of analysis, but within the scope of the other federal degrees, it is important to emphasize that in defense of transportation, especially the public one, other legislative manifestations, such as, mainly, as said, the state and municipal Constituent Power, come up. In this direction, once again choosing Rio de Janeiro, in the figures of State and Municipality, as an illustration, thus the Constitution of the State of Rio de Janeiro establishes in its Article 229, with special focus on the first paragraph: "Art. 229. The urban policy to be formulated by the cities and, where applicable, by the State, will attend to the full development of the social functions of the city with a view to guaranteeing and improving the quality of life of its inhabitants. § 1 The social functions of the city are understood as the right of all citizens to access housing, public transportation, basic sanitation, electricity, piped gas, water supply, public lighting, health, education, day care, leisure, drinkable water, garbage collection, roadway drainage, slope restraint, safety and preservation of environmental and cultural heritage." Followed by the Municipal Organic Law, whose Article 422 thus establishes, with, also, a focus directed to the first paragraph: "Art. 422. Urban policy, formulated and administered within the planning process and in line with other municipal policies, will implement the full attendance of the social functions of the City. § 1 The social functions of the City include the right of the population to housing, public transportation, basic sanitation, drinkable water, urban cleaning services, drainage of traffic routes, electricity, piped gas, water supply, culture, day care, leisure, slope restraint, safety and preservation, protection and recovery of the environmental and cultural heritage."

¹⁶ Although some articles have already been transcribed throughout this work, the new highlight is worth it since the focus is slightly redirected: "Art. 21. The Federal Government shall: (...) XX - establish guidelines for urban development, including housing, basic sanitation and urban transportation"; "Art. 22. It is the exclusive responsibility of the Federal Government to legislate on: (...) IX - national transportation policy guidelines"; "Art. 30. It is the responsibility of the Cities: ... to organize and provide, directly or under a concession or permit system, public services of local interest, including collective transportation, which are essential"; among others.

¹⁷ For example, although the focus of this brief study is on transportation in the urban environment and its consequences, especially legal and from the entry into force of Constitutional Amendment No. 90/2015, it must always be borne in mind that there are several means of transportation, some of which aim at moving between long distances compared to those carried out in urban areas or even between

social and, at the same time, fundamental right, the constituent movement makes it possible, perhaps, to give new power to such a relevant right, strongly claimed by the Brazilian population in various popular and social manifestations¹⁸, as well as the daily target of questionings, mainly linked to innovations and new proposals. In more precise words, and by tapering the analysis, its deficiency, poor operation and precariousness in the main Brazilian cities, had the so-called “alternative” transportation comes up. Vans, motorcycle taxis and, most recently, UBER¹⁹ itself, are just examples of innovations in the transportation sector that have caused and still cause conflicts, criticism, fights and different positions on what should and what should not be allowed, accepted and/or tolerated in the environments, especially Brazilian urban ones.

Beyond the issues raised above, the following lines are briefly and prior examining social rights, their force and validity, always under certain and selected theoretical points of view. However, from some assumptions or, simply, inquiries, to be or not confirmed or answered. In this sense, questions such as “does anything change with the insertion of transportation in the list in Art. 6 of the Constitution?”; “being considered, even formally, a social right, what is the extension of this “new” right (gratuity)?”; “would it be possible to invoke it in the face of the Judiciary Power, looking for an activist position of it in favor of the right referred to (the Judiciary forcing the State to create transportation to areas not covered by it; the Judiciary forcing the State to improve the offer in places with shortages - greater number of bus lines, more buses in the same line, new means, etc.)?” Finally, so many questions for several and various answers and hypotheses to be raised and created. We are trying, therefore, as briefly as the limits of this study allow, to face the above mentioned questions in order to bring solutions and answers and to foster greater reflection on the subject, as well as to encourage researches, interpretations and future developments.

these and nearby rural areas. By way of illustration, air transportation, high-capacity maritime transportation, helicopter transportation, more and more common in major urban centers, but that can be used for longer journeys, such as between cities and regions with difficult access - mountainous etc. - rail transportation, especially freight, since it is extremely rare - once again, license is requested for a judgment by the Authors - to have investment in the country in rail passenger transportation, especially between long distances, among so many other examples that could be mentioned here.

