

Anti-Corruption in Poland: Searching the Optimal Legal Model

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ABSTRACT

The article analyses the transformation of the Polish anti-corruption legal model since the 1990s to nowadays. It considers the constitutional anti-corruption bases and emphasizes the anti-corruption vectors of the Constitution in Poland. The author pays attention to the evolution of the anti-corruption strategy of Poland and shows the role of anti-corruption state institutions including the Central Anti-Corruption Bureau, the Police, the Internal Security Agency, the Border Guard, the Military Gendarmerie, the Counterintelligence Service and the National Revenue Administration. The article pays considerable attention to legislative anti-corruption developments in the Polish criminal law and procedure. It analyses the role of public control in anti-corruption in Poland and highlights the efficiency of the Batory Foundation activity. The author concludes that a significant progress in counteracting corruption has been achieved since soviet period of the Polish People's Republic to present time. Although such areas as infrastructure modernization and development, informatization of the public administration, military defense, health care, energy sector, natural environment protection, state property management, public procurement are still at risk of corruption.

Keywords: *anti-corruption, Law, Poland, bribery, officials, strategy*

1. INTRODUCTION

Combating corruption is one of the key directions of the Polish policy for more than 20 years. By the second half of the 1990s, it was recognized that anti-corruption policy is a necessary condition for further political and economic transformations. According to Corruption Perceptions Index survey by Transparency International Poland has moved from the 70th place in 2005 (among 159 countries) to the 35th one (among 175 countries) in 2014 and keeps approximately the same place in later years.

At least during last eight years its place is below the world average. In 2019, Poland was ranked the 41th place out of 180 countries (58 points) [1]. Thus, Poland has been and continues to be one of the most corrupt countries among the post-communist States that joined the European Union in 2004 [2]. Besides, there is a tendency for increasing the number of registered crimes (2014 – 9354, 2015 – 17790, 2016 – 25968, 2017 – 36247) [3]. The Central Anti-Corruption Bureau has refunded 243 million PLN in 2016, 899 – in 2017, 1627 – in 2018 of unjustly received benefits to the treasure [4].

The tasks of the article are to answer the following questions: What is the phenomenon of corruption in Poland? How has the anti-corruption policy changed from the 1990s to recent time? What significant legal measures do Polish governments provide in anti-corruption? What are specific peculiarities of the Polish anti-corruption policy? What role does the civil society play in counteracting the

corruption in Poland? Does the selected anti-corruption model correlate with the democratic type of Polish legal system?

2. EVOLUTION OF ANTI-CORRUPTION STRATEGY OF POLAND

Some efforts in anti-corruption policy began in the late 1990s on the base of the World's Bank and the Supreme Chamber of Control reports. Particularly, Poland has adopted the important Act of 21 August 1997 on Restrictions on Conduct of Business Activities by Persons Performing Public Functions (so-called Anti-Corruption Act). It became the member of the Group of States against Corruption in 1999 and joined a number of conventions. Namely, Council of Europe Convention on Money Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (1998); Criminal Law Convention on Corruption (1999), the Convention on Combating bribery of Foreign Public Officials in International Business Transactions (Organization for Economic Cooperation and development, 2000); United Nations Convention against Transnational Organized Crime (2000), Civil Law Convention on Corruption (2001). Nevertheless, it had developed no unified systematic anti-corruption strategy. Moreover, anti-corruption slogans were used for political goals.

Nowadays the Polish anti-corruption policy is based on anti-corruption strategy activity of the State. The anti-corruption strategy has appeared as a result of significant changes in

2001-2004 connected with the desire of Poland to join the European Union [2]. For example, in order to comply with formal acquis Poland had to introduce a number of amendments in its Penal Code, Penal Procedure Law, election law, completion law, law on public procurement and law on banking activities. The preparation for the entrance to the European Union was conducted by the Democratic Left Alliance government. However, this government was itself involved in corruption scandals. The Rywin Affair will be forever in the world history of corruption and has had long-term influence on the political culture in Poland.

