CHILDREN BELOW THE AGE OF CRIMINAL RESPONSIBILITY IN BRAZIL: MEASURES, RIGHTS, PROCEDURES, PARTICIPATION

National report for the comparative and collaborative research of the AIMJF

Niños por debajo de la edad de responsabilidad penal en Brasil: medidas, derechos, procedimiento, participación

Informe nacional para la investigación comparativa y colaborativa de la AIMJF

Enfants n'ayant pas atteint l'âge de la responsabilité pénale au Brésil: mesures, droits, procédure, participation

Rapport national pour la recherche comparative et collaborative de l´AIMJF

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Abstract: This document is part of a collaborative research project organized by the International Association of Youth and Family Magistrates (AIMJF) on children below the age of criminal responsibility. The article explains the applicable measures, the procedures adopted, the rights of the child, and their participation in the Protection and Justice System in Brazil.

Resumen: El documento es parte de una investigación colaborativa organizada por la Asociación Internacional de Juventud y Familia (AIMJF) sobre niños por debajo de la edad de responsabilidad penal. El artículo explica las medidas aplicables, el procedimiento adoptado, los derechos del niño y su participación en el sistema de protección y de justicia en Brasil.

Résumé : Le document fait partie d´une recherche collaborative organisée par l´Association Internationale des Magistrats de la Jeunesse et de la Famille (AIMJF) sur

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les enfants n'ayant pas atteint l'âge de la responsabilité pénale. L´article explique les mesures passibles d'application et la procédure adoptée, les droits des enfants et leur participation dans le système de protection et de justice au Brésil.

Introduction

The International Association of Youth and Family Judges and Magistrates (IAYFJM) represents global efforts to establish links between judges from different countries, promoting transnational judicial dialogue in order to provide better conditions for qualified care for children based on a human rights approach.

To this end, the IAJF organizes research on international problems faced by the functioning of courts, various laws relating to youth and the family, and training programs.

The objectives of this research are to identify similarities and discrepancies between countries and to develop a map of measures, rights, procedures, and participation of children below the age of criminal responsibility worldwide.

This national report is based on a questionnaire developed by the AIMJF.

QUESTIONNAIRE:

1. General information

1.1. What is the minimum age of criminal responsibility in your country (the **minimum age of criminal responsibility** is the age below which a child is considered incapable of committing a criminal offense; it may also be called **the age of juvenile responsibility or the age of responsibility for children, and is different from the age at which a person becomes an adult)**?

In Brazil, there is an age difference between children, such as those under 12, and adolescents, those between 12 and 18. Only adolescents are considered responsible, so the minimum age of criminal responsibility is 12.

1.2. Is there more than one minimum age of criminal responsibility? Which one? Is it possible to apply the "doli incapax rule" in your country (the possibility of

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demonstrating that the child is sufficiently mature and capable of understanding that the behavior was a crime and, therefore, could be criminally responsible)?

There is no more than one minimum age in the country, nor is it possible to apply the *doli incapax* rule.

2. Age assessment

2.1. In the case of application of the "doli incapax rule," how is this assessment made? Is there a specific methodology for this assessment? A protocol on how t te the assessment? Who assesses the child? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to contest the conclusions of this assessment?

Not applicable to the country.

2.2. If an age assessment is necessary (due to lack of birth registration), how is this assessment carried out? Is there a procedure? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to contest the conclusions of this assessment?

In Brazil, there is no specific age assessment procedure for the purposes of criminal responsibility.

Every child must have a birth certificate, and age is determined based on civil documentation.

The government is concerned that all children be registered at birth. According to the public records law, all births must be registered within 15 days, which may be extended to up to three months in the case of locations more than 30 kilometers from the registry office (Law 6.015/1973, Article 50[2]). Civil birth registration must be done in the locality where the person was born or in the place of residence of the parents (father, mother) or legal guardian. Birth registration is free of charge.

