

The Offenses Against Religious Freedom According to the Romanian Criminal Code of 2014

Teodor Manea

Faculty of Law, Titu Maiorescu University, Romania, teodor.manea@prof.utm.ro

ABSTRACT: The latest Romanian Criminal Code came into force on the 1st of February 2014. Given that the previous Criminal Code entered in effect on the 1st of January 1969, it was designed according to the ideology of the Communist regime and it was becoming increasingly difficult to adapt it to the changes which occurred in the Romanian society after the Revolution of December 1989. Therefore, the need for a new, unified and updated criminal legislation was keenly felt in 2014. This paper will address one of the innovations proposed by this normative act, the crimes against religious freedom and respect owed to the deceased. The analysis will begin with a few remarks concerning the theoretical structure of an offense (*infracțiune*) in the Romanian Criminal Law, as the international public might not be aware of the subtle differences between the terminology used by this legal system and some of the concepts used in other English-speaking countries. Having succinctly clarified these differences, the paper then proceeds to a study of the four offenses included in this category: preventing the freedom to practice religion (art. 381), desecration of places or objects of worship (art. 382), desecration of corpses or graves (art. 383), illegal harvesting of tissues or organs (art. 384). The conclusions are meant to highlight a few of the key concepts which have to be taken into account if one attempts to realize a comparative study between this segment of the Romanian criminal law and other domestic legal systems.

KEYWORDS: offense, religious freedom, Romanian, criminal code, law

Introduction

History has proven again and again that religious violence should not be accepted in a civilised society. That each human being should be allowed to have a faith, to practice their traditions and to be part of a larger organisation dedicated to that specific faith. From a legal point of view, these ideas imply that the laws of a State should be used to protect the freedom of religion, not to enforce a specific religious doctrine (Even though the notion of justice is yet to be defined by the European Constitutions. See Constantinescu-Mărunțel 2020).

The attitude of the Romanian legislator towards the religious faiths and/or organisations has changed dramatically during the 20th century. The latest Romanian Criminal Code came into force on the 1st of February 2014. Given that the previous Criminal Code entered in effect on the 1st of January 1969, it was designed according to the ideology of the Communist regime and it was becoming increasingly difficult to adapt it to the changes which occurred in the Romanian society after the Revolution of December 1989: a new democratic regime, the adherence to the European Convention of Human Rights (1994), becoming a member of the North Atlantic Treaty Organisation (2004) and of the European Union (2007) etc. One should remember that one of the common threads of these transformations was the reaffirmation of the freedom of religion and the consolidation of the legal means of protecting it.

Therefore, the need for a new, unified and updated criminal legislation was keenly felt in 2014. This paper will address one of the innovations proposed by this normative act, the crimes against religious freedom and respect owed to the deceased. The analysis will begin with a few remarks concerning the theoretical structure of an offense (*infracțiune*) in the Romanian Criminal law, as the international public might not be aware of the subtle differences between the terminology used by this legal system and some of the concepts used in other English-speaking countries. Having succinctly clarified these differences, the paper then proceeds to a study of the four offenses included in this category: preventing the freedom

to practice religion (art. 381), desecration of places or objects of worship (art. 382), desecration of corpses or graves (art. 383), illegal harvesting of tissues or organs (art. 384).

Regarding the methodology we are utilizing for this paper, there are a few remarks we should make. Firstly, one should remember that this is a legal paper, which means that we are going to use legal sources. Thus, our primary sources are the sources of the Romanian law: the legal texts, jurisprudence (when and if it is acknowledged as a source of the law) and the legal principles. Our secondary sources are the legal doctrine, jurisprudence (when it is not a legal source of the law) and a few other materials from other fields of study. Secondly, we would like to underline the fact that our purpose is to conduct an analysis of the dispositions of articles 381 to 384 from the Romanian Criminal Code. In our opinion, such a paper should be objective and unbiased, at least as much as humanly possible. Therefore, we do not want to enter a religious debate about the merits of these norms and we will avoid any argument which tends to favour the beliefs of one particular religious cult.

Thirdly, given that this is a paper which is meant to present the particularities of a segment of the Romanian criminal law to an international public, we are of the opinion that certain explanations regarding specific domestic notions should be given. Consequently, we will insert from time to time some explanatory notes. We are hoping that this strategy will provide the reader who is not familiar with the topic, but is interested in it, with the necessary information to deepen their knowledge.