¹⁸ It is worth remembering that the demonstrations of June 2013, a possible reflection of a process that has been initiated in different parts of the world (CASTELLS, 2012), had as one of their central points of departure and, respectively, a demand for free transportation for all and the improvement of services, including reduction of the fees charged (BONIZZATO, 2014, p. 118-145).

¹⁹ Except for the so-called “motorcycle taxi”, common in several cities of the country, the examples of Vans and UBER have already been mentioned previously, with brief comments.

Towards that proposal, we are leading the desired examination by clearly mentioning the latest wording of Art. 6 of the Republican Constitution:

Art. 6º The social rights include education, health, food, work, housing, transportation, leisure, security, social security, maternity and childhood protection, assistance to the unprotect, in the form of this Constitution²⁰.

Thus, following the attempt to approach social rights, understood as fundamental to this Article, any examination aimed at a thorough interpretation of the constitutional standards that hold social rights cannot be separated from the parallel evaluation of various institutes, among which is the one of the fundamentality of some rights, its efficacy, effectiveness, force and validity, as well as the inter-disciplinarity immanent to the good interpreter. In this sense, when thinking about social rights, especially those currently listed in the Brazilian Constitution in force, one must immediately also think about its constitutional position, so that it is possible, in the same direction, to identify its real applicability in the Brazilian legal order.

It is clear that constitutionally foreseen rights such as education, health, safety, leisure, housing, food and now transportation itself, carry a series of epistemological and theoretical-methodological consequences, leading the researcher to countless ramblings and, therefore, to several points for analysis and reflection.

According to what has been proposed, however, attention is going to be given to only a few of these points of reflection, from which one is trying to achieve the desired ideals, namely, the exordial confrontation of the so-called socialization of the right to the transportation and its consequences in the context of urban environment issues. In other words, it will be sought to ascertain the relationship between social rights, in essence, and rights related to the urban environment, which are very well represented in Brazilian cities.

In fact, starting from the announced evaluation, it is necessary to declare from the outset that many social rights currently in force in our

²⁰ There is talk of “another new wording” because this article has already been the subject of four wordings: the original one, which emerged when the 1988 Constitution was promulgated; as a result of Constitutional Amendment n. 26/2000, which added the right to housing in the list; the one brought by Constitutional Amendment n. 64/2010, which inserted the right to food in the list; and the wording derived from Constitutional Amendment n. 90/2015, which inserted the transportation in the list of Art. 6, stabilizing it as a social and fundamental right in and from the Constitution of the Federative Republic of Brazil.

legal order and enshrined in our Constitution are commonly defined as mere government intentions, that is, as government programs printed on the Main Legal Document in the country.

It was not with no reason that the doctrine named many standards bearing social rights of programmatic standards, in view of the clear programmatic content of its substance.

Thus, José Carlos Vasconcellos dos Reis is attentive to the social standards also called programmatic (REIS, 2003, p. 66):

As social rights are, as a rule, typical rights to benefits - which have important consequences in terms of their effectiveness, especially in the procedural way - the recognition of such a subjective public right should not and cannot be done in a precipitate way once a constitutional "social right" is often a programmatic standard.

Ingo Wolfgang Sarlet, also addressing the subject, says that the so-called programmatic standards would be better defined as standards having a programmatic nature. Thus, he highlights (SARLET, 2001, p. 269):

Therefore, we consider our option of adopting the generic expression "constitutional standards" (and not programmatic standards) justified, in order to fit all standards (program-standards, task-standards, end-standards [or objective], legal impositions, etc.) which, in principle and regardless of the terminology used, call for a legislative implementation, without disregarding any specific features, since the different effective (usually legal and objective) burden of these rules cannot be abstractly stated, depending on the content of each standard. Let us not forget, in this context, that among the various forms of positivation of social rights in constitutional texts, the choice of the Constituent usually - and not only in the Brazilian case - rests on the modalities referred to herein.

