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Articles on:

Personal Data Protection Bill, 2019

*Responsibilities and Liabilities of Directors under
the Companies Act, 2013*



Poetry 



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“The Capacity to learn is a **Gift**, the ability to learn is a **Skill**, the willingness to learn is a **Choice**.”

- Brian Herbert





From the Desk of the Chairman



CA Hardik Vyas,
Chairman,
Rajkot Branch of
WICASA

Dear student friends,

I take upon this opportunity to communicate with you all through this platform of the newsletter published by the Rajkot Branch of WICASA. We are all aware that the exams for CA Intermediate and CA Finals have been scheduled in the month of November, 2020. I am hopeful that all the students who are going to appear in the upcoming examinations are giving their best of the efforts and making best use of the resources available to them. Several initiatives have been taken by the Institute of Chartered Accountants of India to enhance the preparedness of the examinees by way of free virtual coaching classes, study materials, mock test papers and revision test papers. All the examinees should reap maximum benefits from these resources.

It is notable that the situations we are currently facing are unprecedented, but they should not affect our perseverance and determination to keep ourselves upgraded with the latest amendments. The role of the Chartered Accountants in the present scenario is very crucial, whether be it Assurance function, Management Consultancy, Financial planning and Tax planning and as an articled assistant and a student, you all have immense opportunities to gain practical experience in these areas.

We are planning to come up with series of webinars and practical training workshops to enhance your skills, academic and productivity. We also invite suggestions from all the students with regard to coverage of any specific topic or concept, that are important in their viewpoint and we shall try to cover those specific concepts as well. Apart from the academic concepts, we are also planning events to enhance the computer skills and soft skills of the student fraternity, announcements with regard to which shall be made in due course.

In light of the upcoming festivals, all of you are also requested to exercise maximum caution and care while going to office and work premises in form of use of safety gear and medications, to be safe from the Covid infection. As a responsible citizen of the country, the onus is on us to follow the safety guidelines announced by the government. Let us work together and come out stronger.

The Rajkot Branch of WICASA has been continuously working to come up with new avenues and events for the benefit of the student fraternity. This newsletter is an effective medium for the students to showcase their literary and artistic skills by contribution in form of articles and other content. We request you all to continue sharing these on wicasanewsletter@gmail.com and take benefit of the same.

I wish you all a healthy and happy month ahead. Stay Safe !





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Personal Data Protection Bill, 2019



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DECODING THE PERSONAL DATA PROTECTION BILL, 2019

The world has been shaken by the birth and spread of an invisible virus, a virus for which even the first world countries were not ready. Due to lockdown in many countries around the globe, business houses have resorted to the culture of work-from-home. It has brought forward many unthought questions, and now there is a serious need to contemplate them. For instance, in times of COVID-19, the excessive use of technology has raised concern for personal data protection. It has become imperative to keep a check on offences relating to disclosure and breach of personal data without the consent of the concerned party.

Journey of the Bill

In July 2017, the Government of India formed a committee of experts led by retired Supreme Court Justice BN Srikrishna to study the issues related to data protection in the country. After working on it for a year, the committee submitted a draft of the Personal Data Protection (PDP) Bill in July 2018 and requested feedback from the public, Ministers, stakeholders, and other industry experts.

A revised draft of the Bill was submitted in the Lok Sabha on December 11, 2019 and has been sent to a joint parliamentary committee (JPC) for further deliberations before being taken up for passing. The Bill is expected to become a law or an Act in 2020.

Why Do We Need A Data Protection Bill?

Currently in the absence of specific legislation, data protection is achieved in India on the idea of the subsequent legislation, which also applies to other aspects of online regulation, like e-commerce and cybercrime. Additional needs are as follows:

1. Rights of individuals to exercise control over their personal data processed by organisations.
2. Technical, physical and organisational measures to protect the security of personal data.
3. Enforcement and penalties to ensure adequate governance.
4. Timely detection, notification and management of security incidents and breaches.





Personal Data Protection Bill, 2019

This draft bill attempts to fulfil the above needs. Some of the key features of the bill are adaptation of contemporary technology, informed consent, controller accountability, structured enforcement and deterrent penalties. This bill ensures that processing of personal data that has been collected, disclosed, shared or otherwise processed within the territory of India complies to the act which shall be enacted after passing.