All this being said, we may now proceed to the analysis of the first offense out of the four which are included in our study, namely preventing the freedom to practice religion, pursuant to art. 381 of the Romanian Criminal Code. Given that we have to observe certain limits of spatial nature for this paper, we will try to avoid repeating ourselves when a conclusion regarding a specific element of one of the examined offenses is also valid for some of the others. Therefore, when such a case occurs, we will point it out.

The offense of preventing the freedom to practice religion (art. 381)

Historically, Romania has been and still is a very diverse society, a fact which is easily discovered when considering the diverse religious faiths which exist on its territory. According to the provisions of art. 29 of the Romanian Constitution of 1991, revised in 2003, „*all religions shall be free and organized in accordance with their own statutes, under the terms laid down by law*”, remaining at the same time autonomous in relation to the State. As a consequence, one could only guess the exact number of religious faiths embraced by the population.

All these being said, there are a number of religious organizations (*asociații religioase*) which are officially recognised by the Romanian State following a specific procedure. It should be mentioned that religious groups and/or associations are free to choose if they want to become a cult or not, given that the latter status implies that the cults are gaining both rights and obligations. Consequently, not all of these communities opt to become cults in the legal meaning of the word. In fact, according to the provisions of the Law no. 489 of 28th of December 2006 on the religious freedom and the general regime of cults, there are 18 legally recognised cults¹.

However, if a religious organization chooses to become an officially recognised cult, it becomes easier for the authorities to support its activities. For example, the State is able to better protect the members of the cult from any unlawful interference, including through the incrimination of certain unjustifiable acts.

The offense of preventing the freedom to practice religion is defined by the dispositions laid down by art. 381 of the Romanian Criminal Code, however one should not believe that this article criminalizes only one type of action. Each paragraph criminalizes specific categories of deeds, thus covering an entire spectrum of practical possibilities.

The first paragraph provides the basic version (*varianta tip* in Romanian) of the offense, stating that "*the act of preventing or disturbing the freedom to practice any ritual specific to a religion, which was organized and operates according to the law, shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine.*" The second paragraph of art. 381 provides the first aggravated version (*varianta agravată* in Romanian) of the offense, stating that "*the act of compelling a person, by coercion, to take part in the service of any religion or to perform a religious act related to the practice of a religion shall be punishable by no less than 1 and no more than 3 years of imprisonment or by a fine.*" Lastly, the third paragraph of art. 381 provides the second aggravated version of the offense, stating that "*the same penalty shall apply to compelling an individual, by violence or threats, to perform a religious act forbidden by the religion, organized according to the law, to which they belong.*"

The legal object of the offense is formed by the social relationships whose existence depends on the freedom of conscience and religion. (According to the Romanian criminal law, the legislator criminalizes a specific conduct in order to protect a group of social relationships, which means that each criminal law norm has a specific legal object). As some authors argue (Dobrinou 2016a), if those two basic freedoms are not observed in a society, religious cults cannot exist, which in turn means that the individual may not be able to freely practice religion.

The offense of preventing the freedom to practice religion may or may not have a material object, depending upon how it is committed. (According to the Romanian legal doctrine, when criminalizing an act, the legislator may attempt to protect not only a set of social relationships, but also a material entity which is intrinsically linked to those relationships). If the perpetrator seeks to prevent a congregation from attending the Sunday mass by creating a lot of noise near the church, there is no material object which may be retained in the case.

However, some authors (Grofu 2016, 97) have shown that a material object may exist when the perpetrator uses acts of violence or when they resort to physical coercion. As an example, the perpetrator may destroy some religious artifacts (a cross, a holy book etc.) in order to prevent the members of the cult from conducting a religious ritual. In such a case, one might consider that the perpetrator has to be prosecuted for concurrent infringements, on one hand the offense provided for by art. 381 and on the other hand the offense of destruction, provided for by art. 253 of the Romanian Criminal Code of 2014. The same could be said when the perpetrators elect to steal an object in the absence of which a religious ritual cannot take place. One could analyse a concurrent infringement both by relation to the dispositions of art. 381 and to art. 228 (theft) of the Romanian Criminal Code.