Since 2002 six strategy documents in the anti-corruption sphere have followed. The Program in Combatting Corruption – Anti-Corruption Strategy for the years 2002–2004 contained general directions for public administration to combat corruption. The Program in Combatting Corruption – Anti-Corruption Strategy (II stage: 2005–2009) opened the new chapter in the anti-corruption policy of Poland. This Program included a new effective combination of the legislative, organizational and educational measures. In 2006 a new specialized state body – Central Anti-Corruption Bureau started its activity. Poland ratified the United Nations Convention against Corruption and became the member of the European Union Agency for Law Enforcement Cooperation, the European Anti-fraud Office, the European Union Agency for Criminal Justice Cooperation and made some significant steps for adaptation of its legislation to the European Union's one.

In the years 2008–2012 the Anti-Corruption Shield Program was realized to prevent irregularities in the privatization of the key state-owned enterprises and in the public sector in general. Since 2012 the new Anti-Corruption Shield Program focuses on the anti-corruption measures in sphere of reconstruction, construction of road infrastructure, IT projects, health care, purchase of equipment and armament for the army.

In 2014 the Council of Ministers adopted the new Government Program Counteracting Corruption for the years 2014–2019 in correlation with the Strategy of National Development 2020. This Program contained 19 tasks for different ministries and central bodies and 71 activities to fulfill them considering also educational and informational activities. But the analysis of this Program achievements after two years of realization has shown uselessness of the further activities within its framework due to its goals occurred to be unachievable.

The Government Program Counteracting Corruption for the years 2018–2020 aimed to the real restriction of the corruption through its prevention and educational activity in the society and in the public administration, monitoring of the legal regulation in sphere of corruption counteracting and intensification of cooperation between law-enforcement authorities. According the Program, the main indicator of achieving the goals is growth of the Corruption Perception Index by 3 points by 2020 (65 points compared with 62 ones in 2016).

Nevertheless, this index fell down to 58 points in 2019 [1]. Analyzing the main reasons of the corruption the Program lists the lawmaking irregularities, conflict of interests,

deficiency of transparency, weakness of control system, increasing the number of bodies responsible for the same issue, lack of the individual decision-making responsibility, ignoring the report obligations, the excessive use of the additional and intermediary services by the administrative bodies. The Program pays attention to the following spheres of social live: infrastructure modernization and development, informatization of the public administration, military defense, health care, energy sector, natural environment protection, state property management, public procurement.

Even though the largest incentive for implementing the anti-corruption measures was motivated by the European Union, the continuous evaluation of these measures had a disciplinary and mobilization influence on the anti-corruption policy of the Polish governments [5]. The appearance of the Anti-Corruption Strategy was important in itself, because it provided for a boost in changing the attitude of the Polish society and government to this problem. Nowadays the Strategy inclines towards prevention of the corruption by educational policies.

3. THE CONSTITUTIONAL BASE FOR ANTI-CORRUPTION IN POLAND

The Constitution of Poland 1997 (Journal of Laws, 1997, 78) is considered to be the important document for providing the general conditions of anti-corruption in Poland [6]. Although the Constitution does not include directly the principles or directions of anti-corruption, it attempts to build up the constitutionalism and rule of law that would lead to greater transparency and control, and reduce the scale of corruption.

In our mind, the Constitution of 1997 changed significantly the priorities of the State. The constitutional pursuit of the democratization and constitutionalization of many spheres (especially, of criminal law and criminal procedure), and particularly the development of local self-government and the citizen's participation in realization of public power has played a very important role in reducing corruption in Poland. Thus, the Constitution of Poland has implicitly aimed at counteracting corruption.

The main constitutional principles establish the base for anticorruption in Poland: democracy (art. 2), rule of law (art.2, 8), the principle of social justice (art. 2), supreme power of the Nation (art. 4), separation and balance of powers (art. 10), decentralization of public power (art. 15), participation of local governments in public power (art. 16), obligation of public authorities to respect and protect dignity of the person (art. 30), and some others.

The guarantees of independence and political neutrality of the supreme officials (deputies, President, ministers, judges and others) and the public servants are included directly in the Constitution of Poland. These guarantees are the important conditions for realization of the power separation principle and for minimization of the corruption.