Therefore, many current provisions in the Brazilian Constitution are reputed, for the established doctrine, purely programmatic standards.

But what does it mean to say that a standard is programmatic?

For many authors, to define a standard as programmatic means to say that it reproduces only one government program, not representing, at least in the first moment, any subjective right of the citizen. In fact, when the constituent legislator provided for the right to health as a basic social right,

as well as the right to leisure and to minimum wages, under the terms of art. 7, item IV of the 1988 Constitution, first of all, he established objectives to be achieved, immediately dissociating himself from the creation of subjective rights enforceable in the face of the Judiciary Power.

One of the main arguments used by both jurists and members of government branches in order to sustain the programmatic character of these standards is precisely the precarious financial situation of the Brazilian State. In other words, because it fails to have enough resources to comply with all the social standards in the Constitution, they should be seen as mere government intentions, and the State must materialize them to the exact extent of available funds.

That being said, Ingo Wolfgang Sarlet speaks up (SARLET, 2001, p. 292):

As already pointed out, because of the economic relevance of the object of social rights, they are (at least according to the major doctrine) under a reservation of the possible, which, in turn, implies a necessary decision regarding the allocation of public resources, committed to the political bodies made legitimate on that purpose.

Aware of the existence of that reservation of the possible²¹, it is perfectly feasible to say, already in the line of confrontation, that the Constitution is not a space destined to deposit government programs. It is, first of all, a legal document, with legal and, therefore, normative power²². Thus, its standards would invariably translate rights enforceable at any time before the Judiciary Power, not only on the basis of precepts and basic

²¹ And in a specific approach to public policies in the country, this is how Eduardo Apio says it: “The argumentation of governments consists in affirming that the Judiciary cannot act in a positive way, considering that the definition of the values to be destined to a certain social program depends on the will of the Executive Branch, which directs the annual budget law, and to the National Congress, which is responsible for approving it and even amending it. In addition, the Judiciary Power would have to indicate the sources of the resources for these new expenses, which runs into the so-called ‘reserve of the possible’ (APPIO, 2006, 175). Already in a more specific direction and linked to the very notion of reserve of the possible, J. J. Gomes Canotilho puts it in his defense: “Social rights, on the contrary, presuppose large financial resources on the part of the State. For this reason, he quickly adhered to the dogmatic construction of the reserve of the possible (Vorbehalt des Möglichen) to translate the idea that social rights only exist when and as long as there is money in the public safety boxes” (CANOTILHO, 2003: 481). With a view, therefore, more reductionist of the State’s own linkage to social rights, the Portuguese Constitutionalist goes in the direction of the notion of linking the State not to the social rights constitutionalized as a whole, but rather to the guarantee of what is called “minimum social”, which would already be primarily linked to the very duty of the public authorities to guarantee the dignity of the human person, moving away from a juridical-constitutional densification of social rights (CANOTILHO, 2003: 480-482).

²² With regard to the normative force of the Constitution, it is never too much to remember the expression, classically worked out by Konrad Hesse, in his “The normative force of the Constitution” (HESSE, 1991).

principles, such as the principle of the dignity of the human person, but also directly from the social and fundamental rights. The constituent legislator should have been concerned, at the time the text was drafted, with the quantity and quality of rights to be inserted in the Constitution, taking into account, in particular, the financial capacities of the State. It is disheartening that the immediate applicability of many important constitutional standards is reversed, on the grounds that the state lacks the financial means to afford for its application. Thus, the Constitution, the major law of the country, occupying the apex of the normative pyramid, is taken to the position of mere “sheet of paper”, as Ferdinand Lassale (LASSALE, 2000) observed, lending a sociological sense to the Constitution.

Therefore, despite the indisputable quality of many positions of jurists and various scholars, in order to give social rights the programmatic mark, current conceptions also denote a new approach to the Constitution, which is much more committed to the interests of each citizen protected by it²³.