On a related note, if the perpetrator steals a corpse or the accessories of a funeral monument, thus infringing upon the freedom to practice any ritual specific to a religion, one should analyse the criminal conduct not only in light of the provisions of art. 381, but also of those of art. 383 of the Criminal Code. As the human remains of the ancestors play an important role in the rituals of many religious faiths, there is a distinct possibility that such a scenario might occur more often than not.

Any person may be the active subject of the offense of preventing the freedom to practice religion, as the applicable norms do not impose specific conditions which have to be met by a potential perpetrator (In the Romanian legal doctrine, the perpetrator is called „active subject”, while the victim is called passive subject). Most authors (Toader 2014a) consider that the passive subject of the crime is the Romanian State, as it is the sole representative of the society which is directly interested in preserving and protecting the freedom of its members to practice religion. These conclusions are also valid for the rest of the offenses.

Given that the State is the primary victim of the offense (Grofu 2016, 97), one could legitimately ask what is the role of the person who is directly or indirectly harmed by the

actual deed. That is to say that the act may also hurt a secondary victim (*subiectul pasiv secundar*), which may be a natural or a legal person who is harmed as a result of the commission of the offense. As an example, if the perpetrator tries to prevent a religious ritual by destroying a holy relic, the primary victim would be the Romanian State, while the secondary victim is the natural and/or legal persons who owned the relic.

Another notion which should be considered when analyzing an offense according to the Romanian law is the prerequisite situation (*situația premisă*). According to Nedelcu (2014, 807), the offense of preventing the freedom to practice religion, in its basic version, provided for in art. 381 par. (1), or in its second aggravated version, provided for in the second paragraph of the same article, cannot be committed in the absence of a cult which is organized and operates according to the law. In its first aggravated version, according to art. 381 par. (2), one can commit the offense no matter if it is perpetrated in relation to such a cult or not.

Regarding the *actus reus* of the offense, one should remember that it differs depending on which version is reviewed. In its basic versions, the offense consists in an action of preventing or disturbing which is committed by the perpetrator against the member of a religious cult, which is organized and operates according to the law. These actions are varied and can take many forms: making a lot of noise, stealing an important artifact, illegally detaining the person who is supposed to conduct the ritual, destroying the establishment where the ritual is supposed to take place etc. Therefore, one should expect concurrent infringements on multiple in-effect norms.

In its first aggravated version, according to the provisions provided for by the second paragraph of art. 381, the perpetrator has to compel another person, by coercion, either to take part in the service of any religion or to perform a religious act related to the practice of a religion. As an example, the active subject may choose to force a person who does not share their religious beliefs to assist to a religious ritual or to play a part in the ritual by singing, praying or executing specific symbolic gestures.

In its second aggravated version, according to the provisions of art. 381 par. (3), the *actus reus* is another action, this time the perpetrator compelling an individual, by violence or threats, to perform a religious act forbidden by its religious beliefs. This time, the passive subject has to be a member of a cult which is organized and operates according to the law (one of the 18 cults previously presented). To compel by violence means to compel by one of the acts criminalized by art. 193 of the Criminal Code, while to compel by threats means to compel by one of the acts criminalized by art. 206 of the law.

Regarding the *mens rea*, it is highlighted in the legal doctrine (Dobrinioiu 2014a) that the perpetrator has to act with the purpose of infringing upon the freedom of religion or at least with the knowledge that they are harming the social relations protected by the norms provided for in art. 381.

All these being said, we can now proceed to a brief analysis of the next offense.

The offense of desecration of places or objects of worship (art. 382)

The offense of desecration of places or objects of worship is defined by the dispositions laid down by art. 382 of the Romanian Criminal Code and it has only one basic version: "*the desecration of a place or object of worship belonging to a religious denomination which is organized and operates according to the law, shall be punishable by no less than 6 months and no more than 2 years of imprisonment or by a fine.*"

In the view of the Romanian legislator, this legal text is necessary as it provides a superior legal protection to the social relationships which would not exist in the absence of a collective sentiment of piety and respect towards places or objects of worship (Dobrinioiu 2016b). In turn, this means that the legal object of the offense also includes the inviolability and intangibility of the places and objects of worship.