According to art. 103 of the Constitution "The mandate of a Deputy shall not be held jointly with the office of the

President of the National Bank of Poland, the President of the Supreme Chamber of Control, the Commissioner for Citizens' Rights, the Commissioner for Children's Rights or their deputies, a member of the Council for Monetary Policy, a member of the National Council of Radio Broadcasting and Television, ambassador, or with employment in the Chancellery of the Sejm, Chancellery of the Senate, Chancellery of the President of the Republic, or with employment in government administration. This prohibition shall not apply to members of the Council of Ministers and secretaries of state in government administration.

No judge, public prosecutor, officer of the civil service, soldier on active military service or functionary of the police or of the services of State protection shall exercise the mandate of a Deputy". Art. 132 of the Constitution provides for the abstention of the President of the political life and prohibits him to hold the other offices and discharge any public functions. Art. 178-181 of the Constitution contain the guarantees of independence and political neutrality of judges and aim at providing of the independent administration of justice.

Moreover, the Constitution states the anti-corruption guarantees for civil servants. According to art. 153 "A corps of civil servants shall operate in the organs of government administration in order to ensure a professional, diligent, impartial and politically neutral discharge of the State's obligations". The constitutional level of this statement contributes significantly to the stability of the State.

So-called "anti-corruption" article 107 of the Constitution prohibits deputies to perform any business activity involving any benefit derived from the property of the State Treasury or local government or to acquire such property. In respect of any breach of this prohibition a Deputy bears a risk to be brought before the Tribunal of State, which is empowered to adjudicate upon forfeiture of the mandate. The article focuses on the counteracting corruption in the economic sphere. Fixing such a rule at the constitutional level has a principal meaning because it is an additional anti-corruption guaranty for the highest-level public officials. The higher the official position of a person in the hierarchy of public service, the less effectively administrative prohibitions and restrictions work [7], therefore establishing anti-corruption requirements in Constitution is the quite reasonable variant of anti-corruption policy.

Thus, Poland realizes the democratic anti-corruption model based on the Constitution. Many articles of the Constitution of Poland have the anti-corruption meaning. The role of the Constitution in the anti-corruption in Poland is not restricted by the requirements upon the officials and public servants. It has the strategic anti-corruption goals through establishing the main vectors for the development of legal and political system and the main values and principles: democracy, rule of law, open government, free elections, lobbyism, free legislative activity of the parliament, guarantees of human rights and freedom, public control, that are not combined with corruption.

4. THE INSTITUTIONAL CHANGES IN THE SYSTEM OF STATE BODIES THAT PROVIDE COUNTERACTING THE CORRUPTION IN POLAND

Criminal proceedings with the involvement of the Prosecutor's Office are the main way of counteracting corruption in Poland [8]. The investigation functions are divided between Police, Central Anti-Corruption Bureau, Internal Security Agency, the Military Counterintelligence Service, the Military Gendarmerie, the Polish Border Guard, National Revenue Administration, and the Prosecutor's Office. Structures form the so-called Anti-Corruption Shield on the top of which is the Prime Minister. The Police, the Prosecutor's Office and the Central Anti-Corruption Bureau investigate the most of the crimes and offences related to corruption.

The Central Anti-Corruption Bureau established in 2006 according to the provisions of the United Nations Convention against Corruption is a special service counteracting corruption. According to the Act of 9 June 2006 On the Central Anti-Corruption Bureau (Journal of Laws, 2006, No. 104, item 708) this body prosecutes offences 1) against activities of public institutions and local governments; 2) in the sphere of the administration of justice; 3) in the sphere of elections and referendums; 4) against public order; 5) in the sphere of document credibility and property; 6) in the sphere of financing of political parties; 7) in the sphere of realizing the principles of sports competition; 8) in the sphere of trade in pharmaceuticals, circulation of foodstuffs for particular nutritional use, medical devices; 9) disclosure of cases of non-observance of procedures, laid down by law, for taking decisions and accomplishments thereof within the scope of privatization and commercialization, financial support, award of public contracts, disposing of the property of the units or the entrepreneurs, if they connect with corruption. Bureau is often criticized because of the insufficiency of its activities, irregularities in evidence collected by this service and its entrapment methods such as "police provocation", that exceed permitted limits, use moral criteria instead of legal ones [9].