In this sense, social rights would go beyond the sphere of constitutional forecasts that are representative of intentions to improve the state and, ultimately, of the living conditions in the country, becoming standards that are not only valid but also fully valid. Even after the period of celebration of judicial activism, which has been criticized every so often, that has emerged in the form of reductionist theories, mainly due to an institutional strengthening that ended up being considered excessive within the system of Power balance in the Brazilian nation.

As announced by Luigi Ferrajoli, there is a marked difference between force and validity. Under the terms defined by him, the force of a standard would be closer to the idea of a regularly elaborated standard. In more precise words, the current standard is that created and formed in unconditional respect for due process of law. According to the legislator, strictly, the rules imposed for the elaboration of the various normative species, the law resulting from such work will necessarily be in force, that is, it will be in force in the Brazilian legal order.

As Luigi Ferrajoli literally states about force and validity (FERRAJOLI, 2002, 21-22):

²³ At the same time, it should be borne in mind that gradations, concrete and dialogical analyzes between Powers and institutions can strengthen the way in which a lawsuit can be taken for the realization of a social right, without, however, only enclosing the constitutional text and its validity from an often empty, direct, immediate and insufficiently motivated negative decision of the Public Power. The permanent and constant search, perhaps, for balance between the notions of programmaticity and maximum effectiveness of social rights printed in the Constitution.

Se trata, pues, de dos conceptos asimétricos e independientes entre sí: la vigencia guarda con la forma de los actos normativos, es una cuestión de subsunción o de correspondencia de las formas de los actos productivos de normas con las previstas por las normas formales sobre su formación; la validez, al referirse al significado, es por el contrario una cuestión de coherencia o compatibilidad de las normas producidas con las de carácter sustancial sobre su producción²⁴.

Therefore, in favor of social rights - especially when constitutionalized - and the validity necessary to the constitutional standards, as it was defended above, should not the said rights foreseen in the 1988 Brazilian Constitution be only considered valid standards? In addition to being valid, since they have been elaborated under the rigors of the constituent process, they must also be given validity, so that they transcend the sphere of existence and reach the level of effectiveness. It is true that the approximate thirty (30) years of existence of the Constitution of the Republic have led to diverse experiences, one of which is the swelling and exacerbation of powers around the Judiciary Power, precisely because, when issues regarding the direct application of social rights foreseen in the Constitution, it had to decide, and in doing so, to end up becoming truly and excessively - as just mentioned above - “active” and a promoter of public policies traditionally and commonly given to the realization by the Executive Power²⁵. However, with all the arsenal of criticisms contemporaneously focused on judicial action, the theoretical problem persists and continues to deserve special emphasis in studies such as the present one.

However, some considerations still need to be emphasized in order to improve the understanding of the subject. In addition to the

²⁴ From the same author, among several studies, check the work titled *Principia iuris* (FERRAJOLI, 2007), as well as the most recent one, titled, in free translation, “*Democracy through the rights: the constitutionalism guarantor as a theoretical model and as a political Project*” (FERRAJOLI, 2014).

²⁵ There are several works, here and in other countries, that study the phenomenon of Judiciary swelling. Among several ones that could be listed here, it is worth mentioning “The Judiciary as a superego of society” (MAUS, 2010) and “The Judiciary and public policies: between social transformation and obstacle to the realization of social rights” (SILVA, 2008), respectively by Ingeborg Maus and Virgílio Afonso da Silva. The judicialization of numerous and varied issues, on the most diverse subjects and themes, as announced, leads the Judiciary Power, especially through its summit, with greater social exposure and, consequently, also greater power of influence, composition of ideas and formation of opinions, to become a moral and cultural driver of the nation’s course, coming many times to the point of replacing not only legislators or executors, but also other social forces, beyond that of the Brazilian public power itself.

characteristics of force and validity, an intermediate characteristic, called efficacy, should also be emphasized.

According to what is proposed herein, a standard can be in force, ineffective and invalid; in force, effective and invalid; and, finally, in force, effective and valid²⁶.