[2] https://www.planalto.gov.br/ccivil_03/leis/l6015compilada.htm

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There are several initiatives to ensure that registration takes place, with a national commitment to the civil identification of all children and adolescents at various levels (Decree 10.063, 2019[3]). There is a recommendation that the courts responsible for public records take action to guarantee this right of citizenship (Recommendation 17 of the National Council of Justice[4]). The number of children without birth registration has been decreasing, reaching a historic low of 1.31% in 2022, which represents 33,700 births that were not registered within the legal deadline, according to the IBGE – Brazilian Institute of Geography and Statistics. However, there are still children in this situation, especially in the North (the Amazon) and Northeast regions, where underreporting is higher, especially among indigenous communities[5].

If the child has not been registered within the legal deadline, which varies according to the place of birth, there is no fine, and the parents can go to the Civil Registry Office closest to where they live, accompanied by two witnesses, with all possible documents to prove the data.

In the case of adolescents over 12 years of age, the applicant and witnesses are interviewed by the registrar, who, in case of suspicion, may refer the request to a court for a decision.

There is no legal provision for hearing the child in these proceedings, which are independent of any assessment of the offense. Whatever is decided by the civil registry office or, in case of doubt, by the registry judge, will be observed by the authorities responsible for investigating the offense.

3. Police intervention

3.1. If a child below the minimum age of criminal responsibility commits an act considered a crime, is he or she taken to a police station? Is this mandatory? If not, in what situations is it necessary to be taken to the police station?

The Statute of the Child and Adolescent provides in its Article 105 that " Art. 105. The measures provided for in art. 101 shall correspond to the offense committed by a

[3] https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D10063.htm
[4] https://atos.cnj.jus.br/atos/detalhar/850
[5] https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/40899-censo-2022-99-3-das-criancas-com-ate-5-anos-tem-registro-de-nascimento-em-cartorio

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child." Therefore, only protective measures are provided for, under the responsibility of the Guardianship Council, according to Article 136, I - to assist children and adolescents in the cases provided for in Articles 98 and 105, applying the measures provided for in Article 101, I to VII;

Although there is no explicit reference to police intervention, both legal scholars and the practice of the responsible agencies validate the involvement of police stations.

According to Murillo José Digiácomo, "the Guardianship Council is a body for the defense of children's and adolescents' rights par excellence (cf. Article 131 of Law No. 8,069/90), and the duty to assist children accused of committing an offense is a natural consequence of the provisions of Article 98, item III, in conjunction with Articles 131 and 136, item I, of Law No. 8,069/90, not giving rise to "police-like" action by the body in the sense of "repressing" the respective illegal conduct, which, as a true constitutional mission, is the responsibility of the judicial police. It is worth mentioning that, for the purposes of applying protective measures to the child accused of committing an offense and to his or her family, "proof" of the child's actual participation in the respective offense is considered absolutely irrelevant, It is sufficient for the Guardianship Council to assess the presence of one of the situations provided for in Article 98 of Law No. 8,069/90, which must occur immediately after the incident is reported, regardless of the conclusion of the judicial police's investigations into the perpetrator and the materiality of the offense. We must remember that measures of a solely protective nature applicable to children accused of committing an offense and/or who are in the situations described in Article 98 of Law No. 8,069/90 are not coercive in nature, being in any case guided by the principles set forth in Articles 99 and 100, caput and sole paragraph, of Law No. 8,069/90. of Law No. 8,069/90. As a result of this basic finding, it is clear that their application must fundamentally take into account the specific "educational needs" of the child (as well as their family), for which, much more than a "police" investigation into what the child did, a social (or "psychosocial," as it is commonly called) investigation is considered essential to assess their personal, family, and social situation and determine what measures need to be applied (and with what intensity) to quickly and effectively solve any problems that may be detected. In other words, the objective of the intervention of the Guardianship Council is solely to discover the causes of the offending behavior attributed to the child, with the application—and subsequent monitoring of the

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execution—of measures that will neutralize the situation of threat or actual violation of their fundamental rights, from a solely preventive-protective perspective and NEVER repressive-punitive"[6] .

