# THE USE OF FAST-TRACKING IN THE CRIMINALIZATION PROCESS: AN ANALYSIS OF THE BILLS THAT INCLUDED NEW CRIMES IN THE BRAZILIAN PENAL CODE BETWEEN 2010 AND 2019

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**Abstract:** Dealing with the fast-tracking in the Brazilian legislative process, the paper seeks to interpret it and identify the effects of the procedure beyond the regulatory provision. In this sense, the research aims to discuss the use of fast-tracking in the processing of bills that added a new crime to the Penal Code between 2010 and 2019. If it was intended to raise quantitatively the bills that went under fast-tracking procedure; in affirmative cases, analyze whether the requirements for this were justified and the ground basis. Finally, proposals for improvement were suggested. In addition to the bibliographic review, consultations were made to the House and Senate websites, as well as the documentary analysis of the bills. It was possible to notice the absence of robust justifications for requesting and maintaining fast-tracking, demonstrating, among other things, the not so rigorous application of the procedure in congress practice. Thus, there is an urgent need for academics to improve the procedure, especially in the criminal area.

**Keywords**: Legislative Process; Fast-tracking; Brazilian Penal Code; Criminalization.

## 1 Introduction

The Brazilian legislative process, based on its inherent complexity, has a series of formal and informal mechanisms for addressing its rites and dynamics. Among them is the constitutional and regimental forecast by the plurality of processing regimes. Thus, the normative initiatives in processing at the National Congress can follow under the ordinary or special rite or, in those that make it more expedient, a priority, or urgent. This work concentrates in the last of the species.

The delimitation of the research theme sought to analyze this institutes of the federal legislative process: the fast-tracking, more specifically within productions in the criminal field (a relationship still little explored in the national literature). Within this scenario, the central issue of the work intends to ascertain whether the need for Bills that included new types to the Criminal Code between 2010 and 2019 to process in fast-tracking was justified at some point in the legislative process. In case of assertive, identify the tonic of the rationale.

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It is based on the assumption that the justification for the necessity of fast-tracking is essential to the legislative procedure and fundamental in initiatives of criminal discipline. Therefore, this shows how a specific subject supposedly requires the Parliament to be more expeditious in presenting answers to public issues. Likewise, the rationale is crucial to justify the abandonment of the ordinary procedure, which naturally involves more space and time to discuss the project.

The methodology adopted operates under the inductive method. For this purpose, as an instrumental procedure, the work is based on the legislative analysis of the Bills enacted between 2010 and 2019 that typified new conduct in the Criminal Code. Furthermore, a literature review was also used to weigh the analysis and its conclusions.

There will be a brief review of what the Brazilian law provides — in the Constitution and Internal Regiments of the House and Senate — regarding fast-tracking. Therefore, we surveyed through the legislative analysis of the Bills that included new types to the criminal code between 2010 and 2019, how many underwent the urgent procedure, what are the other information that can be extracted from the investigation, and how the urgency of the procedures and matter were justified. At the end, simple propositions will be suggested to refine the institute.

The above demonstrates the relevance of studying the institute surveyed. Retrospectively, it is necessary to investigate the form in which it was used and, prospectively, to identify better and rational forms to address fast-tracking within the criminal legislative process.

## 2 Fast-tracking in the Brazilian legislative process: among the constitutional and regimental provisions

As mentioned, legislative proposals in Congress can be processed under the ordinary, special, priority, or fast-tracking rites (simple and very urgent). The rites dictate the manner and time by which initiatives will be directed. Fast-tracking has as its primary characteristic the speed it imputes to the legislative process, dispensing with deadlines and inevitable regimental formalities present in other rites (with the exception of opinions, quorum for deliberation, and the distribution of copies of the main ones).

Two types of fast-tracking can be identified, generally differentiated by the applicant: the constitutional, requested only by the President of the Republic in projects of his/her initiative; and the strictly regimental, requested by parliamentarians in the course of processing.

In the constitutional hypothesis, the House and the Senate should speak on the Presidential proposal in up to forty-five days, successively. Having expired the deadline without positioning, the Constitution directs that the other legislative deliberations of the Houses will stand until the vote, with the exception of those that have a determined constitutional deadline[3].

[3] Art. 64. [...] Paragraph 2. If, in the case of paragraph 1, the Chamber of Deputies and the Federal Senate do not express

As for the urgency required by the congressmen, as said, it is in the Internal Regulations (IR) of each house that is supported, both in the Internal Regulations of the Federal Senate (IRFS)[4] and in the Internal Regulation of the Chamber of Deputies (IRCD)[5]. Commissions, a percentage of the Board, or the total members of the House may propose fast-tracking, depending on the subject and context.

One of the crucial points to understand the use of fast-tracking is to review which hypotheses justify its application. By the IRFS (Brazil, 1970, n.p.), it is possible in matters that involve danger to national security or to meet public calamity; if intending to consider subsequent ordinary deliberation at the second session; pending an opinion to be included on the Agenda. In the IRCD (Brazil, 1989, n.p.), for matters that: involve the defense of the democratic society and fundamental freedoms; to meet public calamity; aiming to extend legal deadlines or amend/adopt laws that will apply at the right and near time; if intending to consider in the same session.

It is worth noting the call **urgent fast-tracking**, provided for in article 155 of the IRCD[6]. The institute further accelerates the legislative process in the House. When required, it can be automatically included on the Agenda to be discussed and voted on immediately. Under the rules of procedure, the urgent fast-tracking can only be approved if the proposal addresses a matter of relevant and inadmissible national interest.