The material object of the offense, the movable or immovable property against which the action of desecration is aimed, has to be a place or an object of worship (Toader 2014b). The former is an immovable property which plays a specific part in the rituals and beliefs held sacred by the members of a religious cult and it can take many forms: churches, houses of prayer, synagogues, mosques, etc. The latter is also sacred according to the faith of the cult, but it is usually a movable good. There are many examples, including the holy books, personal belongings of the women and men considered to be saints or of a similar status, statues, icons, etc.

Any person, natural or legal, may be an active subject of the offense, while the State is primary passive subject, as it is the one who represents the society which is interested in preserving these values (Grofu 2016, 103). The information provided for the notions of active and passive subject for the offense provided for by art. 381 of the Criminal Code should be applied accordingly, as there are no major differences on this subject.

The offense of desecration of places or objects of worship cannot be committed in the absence of a religious cult which is organized and operates according to the law (Dobrinioiu 2016b). This means that the act has to be committed in reference to one of the 18 religious cults mentioned by the annex of Law no. 489/2006.

The *actus reus* of the offense is always an action of desecration directed against a place or an object of worship. According to the legal doctrine, to desecrate could be defined as to defile, to manifest a serious lack of respect towards something (Dobrinioiu 2016b). Consequently, the deed may be committed in a variety of manners. The perpetrator could choose to draw obscene scenes on a place of worship or they could elect to have sexual intercourse in a place of worship. It is also possible to desecrate a place of worship by destroying some of its component goods: burning the benches, smashing the windows, tearing the canvases, making holes in the wall and thus destroying the paintings etc. In our opinion, especially given the growing culture of intolerance, the judicial authorities should be prepared for concurrent infringements on multiple legal texts. For example, if one chooses to destroy a holy relic in an attempt to desecrate it, they may very well commit at the same time and through the same action (*concur formal de infracțiuni*) both the offenses of desecration of an object of worship, provided for by art. 382, and the offense of destruction, provided for by art. 253 of the Criminal Code.

Turning to the analysis of the required *mens rea*, one should remember that most of the authors agree that it does not matter if the perpetrator acts with intent or with knowledge. At the first glance, it would seem that the dispositions provided for by art. 382 require the commission of the act with a *dolus specialis*, as they mention the action of desecration.

Considering the information provided above, we can now turn to the next offense.

The offense of desecration of corpses or graves (art. 383)

The offense of desecration of corpses or graves is defined by the dispositions laid down by art. 383 of the Romanian Criminal Code and it has two versions. Its basic version, according to the first paragraph, states that „*the theft, removal, destruction or desecration of a corpse or of the ashes resulting from its cremation shall be punishable by no less than 6 months and no more than 3 years of imprisonment.*” The second paragraph introduces what is called in the Romanian legal literature a mitigated version, which reads as follows: „*the desecration, by any means, of a grave, of a funeral urn or of a funereal monument shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine.*”

The legal object of this offense is composed of the social relationships which could not exist in the absence of a sentiment of piety and respect towards the memory of the dead, their human remains and the places of burial (Dobrinioiu 2016c). We are of the same opinion, but we would also suggest that the preservation of this sentiments is also important for the

protection of social peace. The phenomenon of death and the corresponding need to deal with the human remains of the deceased are universal, regardless of politics, religious beliefs, social or economic status etc. Thus, it is justified to use the instruments provided by the criminal law in order to protect a civilized manner of dealing with these fundamental social components.

The material object of the offense of desecration of corpses or graves should not be limited to the obvious two material entities which could be affected as a result of the act. In fact, one should take into account the great diversity of funeral rituals and how these hundreds of particularities are reflected on how a society deals with the human remains of the deceased. Therefore, in its basic version, the material object may be:

- a) the corpse of the deceased person;
- b) the ashes which resulted from the incineration of a corpse;
- c) the various goods which may be used to decorate or cloth the body, or the goods which play a symbolical part in the funeral ritual and are placed near/or/in the corpse/ashes.

As we previously said, the offense has a mitigated version which is provided for in the second paragraph of art. 381 of the Criminal Code. According to these dispositions, one should remember that the material object of the crime could be:

- a) the grave of a deceased person;
- b) a funerary urn;
- c) a funerary monument (statues, crosses, paintings, even a pile of stones if it is considered a funerary monument according to the beliefs of a religious cult);
- d) the accessories and decorations of a grave, urn or funerary monument.