If this is the case, the same scholar, seconded by João Batista Costa Saraiva[7] , states that: "the investigation of any and all violations of the provisions of criminal law is a task that should be carried out by the judicial police, and it is also possible, in certain situations, to be taken over by the Public Prosecutor's Office, which will, as a rule, be its recipient, thus making it inadmissible for such an investigation to fail to be carried out, particularly in the case of a crime of unconditional public prosecution, given the mere report that the agent was a child. This is an obvious conclusion, based on the following basic premises: 1 - Before the investigation into the perpetrator of a criminal offense of any nature is closed, it is not possible to "conclude" in advance that it was committed solely by a child; 2 - In the case of crimes subject to unconditional public prosecution, the action of law enforcement agencies (i.e., the judicial police) is mandatory, the same being true in relation to offenses subject to conditional or private prosecution, after due provocation by the victim or their representative, and it is incumbent upon them, as part of their official duties, to conduct a full investigation of the incident, identifying all perpetrators and participants; 3 - The fact that a child is accused or even admits to committing an offense does not make it unnecessary for the judicial police to initiate the appropriate investigative procedure, given the possible co-authorship and/or participation of accountable persons (or adolescents) in the offense (or even if it is a false self-accusation, aimed at avoiding the accountability of the true perpetrator of the offense).

A decision by the 10th Civil Chamber of the Rio Grande do Sul Court of Justice ruled out any illegality in taking an 8-year-old child to the police station, provided that the parents and the Guardianship Council are notified[8] .

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[6] Digicácomo, Murillo José. Children accused of committing criminal offenses: how to proceed. https://site.mppr.mp.br/sites/hotsites/arquivos_restritos/files/documento/2023-01/criancaacusadadapraticadeatoinfracional.pdf

[7] Saraiva, João Batista Costa. Compendium of Juvenile Criminal Law. Adolescents and criminal acts. 3rd edition, Porto Alegre, Livraria do Advogado, 2006. Similarly, Belluco, Felipe. Legal regime for children and adolescents who commit criminal acts. JusBrasil, 2016.

[8] Martins, Jomar. Taking a minor to the police station does not cause moral damage. https://www.conjur.com.br/2017-fev-04/conducao-menor-delegacia-policia-nao-causa-dano-moral/.

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However, this guidance is not unanimous. There are police chiefs[9] and also Public Prosecutor's Office Support Centers[10] that advise that children should be referred directly to the Guardianship Council, and not to police stations. This guidance was dictated by episodes of institutional violence by the military police and reported throughout the country, leading to the removal of police officers[11] .

The second interpretation seems more appropriate today. If the child cannot be held responsible for the offense, and their actions may merely result in damages being awarded to the victim or protective measures being applied to the child, any investigation that may be conducted due to the possible involvement of adults should not involve the child. On the part of the victim, the delimitation of responsibility can be done in civil court, without requiring police intervention, which could result in stigmatization of the child. If the guideline for adolescents is that involvement with the justice system should be minimized, this should be even more so in relation to children.

This scenario has caused perplexity in the country, recognizing that not even the manuals or protocols for action by the preventive police regulate the matter, showing that institutional improvement is necessary in this regard.[12]

In a consultation with various professionals in different states, it was found that in about 75% of cases, a police report is filed when children commit an act equivalent to an infraction. In a similar percentage, children are taken to the police station, and in about 25% of cases, some type of "restraint" has already been used. There is no legal possibility of arresting or detaining children, so "restraint" refers to some type of restriction not formally provided for in law and not specified.

Judgment available at https://www.conjur.com.br/wp-content/uploads/2023/09/acordao-modificado-tj-rs-mantem.pdf

[9] Barcellos, Bruno Lima. The role of the police chief in relation to the Statute of Children and Adolescents. 2020. https://www.pjc.mt.gov.br/-/artigo-a-atuacao-do-delegado-de-policia-frente-ao-estatuto-da-crianca-e-adolescente

[10] Operational Support Center of the Public Prosecutor's Office of the State of Maranhão. Technical note to the Military Police on the transportation of children and adolescents. 2022. https://www.mpma.mp.br/mpma-emite-nota-tecnica-para-a-pm-sobre-conducao-de-criancas-e-adolescentes/

[11] https://g1.globo.com/jornal-nacional/noticia/2019/03/09/pm-do-maranhao-afasta-policiais-que-amarraram-menores.ghtml

[12] SOUZA, Luis Carlos Martins & CLEMENTE, Cleyton Alan. Referral of children who commit offenses from the perspective of contemporary legislation. RevPMMS, Vol. 1, No. 2, Aug/2024. https://revista.pm.ms.gov.br/OJS/article/view/12/31

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In most of the reported cases, this "restraint" occurred until the parents or protection agencies (Guardianship Council) were located, but there were exceptional references to stricter restraint, such as handcuffing, in situations of behavioral disturbance.