Despite these requirements appearing in the internal regiments, they authorize an unjustified use of urgency by parliamentarians due to the technical character of their open redactions. This is because, to request the fast-tracking rite (simple or very urgent) the request is based either on excessively abstract hypotheses — such as the danger to national security or relevant and inadmissible national interest — or on others that expire being only the unexplained will of the congressman to transfer to the nearest date the analysis of the proposition — such as when the requirement is based solely on the claim to consider it in the same session.

Thus, with the exception of the provision in the IRCD for projects aimed at extending

themselves on the proposal, each one successively, in up to forty-five days, all other legislative deliberations of the respective House will be overridden, with the exception of those that have a determined constitutional deadline, until the vote is finalized (Brazil, 1988, n.p.).

[4] Art. 338. Fast-tracking can be used: I - in the case of article 336, I, by the Board, by a majority of the members of the Senate, or leaders representing this number; II - in the case of article 336, II, two-thirds of the composition of the Senate, or the leaders who represent this number; III - in the case of article 336, III, by one-fourth of the composition of the Senate, or the leaders who represent this number; IV - by the Commission, in the case of article 336, II and III; and V - by the Commission of Economic Affairs, in the case of a request for authorisation to conduct the operations of the credit provided for in articles 28 and 33 of Resolution nº 43 of 2001 (Brazil, 1970, n.p.)

[5] Art. 154. The request for urgency may only be submitted to the Plenary if it is submitted by: i - two-thirds of the members of the Board, when concerning matters within the competence of the Chamber; II - one-third of the members of the House, or leaders representing this number; III - two-thirds of the members of the Commission competent to opinion on the merit of the proposal (Brazil, 1989, n.p.).

[6] Art. 155. A proposal that concerns matters of relevant and inadmissible national interest may be automatically included in the Agenda for discussion and immediate vote, even if the session in which it is presented has begun, at the request of the absolute majority of the composition of the House, or of leaders representing this number, approved by the absolute majority of Deputies, without the restriction contained in paragraph 2 of the preceding article (Brazil, 1989, n.p.).

legal deadlines or changing/adopting laws that will apply at the right and near time, there are no rational criteria that attempt extracting more rigorously the true intention of the congressman to expedite the legislative process.

Some of the practical effects of the use of fast-tracking in processing should be exemplified. For this, it is necessary to reference Simone Mendes (2002, p. 25-27, highlights) who lists some - even if it is a list from the IRCD, much is reproduced in the IRFS:

> For example, the second round of consideration of supplementary bills, the urgency of which has been approved, may be dispensed with. Likewise, it is not necessary to give the author of an urgent proposal three days in advance to inform him that his matter is on the Agenda of the Commissions (article 57, VIII).
> Some features of the assessment of urgent matter: **a)** urgent proposals shall not be subject to the final consideration of the Commissions. It means they always go to the Plenary of the House; **b)** the rapporteur on urgent matters may not have his/her term extended; **c)** urgent proposition view request cannot be accepted; **d)** there is no gap for fast-tracking; **and)** conflict of competence of two or more Commissions on urgent matter must be resolved immediately by the President of the House. In other cases, the President has a term of two sessions; **f)** Urgent propositions are preferred for inclusion on the Agenda; **g)** In the discussion and in the forwarding of the vote on urgent matters, the speakers speak for half the time allowed in the ordinary or priority matters; **h)** The Commissions have a joint session to deliver an opinion on the amendments to the urgent matter presented in Plenary; **i)** the matter shall be distributed simultaneously (contrary to the normal rule of successive processing) to the Commissions involved. Here, there is the possibility that, due to the concomitant but not joint analysis, a certain Commission proposes a certain blatantly unconstitutional modification to the matter, altering the original text, so that only the Plenary of the House can correct such an error when the different opinions of the different commissions are referred to it, and if any parliamentarian raises a question of order; **j)** Urgent motions may only receive commission amendments, or amendments submitted by 1/5 of the House members or leaders representing that number. Unlike the proposals under fast-tracking, the bills initiated by the President of the Republic for which fast-tracking has been requested, paragraph 12, item 111 of the Board Act nº 177/89 establishes that, before sending the matter to the Commissions, the President of the House will open five sessions for the presentation of amendments in the Plenary. After this deadline, the Bill and amendments are distributed to the competent commissions to give their opinion on the matter; **k)** If the bill has not been definitively appreciated by the Plenary of the House within 45 days after the request for fast-tracking, it shall be included on the Agenda, pending the deliberation on the other issues, so that the vote is completed; **l)** Having decided the matter versed in the bill, within the framework of the House, it must be sent to the Federal Senate, which should consider it in 45 days. There is the possibility that the Senate will submit amendments to the proposal, in which case it should return to the House within ten days, at the end of which the deliberation on the other matters shall be discontinued to finalize its vote.

Even if it does not exhaust all the regimental hypotheses, the framework presented is of extreme importance since it shows how the adoption of fast-tracking causes a series of changes that reduce interstices, speeds procedures and, ultimately, compresses the space for deliberation and examination of the matter. Because of this, specifically by enhancing the reduction of the discussion arena of the propositions, it is crucial to strengthen the justifications to opt for the fast-

tracking regime, and not the ordinary one.

## 3 The use of the fast-tracking regime among the Bills that included new types to the Criminal Code from 2010 to 2019.

This item will properly analyze the use of fast-tracking within the Bills enacted between 2010 and 2019 that typified new conduct in the Criminal Code, either by the formal inclusion of new type with primary and secondary precepts[7], by the creation of a qualifier or cause of increase with its own titration, or in the case of femicide and larceny against the elderly.