Applicability of the bill

After getting passed by both the houses of parliament and getting the assent from the president, the bill shall be applicable to processing of private data by the government, companies incorporated in India and foreign companies dealing with the personal data of individuals in India. Further, the proposed law applies to both manual and automatic processing.

Crucial components of the bill

1. Responsibility on Data Fiduciary

Data Fiduciary is the service provider who determines the purpose and manner of data processing. For example, Google collects its users' information and then determines what such information is going to be used for generating more revenue through advertisements.

Responsibilities of the data fiduciary according to the bill are as follows:

- (i) implementing security safeguards (such as data encryption and preventing misuse of data)
- (ii) instituting grievance redressal mechanisms to address complaints of individuals. They must also institute mechanisms for age verification and parental consent when processing sensitive personal data of children.

2. Rights to Individuals

Personal Data can be referred to as any information that is collected online or offline which can be used to identify a person like name, address, phone number, location, shopping history, photographs, telephone records, food preferences, movie preferences, online search history, messages, devices users own, and social media activities.

The rights given under the bill are as follows:

- (i) obtain confirmation from the fiduciary on whether their personal data has been processed
- (ii) seek correction of inaccurate, incomplete, or out-of-date personal data
- (iii) have personal data transferred to any other data fiduciary in certain circumstances
- (iv) restrict continuing disclosure of their personal data by a fiduciary





Personal Data Protection Bill, 2019

3. Social media intermediaries

According to the bill, these include intermediaries which enable online interaction between users and allow for sharing of information. All such intermediaries which have users above a notified threshold, and whose actions can impact electoral democracy or public order, have certain obligations, which include providing a voluntary user verification mechanism for users in India.

4. Data localization

Sensitive Personal Data includes health care data (like private information you share with a doctor or healthcare apps), financial data (banking and payments information), sexual orientation, biometrics (facial images, fingerprints, iris scans), caste or tribe, religious and political beliefs. Critical Personal Data has not yet been defined by the government.

In terms of data localization, the Bill allows transfer of personal data across borders without any limitations. However, restrictions are placed on “sensitive personal data” which must be stored in India. Sensitive personal data also can be processed outside the country if the regulator approves it. For “critical personal data”, the government will notify on its own, which needs to be stored and processed within the country.

Impact of the bill on the stakeholders

Impact on General Public

The proposed Bill gives high priority to individual rights on data protection. As per the Bill, citizens’ personal information cannot be collected, processed, and shared without their consent. Only the required data will be collected and may be used for pre-defined purposes only. The companies are required to be clear and concise on what data is collected, its purpose, how it will be used, and the data is to be preserved for a much longer duration. The Bill also permits customers to move their data from one provider to another and allows users to get informed about the companies with whom the data is shared.

One of the flaws in the bill can be identified that though the data is localised, the security of that data has not been met within the bill. There are chances of leak of personal information even in the country itself, but there is no such proposition in the bill.





Personal Data Protection Bill, 2019

Impact on the Organisations

The introduction of data localization restrictions on payment system operators in 2018 faced resistance from global giants, such as Apple, Google and Amazon, who saw great potential for their e-wallet businesses in the Indian market. However, the Indian government refused to take a step back. The new Bill now extends these restrictions to a much broader category of data.

In order to incentivize companies to store data in India, and to allow India to reap benefits of huge revenues from the potential data center market, the Union Budget 2020-21 encourages private players to set up data center parks in India.

But, this encouragement will bring in a situation of high responsibilities and much higher cost of compliance. Private entities are required to put limits on data collection, processing, and storage of their customers' data. They're subjected to report any instances of security incidents to the regulator. Additional responsibilities also are imposed on companies based on the volume of data they collect from customers. This includes periodic security audits, appointment of a data protection officer, and performing data protection assessments defined by the regulator. Social media platform providers also will be mandated to enable customers to verify their accounts.