The Prosecutor's Office have initiated several cases against the members of the former directorship of the Bureau. There are no sharply defined criteria for the delimitation of competence between the Bureau and other bodies that have powers to pursue crimes of corruption in Poland. Besides Poland has failed to provide an independence of this specialized service. The Prime Minister coordinates the activity of the Bureau (art. 5 of the Act), appoints and dismisses the Head of the Bureau from office (art. 6 of the Act), determines the directions of the activity of the Bureau, approves the Plan of the activities and the annual report of the Bureau (art. 12 of the Act). Nevertheless, the Bureau plays a leading role in the counteracting corruption and statistics show the effectiveness of its activity. In 2016-2019, there were the following results: 823 initiated operational cases, 695 completed operational cases, 971 initiated preparatory proceedings, 734 completed

preparatory proceedings, 2,812 suspects with 8790 pleas and 146 applications for controlled granting of property benefit. Thus, in comparison with the 2012-2015 period there was high growth dynamics: preventive measures grew by 138%, including pre-trial detention 223%, value of the secured property - 743%, number of suspects - 31%, number of applications pursuant to art. 17 of the Act on the Bureau (operational control) - 72.5%, number of suspects - 31%, number of applications pursuant to art. 17 Act on the Bureau (controlled benefit distribution) - 170% [10].

Internal Security Agency provides investigation, prevention and combating threats against the State's internal security, its constitutional order, and specifically its sovereignty and international position, independence and territorial integrity, as well as national defense. Therefore, according to the Act of 24 May 2002 on the Internal Security Agency and Foreign Intelligence Agency (Journal of Laws, 2002, No. 74, item 676) it has power of investigation, prevention and detection of different crimes including terrorism; breach of State secrets; crimes which may damage State security; crimes which may damage the economic foundations of the State; corruption of public officials, which may pose a threat to the State's security. The Agency has the special role in the counteracting corruption in the sphere of privatization and tenders, monitoring of the public procurement and privatization proceedings indicated by the Prime Minister and identifying the irregularities in public tenders.

The Military Counterintelligence Service established in 2006 instead of the Military Information Services is a special service responsible for the protection of Poland against internal threats and for the combat capability of the Polish Armed Forces and subordinate to the Ministry of National Defense. This Service according to the art. 5 of the Act of June 9 of 2006 on the Military Counterintelligence Service and Military Intelligence Service (Journal of Laws, 2006, No. 104, item 709) has power of investigation, prevention and detection of corruption crimes committed by soldiers on active military service, employees of the Polish Armed Forces and other organizational units of the Ministry of National Defense, if they may threaten the security or combat capability of the Polish Armed Forces or other organizational units of the Ministry of National Defense. In the sphere of counteracting corruption this Service cooperate with the Military Gendarmerie, formed in 1990 as a part of Polish Armed Forces.

According to Art. 4 of the Act of 24 August 2001 on the Military Gendarmerie and other law enforcement military authorities (Journal of Laws, 2001, item 1353) it has power to detect and investigate the crimes and offences, including corruption ones, committed by soldiers in active duty, former soldiers but wearing uniforms and the military symbols and insignia and other persons to whom the Military Gendarmerie has the legal authority. With the reference to the Anti-corruption Shield, the Ministry of Defense has its own Anti-Corruption Shield, which consist of the Gendarmerie, the Anti-Corruption Office and the Military Counterintelligence Service.

In the framework of control of the border order, the Border Guard detect the corruption crimes and offences committed

by the officers and employees of the Border Guard (Act of October 12 of 1990 on the Border Guard (Journal of Laws, 1990, No. 78, Item 462).

The National Revenue Administration started its activity on March 1, 2017 as a successor upon merger of tax administration, fiscal control and Customs Service in order to adopt this system to the changing economic conditions. The Administration has power to detect and investigate crimes of art. 270, 271, 273, 286 §1 of the Penal Code in some cases and crimes of art. 228-231 of the Code committed by workers of the National Revenue Administration in the performance of the official duties.

Despite a criticism about the existing system of the anti-corruption bodies in Poland and their politicization, it is necessary to recognize that the multiple and branchy system of the anti-corruption organs with matching functions, the multi-purpose model of specialized anti-corruption body, the tax and fiscal system reforming has given rather efficient results that appear in an increase of the number of corruption investigations, an increase in the proportion of disclosed cases and the successful investigating the cases against high-ranking officials.