Therefore, we will share the guidelines and methodology of the research, some of its preliminary results, and an analysis of how the fundamentals of urgency are addressed — as a procedure regime as a discursive tool for the urgency and importance of the matter for society.

### 3.1 Guidelines and methodology

The analysis of legislative procedures took place under the scope of the formal construction of the policy (RABELO; QUEIROZ, 2019). In the end, we aimed to ascertain how legislators used the mechanism of urgent processing in the criminal field, establishing as a cut the analysis of the Bills that subsequently created new typifications in the Criminal Code from 2010 to 2019.

The option to filter the Bills among those specific for the inclusion of new criminalizations in the CC derives first, from the modesty in choosing only one normative posture of a single legal diploma; second, because it is interesting to observe the bills enacted for the potential to produce real effects on social life, in addition to the possibility of analyzing how the bill processed in both houses; third, the *a priori* perception that it is clear to understand the discourses of **urgency** and **emergency** in movements that seek to criminalize new conducts.

The choice for outlining the analysis to this period, from 2010 to 2019, was based on at least three reasons: first, it was unfeasible to expand the range further and, thus, compromise the analysis due to the duty of honesty with the research object; second, due to the temporal proximity to the research period; finally, because it is the moment of greates dissemination of internet use as a space of claiming criminalizing standards.

The date of enactment of the laws that created criminalizations were used as a reference for the search filter, in the above-referenced standards, available in the virtual Criminal Code made available on the Planalto website (Brazil, 1940), within the proposed temporal delimitation. Consequently, it was possible to closely follow the processing of the selected Bills in the the

[7] It is worth noting the option to include Bill nº 643/2011 (number given to the Bill in the House) that, despite not creating from scratch the offenses of embezzlement and smuggling, separates them into two distinct articles and significantly modifies their wording. Thus, it was the subject of analysis. There is also the case of Law nº 13,968/2019 that included new elementary and substantial conduct to the crime of article 122 of the CC.

Chamber of Deputies and Federal Senate websites.

As an analysis methodology, the Bills were cataloged, questioning in their regard (and their procedures): **(1)** What is the syllabus and content of the standard?; **(2)** Does it criminalize new conduct? Which one?; **(3)** Which House was the Initiator, and consequently, which was the Reviewer?; **(4)** Who is the author of the Bill?; **(5)** Did the Bill proceed in fast-tracking? If not, in which regime?; **(6)** What was the justification presented for the legislative proposal? Is there any reference in it regarding the need for urgency of the matter or to cases of great repercussion?; **(7)** Did the Parliamentary proponent mention at some point in the processing any media case of civil society concerning the content of the Bill?; **(8)** Was there any basis for the request and its consequent vote in the urgent processing?; **(9)** Is their any mention or defense of the urgency of the matter in the debates in the Parliamentary Commissions and in Plenary? If so, how did it proceed?; **(10)** What was the average processing time?

### 3.2 Preliminary results

Initially, it is announced that from 2010 to 2019, there were 13 (thirteen) Bills enacted that included new types to the Criminal Code, resulting in the following laws (Table 1):

**Table 1** – Bills that included new types to the Criminal Code between 2010 and 2019

| Law number | Year of enactment | Authorship | Syllabus |
|---|---|---|---|
| **12,550** | 2011 | Executive Branch (1st Dilma government) | Authorizes the Executive Branch to create the public company denominated Empresa Brasileira de Serviços Hospitalares - EBSERH; adds provisions to Decree-Law nº 2,848 of December 7th, 1940 - Criminal Code; and gives other measures. |
| **12,653** | 2012 | Executive Branch (1st Dilma government) | Add article 135-A to Decree-Law nº 2,848 of December 7th, 1940 - Criminal Code, to criminalize the crime of conditioning emergency medical-hospital care to any guarantee and gives other measures. |
| **12,720** | 2012 | Deputy Luiz Couto - PT/PB | Provides for the crime of extermination of human beings; amends Decree-Law nº 2,848 of December 7th, 1940 - Criminal Code; and gives other measures. |
| **12,737** | 2012 | Deputies: Paulo Teixeira - PT/SP Luiza Erundina - PSB/SP Manuela D'ávila - | Provides for the criminalization of computer offenses; amends Decree-Law nº 2,848 of December 7th, 1940 - Criminal Code; and gives other measures. |

| | | | |
|---|---|---|---|
| | | PCdoB/RS<br>João Arruda - PMDB/PR<br>Brizola Neto - PDT/RJ<br>Emiliano José - PT/BA | |
| **13,008** | 2014 | Deputy Efraim Filho - DEM/PB | Gives new wording to article 334 of Decree-Law nº 2,848 of December 7th, 1940 - Criminal Code and adds article 334-A. |
| **13,104** | 2015 | CPMI - Violence Against Women - 2012 | Amends article 121 of Decree-Law nº 2,848 of December 7th, 1940 - Criminal Code, to provide femicide as a qualifying circumstance of the crime of homicide, and article 1 of Law nº 8,072 of July 25th, 1990, to include femicide in the list of heinous crimes. |
| **13,228** | 2015 | Deputy Márcio Marinho - PRB/BA | Amends Decree-Law nº 2,848 of December 7th, 1940 - Criminal Code, to establish cause for increased punishment for the case of larceny committed against the elderly. |
| **13,330** | 2016 | Deputy Afonso Hamm - PP/RS | Amends Decree-Law nº 2,848 of December 7th, 1940 (Criminal Code), to criminalize, in a more serious manner, the crimes of theft and handling of stolen goods of domesticable livestock assets, even if slaughtered or divided into parts. |
| **13,344** | 2016 | Parliamentary Committee of Inquiry (CPI)/Federal Senate - National and International Human Trafficking in Brazil - 2011 | Provides for the prevention and suppression of internal and international human trafficking and measures to assist victims; amends Law nº 6,815 of August 19th, 1980, Decree-Law nº 3,689 of October 3rd, 1941 (Brazilian Code of Criminal Procedure), and Decree-Law nº 2,848 of December 7th, 1940 (Brazilian Criminal Code); and repeals provisions of Decree-Law nº 2,848 of December 7th, 1940 (Brazilian Code of Criminal Procedure). |
| **13,445** | 2017 | Senator Aloysio Nunes Ferreira (PSDB/SP) | Establishes the Law of Migration. |
| **13,718** | 2018 | Senator Vanessa Granzziotin (PCdoB/AM) | Amends Decree-Law nº 2,848 of December 7th, 1940 (Criminal Code), to criminalize the crimes of sexual harassment and disclosure of rape scene, make public unconditionally the nature of the criminal prosecution of crimes against sexual freedom and sexual crimes against the vulnerable, establish causes of increased punishment for these crimes and defines collective rape and corrective rape as causes of increased punishment; and repeals a provision of Decree-Law nº |