Proposed Penalties

Deterrent penalties are proposed for failing to comply with the data protection requirements. According to the Bill, any organization sharing customers' data without their consent will entail a fine of INR 15 crores (around US\$ 2.1M) or 4 percent of its global turnover. Data breach and delay to address/report the same will end in a fine of INR 5 crores (US\$ 0.7M) or 2 percent of worldwide turnover. Individuals representing the companies can also be sentenced to term in prison.

Conclusion

The Personal Data Protection Bill seeks to bring a variety of considerable changes to the prevailing general data protection regime in India. The Indian Data Fiduciaries will be aligned with global best practices on Personal Data once this bill gets passed. For Indian corporates, this may mean reassessing the character and quantum of Personal Data they collect, store and process, re-evaluating their current practices surrounding consent and notice, and choosing on the treatment of their legacy data. Given the importance of this bill, it will call upon debates and amendments in the bill.





Responsibilities and Liabilities of Director under Companies Act, 2013



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Introduction

The director of a company is responsible for smoothly carrying out the business and managing the day to day affairs of the company. They are appointed by the shareholders for the efficient and effective running of the company as professionals. The relationship between a director and the shareholder is that of a 'fiduciary' (*i.e. based on Trust*). They are entrusted with lots of powers and with power comes liability and duty too. Many of such powers, duties and liabilities have been drafted in the Companies Act.

Section 149(1) of Companies Act, 2013 stipulates that the company should have Board of Directors. As per Section 2(34) of Companies Act 2013, "Director" means a director appointed to the Board of a company

Majorly, directors are categorized as follows and is explained in brief:

A. Executive Directors

- 1) **Whole Time Director:** *He is in whole time employment and looks after the overall functioning and management of the company.*
- 2) **Managing Director:** *He is the head of management who has substantial powers to control and direct managerial affairs subject to the Board's approval.*

B. Non-Executive Directors: He is neither a Whole-time Director, Managing Director nor a nominee director.

C. Independent Directors: He is a non-executive director with pecuniary relationship with the company, its promoters, senior management or affiliate companies, is not related to promoters or the senior management, and/or has not been an executive with the company in the three preceding financial years as defined in sec 149(6).





Responsibilities and Liabilities of Director under Companies Act, 2013

D. Others: *On the basis of the purpose of their appointment, further types of directors are recognized as follows:*

- ✓ **First Director:** *Until directors are appointed in AGM, subscribers to MOA are the first directors.*
- ✓ **Additional Director:** *At the discretion of the board, additional directors can be appointed who will hold office until next AGM.*
- ✓ **Alternate Director:** *Board may also appoint an alternate director who will act when the original director is not present for a minimum of 3 months, subject to the articles of the company.*
- ✓ **Rotational Director:** *These directors have to retire at the end of their tenure due to rotational retirement mandated as per Companies Act 2013.*
- ✓ **Nominee Director:** *These are appointed by certain shareholders in case of oppression and mismanagement in the company. However, their liability is not just restricted to such handful of shareholders but extends to all shareholders as a whole.*
- ✓ **Resident Director:** *These are the ones who have resided in India for at least 182 days in the immediately preceding Financial year.*

1) **Responsibilities of Directors**

Before understanding what are the responsibilities of Directors under the Company Law, first let us understand the difference between **Duty** and **Responsibility**. In normal parlance, the main difference between the two is; **Duty** is that which one is morally or legally obligated to do; while **Responsibility** is the state of being responsible, accountable and answerable.

Through the above difference, we can reach to the conclusion that, Responsibility is much wider term than the Duty, and responsibility includes Duty also.

Therefore, as per Section 166 of the Companies Act, 2013, following are the Duties of Directors.:

a) **Acting in Good Faith and in Best Interest:**

He shall act in good faith in order to promote the objects of the company for the benefit of members as a whole, and in the best interests of the company, its employees, the shareholders, the community, and for the protection of environment.





Responsibilities and Liabilities of Director under Companies Act, 2013

b) Acting with care, skill and Independent judgement:

Director shall exercise his duties with due and reasonable care. Further, an exercise of judgement indicates that there should be no external influence, and he should have complete freedom to reach to his judgement.

c) No undue Gain or Advantage:

It stipulates that, no personal benefit should be made out of the company's business, neither it should accrue to director's relatives, partners or associates. The intent behind this is that, there should not be any loss to the company.

d) No Assignment:

Directors shall not assign his office's rights to another person, and if done it shall be Void.