5. THE CONSIDERABLE LEGISLATIVE ANTI-CORRUPTION DEVELOPMENTS OF CRIMINAL LAW AND PROCEDURE IN POLAND

The effective criminal law and procedure is one of the best guarantees of anti-corruption, therefore Poland pays considerable attention to the legislative developments in this sphere.

Nowadays the criminal liability for corruption comes more frequently in accordance with the following articles: art. 228-231 in Chapter XXIX Offences against the functions of the State and Local Government Institutions of the Penal Code 1997 (Journal of Laws, 1997, No. 88, item 553), including bribery, paid protection, unperforming duties by the official to the detriment of a public or individual interest; art. 250a of the Penal Code (crimes in sphere of election corruption), art. 296a and art. 305 of the Penal Code (crimes in sphere of economics), art. 296 of the Penal Code and art. 46-48 of the Act of June 2010 on Sport (Journal of Law, 2010, No. 127, item 857) (corruption in sphere of sport), art. 305 of the Penal Code (prevention or obstruction of a public tender in order to gain a material profit) [11].

Additionally, to the liability for the official domestic and international (if the committed crimes were against interests of Poland, a Polish citizen or a Polish legal entity) bribery, the legislation of Poland pays significant attention to corruption in business. There are crimes to corrupt the person holding the managerial function in legal entity or the employee of the legal entity for an abuse of the powers granted him or her by his or her office, which may cause material damage to this entity or may constitute an act of unfair competition or inadmissible preferential act in favor of a buyer or recipient of goods and services (art. 296A of the Penal Code).

Besides the Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty (Journal of Laws, No. 53, item 553) regulates the issues of the quasi-criminal liability of the commercial companies. This Act provides for three types of punishment: imposing a fine, ban on the applying for public tenders and making information about the judgment handed down public. Statistics shows that this type of proceedings has not become widespread in Poland especially in comparison with the number of people sentenced for the committing business crimes [9].

The liability may come also for so-called associated offences: money laundering, falsifying documents, keeping inaccurate records, and filing inaccurate tax returns regarding corporate income tax and VAT. The legal entities are obligated to keep financial records and these records are subject of auditor examination. According to the Act of 7 May 2009 on Certified Auditors and their Government, Entities Authorized to Examine Financial Statements and on Public Supervision (Journal of laws, 2009 1011) an auditor is to inform the law-enforcement organs about the corruption cases as concerns persons holding public functions.

Sometimes bribe funds are "siphoned" from the company under a fictitious agreement, which entails specific consequences regarding the accounting system, as well as VAT and CIT settlements [9]. In some cases, tax fraud is committed with falsification of documents (art. 56 of Fiscal Criminal Code (Journal of Laws, 1999, No. 89, item 930)). Money laundering consists in taking actions aimed at concealing the criminal origin of funds (art. 299 of the Penal Code). In cases where money is laundered by the beneficiary of the bribe, the basic crime consists in the corruption. But money laundering is often aimed at the concealing the siphoning of the money from the company, which can constitute an appropriation of the company's funds (art. 284 of Penal Code) or acting to the detriment of the company (art. 296 of the Penal Code).

In order to prevent money laundering, Poland has adopted the Money Laundering and Terrorism Financing Prevention Act of 16 November 2000 (Journal of Laws, 2000, No. 45, item 598). This Act established the office of General Inspector for Financial Information. This Act imposes an obligation for banks and some others legal entities to register the transactions and convey information on them. The Inspector is entitled to demand to withhold the transaction and may notify the Prosecutor's Office. The bank accounts may be blocked for 30 days by the prosecutor's decision in order to return the funds to the authorized person.

The substantive criminal law has also changed. In 2003, the provisions amending the Law - Penal Code and certain other laws colloquially referred to as the "anti-corruption amendment" entered into force. This law has amended more than 20 criminal law provisions and introduced several innovative solutions. There have also been the new terms of 'controlled bribe', 'apparent transaction' most often used as police provocation'.

Since 1 July 2015 the criminal procedure was crucially changed to provide the constitutional right to a fair trial. It

established an adversarial system where the court is obliged to seek evidence and introduce so-called "investigating judges". The substantial change also involves the introduction of a ban on using illegally seized evidence [12].