| | | | |
|---|---|---|---|
| | | | 3,688 of October 3rd, 1941 (Law of Criminal Offences). |
| **13,772** | 2018 | Deputy João Arruda - PMDB/PR | Amends Law nº 11,340 of August 7th, 2006 (Maria da Penha Law), and Decree-Law nº 2,848 of December 7th, 1940 (Criminal Code), to recognize that the violation of women's intimacy constitutes domestic and family violence and to criminalize the unauthorized registration of content with a nude scene or sexual or libidinous act of an intimate and private character. |
| **13,968** | 2019 | Senator Ciro Nogueira (PP/PI) | Amends Decree-Law nº 2,848 of December 7th, 1940 (Criminal Code), to modify the crime of inciting suicide and include the conduct of inducing or instigating self-harm, as well as providing assistance to those who practice it. |

**Source**: The author based on legislative research on the websites of both Houses of Congress, 2020.

Some findings were possible based on the processing of each.

### 3.2.1 Regarding the subject and criminalization of the Bills under analysis

In a general overview, the Bills that included new criminalizations to the Criminal Code between 2010 and 2019 were classified into four distinct prescriptions: they added from scratch a new criminal conduct with its own primary and secondary precepts; they created a qualifier or cause of increase with new titration; they segregated an old criminal conduct into two distinct ones, or; they added new elementary conductes to a previous conduct.

Law of nº 12,550/2011 was registered under number 1749/2011 while being processed in the House and was identified as House Bill (PLC in Portuguese) nº 79/2011 in the Senate. The proposal, originally from the Executive Branch, did not begin as a criminal standard, considering its content revolved around the syllabus of authorizing the executive to create the public company Empresa Brasileira de Serviços Hospitalares S.A. (EBSERH). However, among its many devices of eminently administrative content, it criminalized the crime of **fraud in public-interest events** as one of those practiced against the public faith.

Law nº 12,653/2012, under identification nº 3331/2012 in the House and PLC nº 34/2012 in the Senate, was also enacted on the initiative of the Executive Branch and criminalized the crime of **conditioning of emergency medical-hospital care** to any guarantee as one that gives causes to the endangerment of one's life and health. Details about its processing will be mentioned in a later item.

Law nº 12,720/2012 — nº 370/2007 in the House and PLC nº 137/2008 in the Senate - criminalized the **formation of private militia**. The law was also intended to reprimand

extermination groups, which is why it made this condition of belonging a major crime of homicide and bodily injury. In this context, the legislation was a practical result of the work of the Extermination in the Northeast CPI in the House and was also impacted by the international context, based on the obligation given by Resolution nº 44/162 of the United Nations General Assembly for countries to legislate against primary executions. It was common to perceive the mention of events such as the massacres of Carandiru, Candelária, and Eldorado dos Carajás in the justification of the Bill and in its debates, as well as the contextualization of the militia phenomenon, especially in the state of Rio de Janeiro and northeastern region.

Identified under nº 2793/2011 in the Chamber of Deputies and PLC nº 35/2012 in the Federal Senate, Law nº 12,737/2012 amended the Criminal Code to criminalize the crimes of **credit card forgery** and **hacking of computer device**, among other modifications. As the syllabus warns, the tonic of the legislation is to regulate more deeply the criminal prediction of Computer Crimes in a more explicit context of emergency of the information society.

Law nº 13,008/2014 — nº 643/2011 in the House and PLC nº 62/2012 in the Senate — redacted article 334 of the Criminal Code, dismembering it into two by adding article 334-A to the legal diploma. Therefore, by technical rigor, the crimes of **embezzlement** and **smuggling** became autonomous, a reality not glimpsed before the law where they were greatly confused. The penalties were increased.

It is worth mentioning that the change introduced by Law nº 13,104/2015 — nº 292/2013 in the Senate and nº 8,305/2014 in the House, is one of the most reflected innovations in the normative universe of the last decade. That's because it made the figure of **femicide** a qualifying circumstance of the crime of homicide (also including femicide in the list of heinous crimes). Originating from the works of the Joint Parliamentary Committee of Inquiry (CPMI in Portuguese) on Violence Against Women, the change did not introduce a new criminal conduct from scratch, with homicide remaining as a core condition. However, it qualifies it given its derivative autonomous type, thus, specifying the conduct against women by the condition of the female gender, introducing a new nomenclature, and making the subsumption more burdensome.