Now as regards responsibilities are concerned, the Companies Act, 2013 has given some powers to the Board of Directors as per **Section 179(3)** of the Act which stipulates the powers which are exercisable only by the Board by passing of the Board Resolution in the Board meeting only. The Shareholders will not have any right to take part in the decision making and management of the company which is reserved exclusively for the Board of Directors of the company. The Board shall not exercise any power which is required to be exercised by the company in general meeting.

The following are the powers of Board of Directors;

- a) to make **calls on shareholders** in respect of money unpaid on their shares
- b) to authorise **buy-back of securities** under section 68
- c) to issue **securities, including debentures**, whether in or outside India
- d) to **borrow monies**
- e) to **invest the funds** of the company
- f) to **grant loans** or **give guarantee** or **provide security** in respect of loans
- g) to **approve financial statement** and the **Board's report**
- h) to **diversify the business** of the company
- i) to **approve amalgamation, merger** or **reconstruction**
- j) to **take over** a company or **acquire** a controlling or substantial stake in another company
- k) to **make political contributions**
- l) to **appoint** or **remove Key Managerial Personnel (KMP)**
- m) to **appoint internal auditors** and **secretarial auditor**





Responsibilities and Liabilities of Director under Companies Act, 2013

The Board by passing a resolution at its meeting, may delegate the powers specified in clauses (d) to (f) above to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office.

2) Liabilities of Directors

Directors are exposed to liabilities, it may be 'civil' or 'criminal' in nature in case of breach of duties by them. In cases of civil liabilities, the liability is set off by making payment or compensating the affected party whereas criminal liabilities, mentioned under various statutes, attract punishments for the person responsible for such breach.

Further, penal provisions throughout the Companies Act, 2013 have been made more stringent and provide for increased penalties as compared to the Companies Act, 1956. On an average, the minimum amount of fine that is imposed under certain Sections of the 2013 Act is Rs. 25,000/- which in certain cases extends to Rs.25 crores or even more.

In the following contraventions, the amount of penalties is **Rs. 1 Crore** or even more.

- Violation of provisions relating to Non-profit companies (**Section 8**)
- Violation of provisions relating to subscription of securities on private placement (**Section 42**)
- Issue of duplicate share certificates with an intent to defraud (**Section 46 (5)**)
- Failure to repay deposits within specified time (**Section 74 (3)**)

The liability of a director could arise in the following manner:

- ✓ **Breach of fiduciary duty**
- ✓ **Ultra-viresacts**
- ✓ **Negligence**
- ✓ **Malafide acts/intentions**

Apart from monetary penalties, certain offences even attract imprisonment. Most of the offences leading to imprisonment under the 2013 Act are non-cognizable (it would need a warrant to arrest) but there are certain serious offences which are cognizable in nature and would not require a warrant to arrest. These offences are mainly connected to fraud or intent to defraud. Some of such offences are listed below:

Section 7(6) - Furnishing of any false or incorrect particulars regarding any information or suppressing any material information, in any of the documents filed with the Registrar of Companies in relation to the registration of a company. In this case, the directors making such declaration shall be liable for action **under section 447.**