In the first case, this is a perfectly elaborated but not effective nor even valid standard, often because of the dependence of this standard of supplementary legislation that provides it with efficiency. Thus, the standard, although in force, fails to produce immediate effects, either because its effectiveness would depend on the elaboration of a new supplementary law, or because it is substantially not applicable. Likewise, many programmatic standards are defined as ineffective, since even if they do not depend on a supplementary law, they would be linked to political possibilities for their applicability.

In the second case, there is a perfectly elaborate standard, not dependent on supplementary legislation, but not suitable to the desire of the social group to which it was directed. In this case, invalidity is clear since the standard does not defend or translate the interest of citizens.

Finally, in the third situation previously set forth, the in force, effective and valid standard is the one that, elaborated in the exact terms of the law, is capable of producing full effects at the time it entered into force, and also corresponds to the interests of classes or groups in respect of which it was drawn up. Thus, it would be a standard that is consistent with the purposes for which it was created.

Therefore, and in the proposed line, it is understood that social rights should be framed in the third case mentioned above: seen as in force, effective and valid standards, allowing the citizen who is interested in its compliance the possibility of invoking the legal provision to guarantee his right.

It is important to notice that Luigi Ferrajoli makes a profitable distinction between positive expectations and negative expectations of citizens. In his words, he thus stands, always in defense, above all, of the very validity of the Constitution as a major document within a

State: “*Así, los derechos fundamentales se configuran como otros tantos*

²⁶ The idea of validity presented herein comes very close to the notion of effectiveness, dealt with by several authors, among which is Luis Roberto Barroso, according to whom: “Effectiveness means, therefore, the realization of Law, the concrete performance of its social function. It represents the materialization, in the world of facts, of legal precepts and it symbolizes the approximation, as intimate as possible, of normative duty and the being of social reality.” (BARROSO, 2000, p. 85)

vínculos sustanciales impuestos a la democracia política: vínculos negativos, generados por los derechos de libertad que ninguna mayoría puede violar; vínculos positivos, generados por los derechos sociales que ninguna mayoría puede dejar de satisfacer” (FERRAJOLI, 2000, p. 23-24).

In this line, understanding social rights as positive expectations, the interested citizen should act in search of satisfying his right, invoking the jurisdictional provision or any other means of access to the State Power²⁷ in order to achieve his objectives. And the State has to act towards satisfying these positive expectations, in favor of a greater safeguard of fundamental rights, but always, and increasingly, attentive to the necessary dialogue with other agencies and institutions (SUNSTEIN, 2002), so that the plague of senseless and unrealistic activism (VERMEULE, 2006) starts to dilute and to be gradually mitigated in the country.

In this way, the stage of qualification of social rights being overcome, prior to conclusion, linked to the issues raised on the inclusion of the right to transportation into the list of Art. 6 of the Constitution of the Republic, through Constitutional Amendment n. 90 dated September 15, 2015, it is never too much to remember and stress the fundamentality of social rights. And, to emphasize, to affirm that social rights are fundamental, necessarily means to defend their petrification, in terms of art. 60, § 4, item IV of the Constitution of the Republic. Understanding “individual rights” as fundamental²⁸, the entire

²⁷ Even if due proportions and particularities are respected, by means of the right of petition, provided for in art. 5, item XXXIV, of the Constitution of the Republic, which states: “the right of petition to the Public Authorities in defense of rights or against illegality or abuse of power is guaranteed to all, irrespective of the payment of fees; (...)”. How many times have the citizens been subjected to real attacks against their person, property and dignity, in cases of manifest abuse of power and/or illegalities, and are at most restricted to looking for the already overcrowded Judiciary Power, activist and politicized according to the complexity of internal and external relationships and functioning developed *interna e externa corporis*.