In the same form as with femicide, Law nº 13,228/2015, which was processed under nº 6920/2010 in the House and PLC nº 23/2015 in the Senate, did not originate a new criminal conduct; only created and gave its own title to **larceny committed against the elderly** as being a cause of increased punishment of the crime of larceny.

With the identification of nº 6999/2013 in the House and PLC nº 128/2015 in the Senate, Law nº 13,330/2016 added article 180-A to the Criminal Code, criminalizing the conduct of **handling of stolen livestock assets**. A transcription of its primary precept helps to understand better the type:

> Acquire, receive, transport, conduct, conceal, hold in deposit, or sell, for the purpose of production or marketing, domesticable livestock assets, even if

> slaughtered or divided into parts, knowing it to be the product of a crime (Brazil, 1940, n.p.).

Law nº 13,344/2016 — nº 479/2012 in the Senate and nº 7370/2014 in the House — is a consequence of the activities of the CPI of national and International Human Trafficking in Brazil started in 2011. The legislation provides for the prevention and suppression of human trafficking and measures of attention to victims. Therefore, the punitive orientation is not its main characteristic. However, it criminalized the conduct of **human trafficking**, among what it provides as a repression mechanism.

Law nº 13,445/2017 — nº 288/2013 in the Senate and nº 2,516 / 2015 in the House — is the Immigration Law. It is a result of several debates in society and has considerably changed the disposition of people on immigration in Brazil, seen by many as a remarkable advance. Like the previous one, it does not figure as a criminal standard but defines a new criminal conduct in its text. Thus, it included the crime of **promotion of illegal migration** in the Criminal Code.

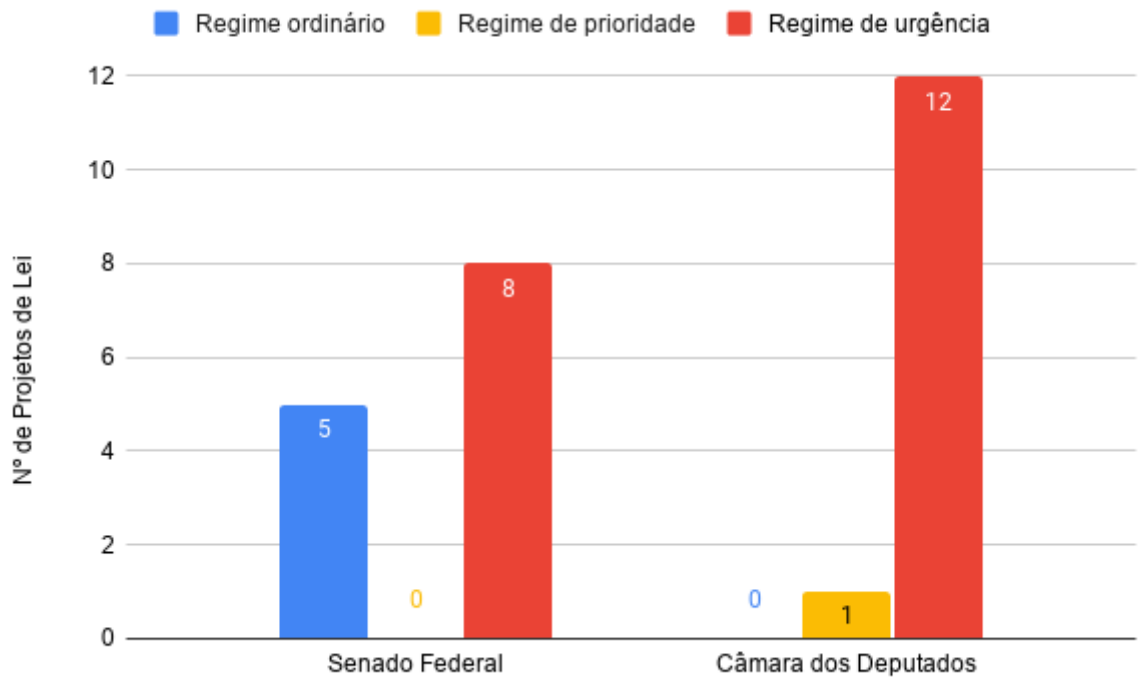
Law nº 13,718/2018 — nº 618/2015 in the Senate and nº 5,452/2016 in the House - introduced the offenses of **sexual harassment** and **disclosure of rape scene or rape scene of vulnerable, sex scene, or pornography to the Criminal Code**. **Collective rape** and **corrective rape** also became causes of increase with their own titration. Initially, the Bill only envisaged the hypothesis of collective rape, largely due to events reported in Brazil at the time. Later, during the processing, other figures and other Bills were incorporated until the promulgated text was reached, representing a series of changes related to sexual crimes. Also within the matter, Law nº 13,772/2018 — nº 5555/2013 in the House and PLC nº 18/2017 in the Senate - created Chapter I-A in the Code, in the title regarding Crimes Against Sexual dignity, and criminalized the conduct of **public exposure of sexual intimacy**.

Finally, Law nº 13,968/2019 — nº 664/2015 in the Senate and nº 8,833/2017 in the House - substantially modified article 122 of the CC, so that the crime of **inducing, instigating, or assisting suicide or self-harm** specifically contemplated the conduct of inducing or instigating self-harm. To this end, the context of the enthusiastic parliamentarians of the Bill was to reference the increase in cases of individuals seeking to influence children and adolescents to self-injury.

### 3.2.2 On the procedures

At first, the research indicated the recurrence of the use of accelerator mechanisms in the processing of the Bills under examination. The graph below (Figure 1) summarizes the information collected regarding the processing regime of the thirteen Bills selected.