3.2. If the child is taken to the police station, what is the police expected to do? What legal guarantees does the child have in this context? Is it possible, under any circumstances, for the child to be detained, even for a very short period? If so, how long can the child be deprived of liberty?

Although there is no clear legal definition, based on a systemic interpretation of the duties of the various agencies, Murillo Digiácomo argues that: "It is worth noting that, although indirectly, Law No. 8,069/90 provides for the possibility of apprehending children caught in the act of committing an offense (in accordance with the provisions of Article 230 of the Statute), with subsequent notification by the police authority (and not by the Guardianship Council) to the judicial authority and the family of the apprehended child (or, if this is not possible, to the person indicated by them), including under penalty of committing the crime defined in Article 231 of the same Legal Diploma. And here it is important to highlight: the Law not only provides for the intervention of the police authority when apprehending children caught in the act of committing an offense, but also establishes the obligation of the police to communicate the fact to the family of the apprehended child or to the person indicated by them (and not to the Guardianship Council), and it is incumbent upon the parents or guardian, by analogy with the provisions of Article 174 of Law No. 8,069/90, to receive the child upon signing a statement of responsibility for their subsequent presentation to the Guardianship Council.

"Incidentally, it is necessary that, before their release (notably in the case of crimes subject to unconditional public prosecution or in the case of crimes subject to conditional or private prosecution, after due provocation by the victim or their representative), the child be heard in statements, which must invariably occur in the presence of their parents or guardian and, preferably, through social workers who work in the aforementioned child protection services and/or specialized police stations (or even if they are requested from

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the municipality), and the act should not take the form of an "interrogation" as occurs with an adult.

"It is entirely appropriate, in fact, that in order to avoid further embarrassment to children accused of committing an offense, a differentiated system be established for their care (as should be the case with child victims of violence), with their referral, immediately after apprehension, to a protection program and/or even to the Guardianship Council, with immediate notification of the parents or guardian and the police authority going to the location where the child is, for the purpose of formalizing the seizure of any weapons used and the material object of the offense that may have been seized from the child, and collecting information about the offense committed and, above all, about the possible participation of adults (or, , adolescents) in the episode. What cannot be accepted under any circumstances is the pure and simple "dismissal" of the intervention of the judicial police, particularly in the event of a crime of unconditional public prosecution and/or when weapons, drugs, and other objects related to the incident are seized.[13]

This police investigation, however, should not involve the child, except as a "victim," with analogous application of Law 13.431/2017, excepting their right not to participate in any testimony and, if they so desire, only through a professional specialized in forensic interviews.

In consulting with various professionals from several states, it was found that when taken to the police station (about 75% of cases), children are heard, as a rule, by the police authority itself (police chief). However, there was no reference to the existence of a protocol on how to hear children in this context.

The law does not provide details on the legal guarantees that apply specifically to this context, which leads some to believe that the typical discretion of public administration should be observed[14] . However, it is considered that some of them are compatible with this hearing, since, according to Article 227 of the Federal Constitution,

[13] Digiácomo, Murillo José. Children accused of committing offenses: how to proceed. https://site.mppr.mp.br/sites/hotsites/arquivos_restritos/files/documento/2023-01/criancaacusadadapraticadeatoinfracional.pdf

[14] Public Prosecutor's Office of the State of Rio Grande do Sul. COMMENTS ON ARTICLES 131 TO 140 OF THE STATUTE OF CHILDREN AND ADOLESCENTS, pp. 6-7. https://www.mprs.mp.br/media/areas/infancia/arquivos/comentart.pdf

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"Children and adolescents enjoy all the fundamental rights inherent to human beings." Thus, the following guarantees can be recognized in their favor:

- "Requesting the presence of their parents or guardians at the place of apprehension, whenever possible, and that they be informed of the location of the adolescent after any apprehension, indicating the address and contact telephone number of the police station to which they will be taken

- Not to be handcuffed, except in cases of extreme necessity that are duly justified

- Not being transported in a closed compartment of the police car.