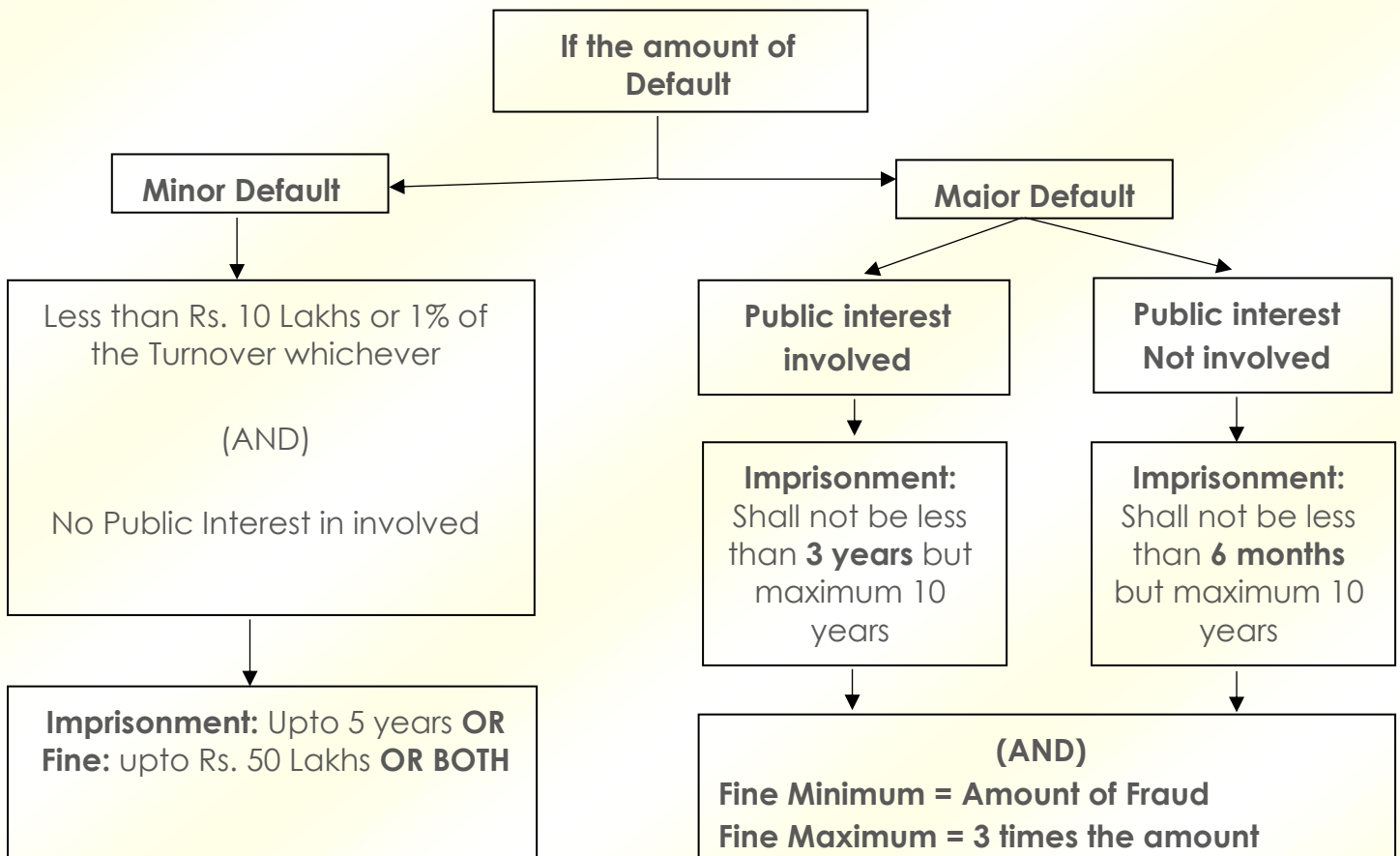


Responsibilities and Liabilities of Director under Companies Act, 2013

Section 34 - According to this section, every person who authorizes the issue of such prospectus which contains untrue or misleading statements in the form of inclusion or omission thereby inducing another person to buy shares on that faith will be subject to imprisonment shall be liable for action under section 447.

Section 36 - Fraudulently inducing person to invest any money. Shall be liable for action under section 447.