**Figure 1**– Processing regimes of the Bills analyzed in the House and Senate




**Source**: The author based on legislative research on the websites of both Houses of Congress, 2020.

Nº of Bills
Ordinary Regime
Priority Regime
Fast-Tracking Regime
Federal Senate
Chamber of Deputies

Therefore, when in the House, it draws attention that, of the thirteen Bills, 12 (twelve) processed in fast-tracking (very urgent) and 1 (one) in priority. In the Senate, eight were in fast-tracking and five in the ordinary regime. Therefore, none of the Bills ran under the ordinary regime in the House, while approximately 38% ran in the Senate. The panel shows an interest, at least initially, in streamlining the process by parliamentarians.

We emphasize that all the Bills ran under very urgent fast-tracking in the House. As stated in item 1, this is the species that hastens the processing the most and is the one that has only open and subjective hypotheses to be requested. Even in the face of this mismatch, it was the only acceleration mechanism used in the House.

It is curious to briefly mention the case of the processing of the Bill that resulted in Law 13,772/2018 and that typified the **unauthorized recording of sexual intimacy**. In this case, the request for fast-tracking within the House was only made after adding the criminalization in its wording. Before, it was processed in ordinary regime, when it was only a change without a punitive character in the Maria da Penha Law and in the molds of the original text.

Although the urgency has been widely used in the Bills under analysis, there is no

temporal pattern of their enactment, and the Bills took on average three years, one month, and 29 days to be approved. Among them, the fastest enactment occurred in two months and 23 days and the longest in five years, nine months, and 16 days, which causes the temporal difference between the two to reach five years, seven months, and seven days. The scenario indicates a poor standardization of the effects of the fast-tracking rite, although it theoretically waives the same regimental procedures for all Bills.

Among the Bills processed under fast-tracking, only one[8] was denominated Constitutional. In other words, the one requested by the President of Brazil, even if there were two Bills authored by the Executive Branch in the analyzed period[9]. Thus, every other time that the fast-tracking rite was used, it was requested on the sole basis of the IRs, confirming a trend already announced by Acir Almeida of decreasing the interference of the Executive Branch in the acceleration of the legislative agenda.

Acir Almeida shows that the annual average of executive Bills approved urgently decreased from 28.7% to 13.8%, considering the periods of 1995-2002 and 2007-2014, and that of conclusively approved in commissions tripled from 9.8% to 29.1%. According to him, the information leads to the conclusion that with a more decentralized legislative agenda:

> [...] the timing of the increasing amount of legislative decisions became defined by the various standing commissions, and no longer by the Executive (via the use of MPV and constitutional fast-tracking), and by party leaders (via regimental fast-tracking and the control of the Plenary agenda) (ALMEIDA, 2015, p.48).

It should also be noted that the political orientation of parliamentarians[10] who presented the Bills and who requested fast-tracking for them is quite variable, with these steps led by representatives of the MDB, PT, PSDB, PCdoB, PP, DEM, among other parties. In summary: both congressmen in the political spectrum are more aligned to the left and those more to the right required the regimental fast-tracking in the process of criminalization under study. The fact dates back to the legislative research conducted by Gazoto (2009) in his doctoral thesis, in which he stated that all sides have punitive tendencies that depend on the context.

In the same sense, when it comes to the theme of partisan orientation, as stated by Mariana Batista (2020), another issue that deserves to be considered is that, even if the parties build some thematic link between the parliamentary and the kind of Bill they will present, in the end, at least the legislative proposal is still the act of the individual disposition of the representative - one of the only ones in the legislative process (FIGUEIREDO; LIMONGI, 2001). To reach this

[8] The Bill was enumerated as PL 1749/2011 in the House and PLC 79/2011 in the Senate. It resulted in Law 12.550/2011. The President at the time was Dilma Rousseff.

[9] The other was the Bill that originated Law 12,653/2012, according to the one addressed in the previous item.

[10] This is on the unpretentious premise of considering party affiliation as a legitimate, albeit insufficient, indication of the political orientation of deputies and senators.

conclusion, the author realized, when analyzing the thematic prominence of the Bills in the House between 1995 and 2014, that the distribution of these preferences among the parties is somewhat uniform and little distinct between them," [...] indicating that the proposition process is more subject to individual incentives than party coordination" (BATISTA, 2020, p. 16, owr translation). Thus, even if the party must build solid foundations and thematic axioms linked to its ideological orientation, in practice, the more or less punitive enthusiasm of parliamentarians regarding the subject of this work, can still be hostage to its individual stimuli, to some extent, and, therefore, not fully represent the party to which it is linked.

There is also no natural correlation of the author of the original proposal being the one who will apply for fast-tracking. In the vast majority of times, this was not what occurred.

### 3.3 From absence to lack of justification to request the fast-tracking rite and justify the urgency of the matter

Analyzing the Bills in urgent regime at some stage of its processing, during the voting of the request by the Plenary of the House and Senate and in the deliberative discussions regarding the initiatives (not on the specific request, but on the Bills), showed that the need for urgency was not satisfactorily justified by the parliamentarians.

In the first of the two moments, the vote of the request for fast-tracking was concerned with substantiating the decision was observed in none of the procedures. The request was summarily approved every time it was formalized. The IRs of both Houses do not require parliamentarians to justify the request for fast-tracking, and only a brief mention of the subsumption article is sufficient. On the other hand, they provide room for argumentation at the time of the vote of the request[11]. This possibility was not exploited in the processing of any of the Bills examined, both in the Chamber of Deputies and in the Federal Senate.