Any legal or natural person could commit the offense of desecration of corpses or graves, as the legal texts do not state that the active subject should meet certain specific requirements. As in the previous cases, the primary passive subject is the State, as it is the representative of the society which is harmed by the violation of these basic rules of conduct (Toader 2014c).

The offense cannot be committed in the absence of a prerequisite situation, as the desecration has to occur in relation to a corpse, the ashes resulted from the incineration of a corpse, a grave, a funerary urn or a funerary monument (Grofu 2016, 109). Consequently, one could argue that the prerequisite situation to the commission of these acts is the previous decease of a person. This death may occur in ordinary circumstances or in extraordinary ones. The latter are also relevant, especially when funerary monuments are in question. For example, the family who wants to celebrate the memory of someone who disappeared during a flooding and has been declared dead may want to erect a statue in the memory of the lost one.

The *actus reus* of the offense is always an action of desecration (of defilement). We have already explained the notion of desecration in the previous section and those ideas are also applicable in this scenario. The only thing that changes the dynamic of the specific acts is the fact that the perpetrator targets not a place or object of worship, but a corpse, a grave, a funerary urn or a funerary monument.

Similarly, regarding the *mens rea*, multiple authors (Toader 2014c) agree that the perpetrator has to act with intent or with knowledge. Therefore, *dolus specialis* is not required, but, if it is present, the judicial organs may take it into account when analysing the seriousness of the criminal conduct.

While the subject is indeed extremely interesting, we must observe the spatial limits of this paper, so we will begin the review of the last offense.

The offense of illegal harvesting of tissues or organs (art. 384)

The offense of illegal harvesting of tissues or organs is defined by the dispositions provided for by art. 384 of the Romanian Criminal Code, which state that the „*unlawful harvesting of*

tissues or organs from a corpse shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine.” Therefore, the Romanian legislator of 2014 elected to include in the Criminal Code only one basic version for this offense.

However, one should take into account that these norms were not created in 2014. In fact, the text of the art. 384 was retrieved from the already existing content of *Law no. 95/2006 on the reformation of the health field*, published in Monitorul Oficial no. nr. 652 of 28th of August 2015, more precisely from art. 155 of the said law (Toader 2014d).

In order to understand these norms, one should start by defining the notions of corpse, tissue and organ. The notion of corpse is defined by art. 1 par. (1) of the *Law no. 104/2003 on the manipulation of corpses and on the collection of tissues and organs from corpses for transplantation*, published in Monitorul Oficial no. 213 of 25th of March 2014, where it is stated that a cadaver is a person who no longer presents any sign of brain, heart or respiratory activity and who is declared dead from a medical point of view, according to the law.

The legal object of the offense is composed of the social relationships which could not exist in the absence of the collective and/or individual sentiments of piety and respect towards the memory and the human remains of the deceased, sentiments which should characterise any medical tissue and/or organ sampling process (Dobrinouiu 2016d). Given the fact that the legislator chose to include this norm in a chapter of the Criminal Code which is dedicated to the protection of the sentiment of respect toward the deceased, we are of the same opinion. The material object of the offense is the corpse of a human being, human remains which are used by the perpetrator as a source of biological material for medical purposes.

Like in the cases of the previous offenses, any legal or natural person may be the active subject, as there are no special requirements which are to be met (Dobrinouiu 2016d). However, some authors have highlighted the fact that it is much more probable for the crime to be committed by someone who has medical training, like a surgeon, a nurse or even a medical student. The primary passive subject of the crime is the Romanian State, as it is the representative of the society which has the interest to protect the basic human values necessary for a civilized and humane process of collecting the organs.

Regarding the prerequisite situation, one should easily notice that the offense of illegal harvesting of tissues or organs, provided for by art. 384 of the Criminal Code, cannot be committed in the absence of the decease of a human being, death which occurs in circumstances which favour the harvesting of tissues and/or organs.