- Have a female officer (female police officer) present with the teams to conduct personal searches of women, if necessary, respecting gender identity and the right of transgender persons to choose whether to be searched by a man or a woman.

- Be informed of their rights, especially the right to remain silent. Although children cannot be formally charged for committing an offense, their statements may compromise their parents, who are legally responsible for any damage they may have caused.

- To record, film, or otherwise document the actions of police officers or guards during the approach and/or apprehension.

- To be approached and/or escorted in a respectful manner by police officers or guards. The police cannot use violence.

- The child has the right not to be exposed to embarrassment or torture. The police cannot order the person to take off their clothes, nor can they order the person to stand in a humiliating position.

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- To be referred to medical care when necessary.[15]

Due to abusive practices, the Federal Supreme Court ordered the drafting of a guiding document, which led to the establishment of a care flow in certain locations, according to which the military police (who provide preventive care) can only approach children if they are accompanied by a guardian or the Guardianship Council (a protection agency).[16]

It is not legally possible for a child to be arrested, even for a short period of time.

4. Measures

4.1. In the case of a child below the minimum age of criminal responsibility who has committed an act considered a crime, is it possible to impose some type of measure? Which one?

According to Article 105 of the ECA, the measures provided for in Article 101 (protective measures or protection in kind, to be applied primarily by the Guardianship Council (Article 136, I) or, alternatively, by the Juvenile Court Judge (Article 136, II) shall apply to offenses committed by children. 101 (protective measures or protection in kind, to be applied primarily by the Guardianship Council (Article 136, I) or, alternatively, by the Juvenile Court Judge (Article 148, VI and VII)

The measures are provided for in Article 101 of the Statute of Children and Adolescents, namely:

I - referral to parents or guardians, subject to a term of responsibility;

II - temporary guidance, support, and monitoring;

III -compulsory enrollment and attendance at an official elementary school;

[15] Public Defender's Office of the State of Rio Grande do Sul. RIGHTS OF CHILDREN AND ADOLESCENTS IN POLICE INTERACTIONS. https://defensoria-admin.rs.gov.br/upload/arquivos/202009/30135655-cartilha-abordagem-policial-28-09-ultima-versao.pdf

[16] https://andi.org.br/infancia_midia/abordagens-de-criancas-ate-11-anos-pela-pm-deve-ser-acompanhada-por-responsavel/

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IV - inclusion in official or community services and programs for the protection, support, and promotion of families, children, and adolescents

V - request for medical, psychological, or psychiatric treatment, in a hospital or outpatient setting;

VI -inclusion in official or community programs for assistance, guidance, and treatment for alcoholics and drug addicts;

VII - institutional care;

VIII - inclusion in a foster care program

IX - placement in a foster family

4.2. Is it possible to impose placement outside the home (shelter or foster care, with another family, in an institution, or in a health care facility)? Under what circumstances? For how long?

Removal from the family environment is one of the measures that may be applied, under the terms of Article 101 of the Statute of the Child and Adolescent, as mentioned above, whether it be foster care, institutional care, or placement of the child in the custody of a third party.

However, under Article 19 of the same law, these measures must be exceptional and always depend on contentious legal proceedings against the parents, under the terms of Article 101, §2, with the child having the right to be heard (Article 100, sole paragraph, XII). Thus, it cannot be applied by a protection agency.

When applied, it must be reviewed quarterly, in accordance with the provisions of Article 19, §1, of the Statute. The maximum time for family separation is 18 months (Article 19, §2).

5. Procedure

5.1. Who imposes these measures?

Protective measures are, as a rule, applied by the Guardianship Council, pursuant to Articles 105 and 136, I, of the Statute of Children and Adolescents.