²⁸ On the purposes herein, the social rights provided for in the Brazilian Constitution are considered fundamental. It lends itself already to a somewhat settled interpretation to art. 60, § 4, item IV of the Constitution, so that fundamental rights, not just individual rights, are also unchanged. In this sense, all social rights, since they are also fundamental, would not entail any change, except in case of an increase of rights. In the same vein, check Ingo Wolfgang Sarlet for whom “the individual rights and guarantees referred to in art. 60, § 4, item IV of our Fundamental Law therefore include social rights and the rights of nationality and citizenship (political rights)” (SARLET, 2001, p.367). The author reinforces arguments to defend the thesis that it is necessary to extensively interpret art. 60, § 4, item IV of the Constitution, thus extending to fundamental rights the petrification literally conferred on individual rights and guarantees.

list of fundamental rights foreseen in the Brazilian Constitution would not entail any reductive modification. That is, relative immutability would lead to the impossibility of changing fundamental rights, except in order to improve or increase them, as in the case studied herein, in which the right to transportation was added to the list of social rights. Although with no suppressions.

Therefore, confirming the understanding that is outlined and from the aforementioned, necessary and constant institutional dialogue in the country, since social rights are also considered fundamental, they must be able at any time to be claimed before the State, granting to Brazilian citizens the guarantee of several rights on the national *Magna Carta*.

Thus, it can be easily seen that for a more appropriate and adequate functioning of the 1988 Brazilian Constitution, that is to say, for a broader and wider application and extension of its standards, especially those having a social character, social rights must be faced and interpreted in such a way that their force, efficacy and validity are always proclaimed not only by the Courts, but also by the State in its broadest sense and by all civil society. There is no doubt that institutional imbalances, as previously announced, can be made present, in the case of intense criticism currently aimed at the Judiciary Power in recent years. But, on the other hand, according to what has already been announced, one should not create a radically contrary and opposite behavior, so that, at the end of the process, it ends up emptying what must always be protected, that is, the national Constitution (VERMEULE, 2011).

As a consequence of all the explained above, especially with regards to the social right to transportation, a new moment may be in place in the country. But everything depends on how facts develop, on the conduct to be adopted by the Brazilian institutions and on the way in which transportation is considered in the list of the sometimes cited Art 6. The questions posed at the beginning of this chapter 02 are thus only initial kicks in a process of analysis that is following through other research and investigations and which must necessarily be constant.

Indeed, if, despite the legal order and the very nature of transportation as an institute, it has always led to believe that one is

faced with a fundamental and social right, any doubts dissipate from the express intention in the list of Art 6. Moreover, such a forecast naturally ends up strengthening the right to transportation, for the simple but very important fact of being directly and precisely predicted as a social and fundamental right. Therefore, in fact, the Brazilian legal order and the Brazilian society, subdivided in its most varied groups, are facing, rather, a new reality, although predictable and with no innovative consequences, from a certain angle; holder of new airs and possibilities; finally, the creator of new rights, under yet another and distinct look.

If one thinks in an analogous way to the other rights contained in Art. 6, such as education and health, can the country truly face the claim for a now differentiated right, in face of the Public Power even for new factual situations. For example, if today some Brazilian laws guarantee free public transportation to certain categories of people or social groups (elderly, certain students, etc.), how not to imagine a person who lives in a place where there is no offer of transportation within reasonable geographical radius, to file a request for the State to make transportation get there?²⁹ This would be a direct application of a social, constitutional right, not dealt with by the State. A situation similar to that in the last preceding paragraph may well occur, as well as for a plea of new gratuities, which may not be foreseen or contemplated by any existing law and from new arguments based on the social, fundamental and constitutional character of a right now expressly inserted and foreseen in the list of Article 6 of the Constitution.

Consequently, the scope and extension of the right to transportation, in the exact terms of the consolidated Art. 6 of the Constitution of the Republic, are indeed a daily construction, constant and based on the first and primary performance of public entities, social groups from the most diverse origins and natures, public and private institutions and, of course, the broadly conceived Brazilian Public Power. Such an important and relevant right, which involves subjects related to so many branches of Law, as it has been since the beginning of this work, may be facing a new Era, a new moment. For

²⁹ And this idea certainly applies to cases where, even if there is transportation to a particular area, there is something that is precarious and/or insufficient. The scope and reach of Constitutional Amendment n. 90, therefore, is defined insofar as society and its groups, as well as the Public Power itself, are giving the real and practical understanding to the right to transportation inserted in Article 6 of the 1988 Constitution.

sure? Certainly not. From the development of social consequences, whose law they makes constant and permanent use, what is to come in terms of transportation and its environmental, urban, legal and factual consequences is depending. But then, surely, there will be something new in the republican Constitution to be considered and never ignored. Exactly, the intention here was to study and stimulate: the constitutional, social and fundamental right to transportation, from its environmental and/or urban bases.