6. THE ROLE OF PUBLIC CONTROL IN ANTI-CORRUPTION IN POLAND

The rather high level of public control in Poland connects with two main factors: the wide range of form of citizen's participation in realization of the public power, especially at the self-government level, and the important role of non-governmental organization in anti-corruption in Poland. The list of the most famous organizations includes Transparency International Poland, Stefan Batory Foundation, the Institute of Public Affairs Foundation, "Stop Corruption" Association, Institute Kosciuszki, Institute for Private Enterprise and Democracy, The Center of Citizenship Education, the local social group "Citizens against corruption", Helsinki Foundation for Human Rights.

The leading role in the anti-corruption activity belongs not to the Polish office of Transparency International but to the Batory Foundation [5]. This organization, founded in 1988 by George Soros with the support of the Polish democratic opposition, has a mission to build an open, democratic society – a society of people aware of their rights and responsibilities, who are actively involved in the life of their local community, country and international society. The examples of the activities of this Foundation in sphere of anti-corruption are the organization of the public discussions and conferences, monitoring of the state bodies activities and elections, educational projects, the juridical support of organizations, the research and publication activities, monitoring of legislation and anti-corruption strategies [14].

It is necessary to notice the high efficiency of the anti-corruption activities of non-governmental organization in Poland. They successfully perform four functions: forming the negative attitude of the society to the problem of corruption and reduction of social tolerance for this phenomenon, realization of the social control, identification of the areas of social life with the largest risk of corruption, preparation of their own legislative projects with an implementation of effective anti-corruption measures [5]. There is no open confrontation between civil society and the governmental structures in Poland. Moreover, in sphere of counteracting corruption they act in cooperation and realize the effective common projects (for example, famous internet portal antykorupcja.gov.pl has appeared as a result of cooperation between non-governmental organizations and governments [14]).

7. CONCLUSION

The legal anti-corruption model of Poland has seriously transformed from the late 1990s to nowadays. Poland uses

the democratic multi-level anti-corruption model consisting of many elements. There is no open confrontation between participants of this model: state and municipalities, public bodies and public officials, civil society and non-governmental organizations, legal entities and individuals. All of them try to act in a collaboration with each other and with international organizations. This collaboration gives rather effective results.

The Polish model appears under influences of many factors. The establishing of the anti-corruption strategy began in the late of the 1990s when the basic anti-corruption constitutional statements were built up. The entrance to the European Union was the key factor of its cardinal change due to adaptation of Polish legislation to the European Union's one and to the institutional changes in the system of state bodies counteracting corruption in Poland. Later, in the post-accession period it was complemented by some legislation developments considering the worldwide experience and realizing the twofold policy that combines restrictions of bureaucrats' behavior by standards and the public control, as well as by the widening the borders of trust in the public life.

The first type of policy is connected with reducing the "spheres of uncertainty" and possibilities of the interrelations between state and municipal officials, medical personnel, teachers, policemen and other state and municipal employees with individuals as receivers of their services. The second type of policy imposes creating the joint institutional conditions and rules of the relationships within the state and public bodies where corruptive behavior becomes economically unprofitable and morally unacceptable [15].

To our mind, this twofold policy realizes on five main levels in Poland: constitutional, strategical, institutional, legislative and behavioral ones. The first level aims at the forming such conditions in which make the corruption behavior is unacceptable. These conditions include the creation of the democratic competitive political system, the real competitive economic environment, the independent media and the strong civil society. At the second level the State defines the main directions of the anti-corruption strategy. At the third level, Poland has system of the anti-corruption bodies, extended in 2003 by the multi-purpose specialized body – Central Anti-Corruption Bureau. Poland pays significant attention to the developments of the criminal law and procedure in the sphere of corruption with an accent on the corruption in business that correlates with the task of establishing the effective legal anti-corruption framework and of guarantying the right to fair trial. The goals of influencing on the behavioral settings are to form a society's intolerant attitude towards corruption and to decrease the administrative presence of the bureaucracy in case of decision-making at the discretion of the officials.

In conclusion, it should be noted that in Poland the sufficiently effective and relatively stable to political changes anti-corruption system has been developed. Nowadays it is necessary to change this system just in some points connected with the problem spheres: infrastructure modernization and development, informatization of the public administration, military defense, health care, energy

sector, natural environment protection, state property management, and public procurement.

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