Now, let us discuss the provision of **Section 447** with the help of a chart which is about Punishment for Fraud:





Responsibilities and Liabilities of Director under Companies Act, 2013

- Section 53** – This section strictly prohibits any company to issue shares at a discount. Recently the changes were made in the penalty provisions as per *The Companies (Amendment) Ordinance, 2019*. Non-compliance of this section results in a fine for the company and the officer in default which is equal to the amount raised by the issue of shares at discount or Rs. 5Lakhs, whichever is less. Company shall also be liable to refund the money received with interest @ 12% p.a. from the date of issue of the shares.
- Section 56** – Default relating to transfer and transmission of shares with an intent to fraud - every officer of the company who is in default shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees.
- Section 68** – This section contains provisions and guidelines to be followed by the company while buying back its own shares or other securities. According to Section 68 (11), in case of default by the company in complying with the provisions of aforesaid section or guidelines laid down by SEBI, criminal liability of the officer in default of such company shall be imprisonment up to 3 (three) years or fine not less than One lakh rupees which may extend to three lakhs rupees or both.
- Section 71(11)** – This section deals with issuing of debentures by the company for financing with an option to convert such debentures into shares, wholly or partly, at the time of redemption. Non-compliance shall make the officer in default liable for imprisonment for a period which may extend up to 3 (three) years or fine of 2 (two) lakhs to 5 (five) lakhs or both.

Section 86 -Failure to Register Charge

Officer in default - Maximum imprisonment of six months **or** a fine not less than Rs. 25,000 which may extend to Rs.1 lakh **or both**. If any person wilfully furnishes any false or incorrect information or knowingly suppresses any material information which is required to be registered as per section 77, he shall also be liable for action under **section 447**.

Section 92(5) - Failure to file Annual return

Officer in default – Shall be liable for penalty of Rs. 50,000/- and in case of continuing failure, further penalty of Rs.100 per day which may extend to maximum Rs.5 lakhs.





Responsibilities and Liabilities of Director under Companies Act, 2013

Section 118(12) - Tampering with the minutes of proceedings of general meeting, meeting of Board of Directors and any other meetings and resolutions passed by postal ballot.

Any person found guilty of tampering with the minutes - Maximum imprisonment for 2 years and a fine not less than Rs. 25,000 but which may extend to Rs.1 lakh

Section 128(6) - Failure to keep Books of accounts

Maximum imprisonment of 1 year or a fine not less than Rs. 50,000 which may extend to Rs.5 lakhs or both.

Section 185(4) (ii)- Loan to directors in contravention of section 185

Maximum imprisonment of 6 months or a fine not less than Rs.5 lakhs which may extend to Rs.25 lakhs.

Section 186(13) - Loan and investment by Company

Maximum imprisonment of 2 years or a fine not less than Rs. 25,000 which may extend to Rs.1 lakh.

Section 187(4) – Investments of company to be held in its own name:

Maximum imprisonment of 6 months or a fine not less than Rs. 25,000 which may extend to Rs.1 lakh or both.

CONCLUSION

Every director or officer-in-default of a company has huge responsibility of complying with various provisions of the Companies Act while dealing with the matters of the company and failure to abide by the provisions of the Act can lead to huge penalties to the company as well as themselves individually which can be in both civil and criminal form. Thus, they must be aware of the various compliance which needs to be performed. Therefore, a director must be careful while dealing with the affairs of the company and must ensure the maximum amount of transparency in his/her actions.





Poetry

ન જાણે સમય ધીમો થયો છે કે થંભી ગઈ છે જીંદગી,
સંપન્ન માણસ વાત કરે બિતર ઝાંકવની,
તો રોજીંદુ કમાનાર બે ટંક માટે કરે ખુદાની બંદગી,

બિમારી દૂર કરવા લડતાં યોદ્ધાને નડે છે દુશ્મન બની બેઠેલાં ની નાદાની,
ઈશ્વરના છે બંને સંતાન છતાં બેચની અલગ અલગ પસંદગી,

રોજિંદા જીવનની ફરિયાદ કરનારાને અકળાવે છે હવે ક્ષણ સુકૂનની,
પોતાનાને બચાવવા પોતાનાઓથી દૂર રહેવા પાંજરે પુરાયેલી છે જાણે જીંદગી,

ડાર્યા વિના, હિંમત હાર્યા વિના વાત છે એક સાથે રહીને ઝઝૂમવાની,
દુનિયા આખી ઝંખે હવે અંધારી કાળી રાત્રિ પછીની સવાર સુવર્ણ રંગી,
ન જાણે સમય ધીમો થયો છે કે થંભી ગઈ છે જીંદગી....

Contributed by: Meet Ganatra [WR00526377]



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