CONCLUSION

Constitutional Amendment n. 90, dated September 15, 2015, can definitely confirm the social nature of a right already envisaged, both at the constitutional level and in an infra-constitutional court, as socialized. On the other hand, it can also mean a broader path for progress towards its guarantee, improvement and protection.

The right to transportation, which is now formally considered a social and fundamental right, under the current wording of the 1988 Constitution, is surrounded by a series of influences exerted by various branches of law and knowledge. As seen throughout this article, thinking about transportation means, at an even broader level, simultaneously thinking of a natural and, mainly, artificial environment; in legal standards norms and, above all, constitutional rights in the country, with an extensive and leading Constitution, in which multiple guarantees for Brazilian citizens are foreseen, which also means that, under a less extensive and more specific approach, that same transportation, as an institute, attracts and approximates issues related to housing, environmental protection, the operation of cities, urban planning and management, sustainability, as well as, by corollary, social welfare and quality of life collectively seen.

May the recent labor by the corresponding Brazilian legislator be another stimulus to the improvement of transportation in the country and, likewise, foster the continuous and fundamental theoretical-academic debate, practical and administrative measures and new possibilities for a qualitative increase in this field. Inquiries have already

come up. May, then, attempts to answer appear from the unfolding and interpretations to be given, day after day, both by the relevant Powers, as by the most diverse Brazilian social groups.

REFERENCES

ACSELRAD, Henri (Org.). *A duração das cidades*. Rio de Janeiro: DP & A, 2001.

APPIO, Eduardo. *Controle judicial das políticas públicas no Brasil*. Curitiba: Juruá, 2006.

BARROSO, Luís Roberto. *O Direito Constitucional e a efetividade de suas normas*. 4. ed. Rio de Janeiro: Renovar, 2000.

BONIZZATO, Luigi. *Constituição, Democracia e Plano Diretor; sob o influxo dos direitos sociais e de liberdade, políticas estatais e institucionais*. Rio de Janeiro: Lumen Juris, 2014.

BONIZZATO, Luigi. *A Constituição Urbanística e elementos para a elaboração de uma teoria do Direito Constitucional Urbanístico*. Rio de Janeiro: Editora Lumen Juris, 2010.

CAIAFA, Janice. *Jornadas urbanas: exclusão, trabalho e subjetividade nas viagens de ônibus na cidade do Rio de Janeiro*. Rio de Janeiro: FGV, 2002.

CANOTILHO, J. J. Gomes. *Direito Constitucional e Teoria da Constituição*. 07. Ed. Coimbra: Almedina, 2003.

CASTELLS, Manuel. *Redes de indignação e esperança: movimentos sociais na era da internet*. Tradução de Carlos Alberto Medeiros. Rio de Janeiro: Jorge Zahar Editor, 2012.

CASTELLS, Manuel. *A questão urbana*. Tradução de Arlene Caetano. São Paulo: Paz e Terra, 2000.

CLÉBICAR, Tatiana. *Domingo é a cara do Rio: pesquisa revela quais são os programas favoritos dos cariocas no fim de semana*. *O Globo*. Rio de Janeiro, n. 0, ano 1, p. 38.

CORRÊA, Vera Lúcia de Almeida; VERGARA, Sylvia Constant (Orgs.). *Propostas para uma gestão pública municipal efetiva*. Rio de Janeiro: FGV, 2003.

DOWBOR, Ladislau. *A reprodução social*. Petrópolis: Vozes, 2003. 3. v.

FERRAJOLI, Luigi. *Principia iuris. Teoria Del diritto e della democrazia*. V. I, II e III. Roma-Bari: Editori Laterza, 2007.