A possible factor that allows to contextualize this scenario is that of fast-tracking being previously deliberated in the college of leaders. Thus, when it reaches the Plenary, the tendency is of a symbolic vote, mainly due to the lack of space for deliberation, and as a consequence, the formation of obstacles to the participation of other parliamentarians (FIGUEIREDO; LIMONGI, 1995).

In the second, in the phase of the deliberative discussions in the Commissions and Plenary regarding the propositions, the need for external and insufficient justifications for fast-tracking

[11] Art. 343. In forwarding the vote on an fast-tracking request, one of the signatories and a representative of each party or parliamentary bloc may speak for a period of five minutes and, when it comes to a commission request, its President and the rapporteur of the matter for which the emergency was requested (Brazil, 1970, n.p.).
Art. 154. The request for fast-tracking may only be submitted to the Plenary if it is submitted by: [...] paragraph 1 The request for fast-tracking has no discussion, but its vote can be forwarded by the Author and by a Leader, Rapporteur, or Deputy who is contrary to it, one and the other with the non-renewable period of five minutes. In the cases of items I and III, the favorable speaker shall be the member of the Board or Commission appointed by the President (Brazil, 1989, n.p.).

was delegated when not absent even the mention of the necessity of urgency as if it were unquestionable and natural, responding to agendas that call for the increase of punitive demands.

At least three striking trends of this last position of the legislators were identified in the debates and reports, defending the approval of the Bill imputing a supposed duty of urgency of the matter[12]: (i) dispose the fight against impunity as a pressing stimulus; (ii) refer to cases of great media repercussion on the issue to provide the problem with the indisputable perception that it is recurrent, solid, and that calls for penalization; (iii) from the premise that the logical form to face the problem and these cases is to evoke the punishment of the conduct as if it were the only and expected response the State can provide to the conflict.

An example regarding the consignment of cases of great repercussion to justify criminalization is seen in the excerpt of the justification of the original text of the Bill that originated Law 13,718/2018, signed by Senator Vanessa Grazziotin (PCdoB/AM):

> Only in May of this year, in the state of Piauí, four adolescents were victims of "collective rape", one of whom died due to the aggressions suffered. In the state of Rio Grande do Norte, in August, three cases of "collective rape" were widely reported by the media (Brazil, 2015C, n.p.).

Still on this trend of mobilizing cases, it was also found that some of the Bills were nicknamed by the name of victims to provide awareness to the demand. This is the case of Law 13,772/2018, nicknamed "Law Rose Leonel". Another example is Law nº 12,653/2012, called "Duvanier Law" in honor of Duvanier Paiva Ferreira, former Secretary of Human Resources of the Ministry of Planning of the Dilma government. The Law criminalizes the specific conduct of **conditioning of emergency medical-hospital care to guarantee** after Duvanier died in an episode corresponding to the conduct that was subsequently criminalized, on January 19th, 2012 (less than two months before the presentation of the Bill). By example, one does not underestimate the gravity of the event, only question the opportunity and convenience in treating it as criminal.

A curious fact of Law nº 12,653/2012 is that it processed in only six days in the Senate, from the protocol to the approval in Plenary. It remain in the House only one month and 27 (twenty-seven) days, counting from the presentation until the first approval in Plenary (Brazil, 2012a).

The three trends identified represent more clearly the agenda of what is understood by emergency criminal law[13]. According to Ana Elisa Bechara (2008), the phenomenon is characterized by the acceleration of normative elaboration, driven and requested by a public opinion influenced mainly by media provocations. In this sense, the tendency to greater criminal rigor, flanked in the opinion of a common sense that is approached daily by the exacerbated

[12] Recalling that, at this point, there is no mention of fast-tracking. The position mentioned in the paragraph is that in the discursive scope of addressing the matter (the theme of Bill and its criminalization) generically as urgent and necessary for society.

[13] On the subject see: Tavares (1997); Bechara (2008); Batista (2010).

exposure of selected offenses by the media, from the results of this research, remains unchanged since the analysis of Luís Gazoto (2010).

What is noticeable when the Congress addresses social problems, criminal intervention always appears as a means to resolve these demands, even if insufficiently (SOUZA; FERRAZ, 2018). They therefore abdicate solutions of another nature. This trend becomes evident, for example, in the legislative procedure that resulted in the qualification of femicide, in particular, in the obstacles faced for the approval of the Bill. It contained the reference to homicides related to gender issues in its initial wording -nomenclature currently more appropriate and that dialogues with the construction of feminist agendas-, rather than expressly referencing the condition of the female sex, as stated in the approved text. The change in nomenclature was due, among other reasons, to the committed performance of the parliamentary group popularly called the Bible bench[14], which commonly bar initiatives that involve what they understand as *gender ideology*, curbing the development of any public policy that would focus on solving at the root of the problem (SOUZA; FERRAZ, 2018). In this sense, we note once again how the abdication of structurally considering public problems on the parliamentary agenda is not rare, as happens when the only one to be invested is delegated to the criminal exit.

Javier Quenta Fernández (2017) constructs the concept of criminal populism as a phenomenon originated in popular demands for punishment. In this context, at the time of construction of criminal legislation, the political elites perceive the power of return in fulfilling the expectations (almost always immediate) of the citizen who opines and considers criminality, so that the answer to a crime is to only further criminalize from justifications that cling to the gravity and indignation of the fact, and not necessarily in rational public policies. The author states:

> It is clear, then, that the function of punishment in punitive populism is none other than to temporarily satisfy social demands for greater security, for greater punishment, to temporarily eradicate feelings of insecurity, vulnerability, and fear [...] (QUENTA FERNÁNDEZ, 2017, p. 140, own translation).