The *actus reus* of the offense is represented by an action of harvesting of tissues or organs. As this is a medical, highly sensitive operation, one should expect it to be conducted in a specific manner, thus giving the perpetrator a reasonable chance to achieve a successful removal and preservation of the desired tissue and/or organ. One should also note that there are also two conditions which have to be met by the *actus reus*. Firstly, the harvesting has to be conducted in an unlawful manner, i.e., by infringing upon the disposition of Law no. 95/2006 or of Law no. 104/2003. One should take note of the fact that it is not necessary for the breach of the law to amount to an offense or to a crime (both known in Romanian under the term *infrațiune*), as it is sometimes sufficient to commit a mere disciplinary misconduct by ignoring the medical procedure imposed by the law. Secondly, the harvesting of tissues or organs has to occur in relation to a corpse. If the perpetrator removes tissues or organs from a living human being, one should analyse the act as an offense or a crime against the health or the physical integrity of an individual (for example, bodily harm according to art. 194 of the Criminal Code).

The perpetrator has to act with the intent to unlawfully harvest an organ or a tissue, but there are also some discussions in the legal doctrine regarding the possibility of the perpetrator to act simply with knowledge (Toader 2014d).

We have now presented the most important elements of the offenses against freedom of religion and respect towards the dead. Therefore, we are now ready to draw a conclusion to our examination, thus highlighting once more the most important ideas included in our paper.

Conclusions

Criminal Code In 2014, the Romanian legislator tried to amend the criminal legislation in order to offer a superior legal protection to some of the most important values traditionally known to human societies. A task which was long overdue, especially given the recent history of the country. The freedom of religion, the freedom of conscience and the respect owed to the memory of the deceased are values which have to be observed by each and every member of a community, as they are intrinsically linked to the realities of the end of our biological life. Therefore, the offenses included in the 3rd Chapter (*offenses against freedom of religion and respect owed to the deceased*) of the 8th Title (*offenses that harm social relationships*) of the Romanian Criminal Code are not only necessary, but also from a cultural, social and historical point of view.

However, it would have been certainly useful if the legislator had chosen to better define the legal notions used to formulate the norms provided for in art. 381-384. As it is, the texts are unnecessarily difficult to read by someone who is not familiar with the legal sciences. Our *de lege ferenda* proposal would be to complement the existing dispositions with the definitions of the concepts now explained in other normative texts. Of course, one could also use norms of reference, thus signalling to the legal subject that they should also consult other legal sources.

Both manners of regulating an already very sensitive issue would provide clarity and ease of access to the law. The former has the advantage of efficacy, as it compiles all the necessary information for the understanding of the norm in one single legal document. Nevertheless, it has the disadvantage of doubling the legal texts already provided for in other special laws. The latter option has the advantage of avoiding the problem of doubling the texts, but it has the disadvantage of creating the need for an extensive research effort on the part of the citizen. If the history of legal practice teaches one lesson, this is that the citizens are rarely inclined to conduct a study of the in-effect norms before acting. Therefore, we would suggest that it would be better if the legislator would consider the first option during its future deliberations.

In the end, one could simply reiterate the fact that these criminal norms are extremely important as they are put in place to prevent the violation of some of the most sacred beliefs of any society at any given time. In world where a culture of intolerance is resurfacing, the State has to intervene in order to protect the core values of its citizens, especially when such ideas are directly linked to the most profound individual and/or collective faiths.

Endnotes

¹ The cults are: the Romanian Orthodox Church, the Serbian Orthodox Diocese of Timișoara, the Roman-Catholic Church, the Romanian Church United with Rome (Greek Catholic), the Diocese of the Armenian Church, the Russian Christian Church of Old Rite of Romania, the Reformed Church of Romania, the Evangelical C.A. Church of Romania, the Lutheran Evangelical Church of Romania, the Unitarian Church of Transylvania, the Union of the Baptist Christian Churches of Romania, the Christian according to the Gospel Church of Romania – the Union of the Christian according to the Gospel Churches of Romania, the Romanian Evangelical Church, the Pentecostal Union – the Apostolic Church of God from Romania, the Seventh-day Adventist Christian Church of Romania, the Romanian Federation of Jewish Communities, the Muslim Cult, the Religious Organization Jehovah's Witnesses. The list may be changed in time, if more cults apply for legal recognition, so one might to consult it in the annex of Law no. 489/2006, which may be accessed on <http://legislatie.just.ro/Public/DetaliiDocument/78355> (last visited on the 12th of February 2021).

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