FERRAJOLI, Luigi. *La democracia a través de los derechos: el constitucionalismo garantista como modelo teórico y como proyecto político*. Madrid: Editorial Trotta, 2014.

FERRAJOLI, Luigi. *Derechos y Garantías: la ley del más débil*. 03. ed. Tradução de Perfecto Andrés Ibáñez e Andrea Greppi. Madrid: Editorial Trotta, 2002.

FOLADORI, Guillermo. *Limites do desenvolvimento sustentável*. Campinas: Unicamp, 2001.

HARVEY, David. *A produção do espaço capitalista*. 2. ed. Tradução de Carlos Szlak. São Paulo: Annablume, 2005.

HESSE, Konrad. *A força normativa da Constituição*. Porto Alegre: Sergio Antonio Fabris, 1991.

JACOBS, Jane. *Morte e vida de grandes cidades*. Tradução de Carlos S. Mendes Rosa. São Paulo: Martins Fontes, 2003.

LASSALE, Ferdinand. *A essência da Constituição*. 5. ed. Rio de Janeiro: Lumen Juris, 2000.

LIRA, Ricardo Pereira. *Campo e cidade no ordenamento jurídico brasileiro*. Rio de Janeiro: Riex, [s.d.].

LIRA, Ricardo Pereira. *Missões da universidade: a reforma agrária e a reforma urbana*. Rio de Janeiro: UERJ, 1997.

MARICATO, Ermínia. *Brasil, cidades: alternativas para a crise urbana*. 2. ed. Petrópolis: Vozes, 2002.

MAUS, Ingeborg. *O Judiciário como superego da sociedade*. Rio de Janeiro: Editora Lumen Juris, 2010.

REIS, José Carlos Vasconcellos dos. *As normas constitucionais programáticas e o controle do Estado*. Rio de Janeiro: Editora Renovar, 2003.

SARLET, Ingo Wolfgang. *A eficácia dos Direitos Fundamentais*. 02. ed. Porto Alegre: Editora Livraria do Advogado, 2001.

SILVA, Virgílio Afonso da. *O Judiciário e as políticas públicas: entre transformação social e obstáculo à realização dos direitos sociais*. In: SARMENTO, Daniel, SOUZA NETO, Cláudio Pereira de. *Direitos sociais: fundamentação, judicialização e direitos sociais em espécie*. Rio de Janeiro: Editora Lumen Juris, 2008.

SOUZA, Marcelo Lopes de. *Mudar a cidade: uma introdução crítica ao planejamento e à gestão urbanos*. Rio de Janeiro: Bertrand Brasil, 2002.

SUNSTEIN, Cass R., VERMEULE, Adrian. *Interpretation and Institutions* (July 2002). U Chicago Law & Economics, Olin Working Paper No. 156; U Chicago Public Law Research Paper No. 28. Disponível em SSRN: <http://ssrn.com/abstract=320245> or <http://dx.doi.org/10.2139/ssrn.320245>.

VASCONCELLOS, Eduardo A. *Transporte urbano, espaço e equidade: análise das políticas públicas*. São Paulo: Annablume, 2001.

VERMEULE, Adrian. *The system of the Constitution*. New York: Oxford University Press, Inc., 2011.

VERMEULE, Adrian. *Judging under uncertainty: an institutional theory of legal interpretation*. Massachusetts: Harvard University Press, 2006.

Artigo recebido em: 17/10/2016.

Artigo aceito em: 29/11/2016.

Como citar este artigo (ABNT):

BONIZATO, Luigi; BONIZZATO, Alice Ribas Dias. A Emenda Constitucional nº 90 e possíveis desdobramentos sobre o direito social ao transporte em ambientes artificiais brasileiros. *Revista Veredas do Direito*, Belo Horizonte, v. 13, n. 27, p. 341-369, set./dez. 2016. Disponível em: <<http://www.domhelder.edu.br/revista/index.php/veredas/article/view/911>>. Acesso em: dia mês. ano.