The conceptualization above is important to develop the reflection that follows. Even if one conceives, based on this study, that the immediacy of the presentation of the legislative responses affects the Brazilian Congress and the demand for punishment does not necessarily have a political party, the scenery indicates the perception that the mobilization of fast-tracking as an effect of criminal populism occurs only in the discoursive sphere regarding the Bill, when the parliamentarians can use the podium to comment on the proposal and access his/her electorate. In contrast, there are no indications in the spaces defending the fast-tracking rite to identify it as an ally of emergency criminal law or a crucial tool manipulated by this type of agenda, at least in

[14] Popularly known due to the connection of the members with the Christian Matrix Churches.

the analyzed Bills and formal documents indexed to the procedures.

## 4 Brief reflections for improving the institute

In view of the scenario discussed, it is essential that academic thought turns to improve the legislative process, especially concerning the work, to elaborate more solid criteria for the use of fast-tracking. This is done so that the fast-tracking regime emerges from the situation currently being implemented and more transparency can be guaranteed to the Brazilian legislative process.

As is known, the Parliament can be identified as a space for divergences, in which listening and dialogue are used as mechanisms for consensus-building, either through the convergence of ideas or by persuasion (BARCELLOS, 2017). Therefore, despite external influences, the legislative exercise is a democratic act, and, although the fast-tracking institute is a political mechanism, it is believed that it deserves stoning regarding the constitutional precepts of publicity and access to information, mainly due to the limitation it produces in the participation of parliamentarians — explored in topic 1 — within the legislative process (BARCELLOS, 2017).

As a first step, with a status of regimental change, the production of a more robust justification by the legitimation of the articles 338 and 154/155 of IRFS and IRCD, respectively, should become mandatory so that a certain Bill is processed as fast-tracking.

For this, the following proposals are elaborated as modest suggestions and in the movement to confer more transparency to the normative path without disregarding the legislative autonomy of the representatives: (1) reformulate all the possibilities of application provided for in articles 153 and 155 of the IRCD, and article 336 of the IRFS, to conduct an open request to the defense of democratic rights and fundamental freedoms, and the threat to the national security or the relevant and urgent national interest; (2) to modify article 154, paragraph 1, of the IRCD (BRAZIL, 1989), and article 343 of the IRFS (BRAZIL, 1970) to make mandatory the defense of the order of the fast-tracking of the parliamentary or representative of the applicant prior to the vote in the Plenary; and (3) to add the mandatory nature of substantiating the vote to the approval of fast-tracking via the college of leaders.

Moreover, it becomes necessary to extend this constitutional publicity to the minutes of this college, given the importance of the College of leaders for legislative decision-making, both to ensure access to information by citizens regarding the motivations of this political negotiation mechanism, and for the parliamentarians who do not hold a position of party leadership having subsidies for questioning the request, thus ensuring the expansion of participation in the legislative process.

## 5 Conclusion

In advance, the assumption made *a priori* that the use of fast-tracking could be a very powerful mechanism for demands manipulated by an emergency Criminal Law remained defeated

throughout the research. What was surprising, in turn, was that, besides it not functioning as this tool, the justification and use of urgent processing, even in criminal matters, seemed to be treated with little relevance in law-making practice.

This conclusion is reached for at least three reasons. First, there are no robust formal criteria in regiments of the Houses for the formulation of requests for fast-tracking. Those entitled to do so request it generically. The gap shows that parliamentarians do not need to clarify the option for fast-tracking and that the application will be approved regardless. The request is only because.

Second, there is no temporal pattern of approval of the Bills analyzed regardless of whether or not there was agreement for the fast-tracking to prosper. The situation shows that there are several other reasons, explicit or not, within the political arrangements of the Congress besides the fast-tracking rite that make a project eligible as more or less a priority.

However, at this point, the concern is not simply to regret the little effect of the institute. What we intend to sustain is that, even if it is not the predominant factor in dictating the pace of processing, it can still dispense with various regimental formalities. However, even if the choice of regime is important and formally changes the legislative rite, no rigor is observed in practice. The primary concern derives from it naturally shortening the procedure and by not being accompanied by in-depth arguments regarding being reduced to a form of limiting legislative debates.

The third reason derives from the observation that the spaces provided regimentally as possible to produce justifications for the urgency of the processing and the project are emptied or undermined by the parliamentarians. Both the votes on the request for urgency — when it comes to the self-interest in processing — and the debates in Commissions and Plenary — when it comes to the self-interest in the relevance of that criminal matter to society - lack robust arguments for the need for urgency.

Despite this, when this justification is not completely absent due to the urgency of the processing or matter, what we have are allegations and subterfuge that summerize in moralizing discourses, arising from the criminal populism of which the legislator often adopts as a standard. Therefore, in addition to considering the mention of cases with media repercussions and the systematic use of the discourse against impunity as an impulse in the vast majority of the justifications analyzed, the parliamentarians summarize the need for the State to intervene from criminalization as its only public policy.

The search for a more rational legislative process, especially within the criminal discipline already so subject to passionate influences, deserves to stand against this movement of diminishing fast-tracking. It is necessary to understand that the improvement of their employment cannot be read as a superfluous artifice of complication or prolongation of the processing. It is important in promoting the absence of defects within the legislative procedure — which is why

suggestions for change in the work were listed.

The situation requires improvement to impute more transparency to the legislative process, with the aim of the Parliament not only justifying the reason for a certain matter to justify a faster processing but also to clarify the reason for others not to. If the establishment of criteria is already essential in any and all procedures, it is especially vital within the criminal field since it is where the state operates its most offensive agenda.

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