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They may also be applied by the juvenile court judge, pursuant to Article 148, VI and VII, of the same law. It is understood in case law that the judge has concurrent jurisdiction, that is, there is no limitation on the application of protective measures in relation to children or families, because, being able to review the acts of the Guardianship Council or restrict measures imposed by it (Article 137 of the Statute), the judge is not conditioned by the prior opinion of that body. [17]

5.2. Is there a legal procedure for determining these measures? What is the nature of these procedures? Can you describe it briefly?

The decisions of the Guardianship Council are collegial. It is a protection body composed of five members, elected by the population for a four-year term (Article 139, §1 of the Statute).

The procedures are, as a rule, established in local laws, always governed by principles that regulate administrative activity, namely: *(1)* the principle of hearing the interested party; *(2)* the principle of accessibility to the elements of the case file; *(3)* the principle of broad evidentiary investigation; *(4)* the principle of motivation; *(5)* the principle of reviewability; *(6)* the principle of representation and advice; *(7)* the principle of loyalty and good faith; *(8)* the principle of material truth; *(9)* the principle of officiality; *(10)* the principle of gratuity; and, finally, *(11)* the principle of informality[18]

5.3. Is it possible to adopt alternative resolution mechanisms in these situations, such as mediation or restorative justice?

[17] In this regard, Saraiva, João Batista Costa, citing a decision by the 8th Civil Chamber of the Court of Justice of the State of Rio Grande do Sul. Compendium of juvenile criminal law. Porto Alegre, Livraria do Advogado, 2006, p. 61

[18] Konzen, Afonso Armando. Guardianship Council, school, and family - Partnerships in defense of the right to education. In: Konzen, A. (ed.). For Justice in Education. MEC/FUNDESCOLA, 2000, p. 159 et seq.

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Restorative justice or mediation are adopted in institutions that serve children, such as schools. If offenses occur in these spaces, these alternative conflict resolution mechanisms can be used without the involvement of other protection agencies[19] .

6. Assessment

6.1. Is there any type of assessment of the child for the imposition of such measures (on vulnerabilities, rights violations, risks)? Who assesses the child? Is there a protocol or guideline on how to assess the child? Could you share it?

In Brazil, discussions are underway regarding the introduction of a national assessment mechanism. However, this is still in the preliminary stages. For now, there is a recommendation for the Guardianship Council to consult with the protection network agencies that monitor the family (social assistance, health, and education) to determine the protective measure to be applied.

7. Legal and procedural guarantees

7.1. What are the rights of the child in this procedure (legal and procedural guarantees)?

All children and adolescents have, according to Article 227 of the Federal Constitution, "Children and adolescents enjoy all the fundamental rights inherent to human beings."

Article 100 of the Statute of Children and Adolescents provides that, "in applying the measures, **educational needs shall be taken into account**, **with preference given to those aimed at strengthening family and community ties**.

Sole paragraph. The following are also principles that govern the application of measures:

[19] Melo, Eduardo Rezende; EDNIR, Madza; YAZBEK, Vânia C. **Restorative and Community Justice in São Caetano do Sul**. São Paulo: CECIP, 2008https://www.tjsp.jus.br/Download/CoordenadoriaInfanciaJuventude/JusticaRestaurativa/SaoCaetanoSul/Publicacoes/jr_sao-caetano_090209_bx.pdf

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I - the status of children and adolescents as subjects of rights: children and adolescents are entitled to the rights provided for in this and other laws, as well as in the Federal Constitution;

II - comprehensive and priority protection: the interpretation and application of any and all rules contained in this Law must be geared toward the comprehensive and priority protection of the rights to which children and adolescents are entitled;

III - primary and joint responsibility of the public authorities: the full implementation of the rights guaranteed to children and adolescents by this Law and by the Federal Constitution, except in cases expressly provided for herein, is the primary and joint responsibility of the three (3) levels of government, without prejudice to the municipalization of services and the possibility of programs being implemented by non-governmental entities;

IV - best interests of children and adolescents: intervention must give priority to the interests and rights of children and adolescents, without prejudice to the due consideration given to other legitimate interests within the plurality of interests present in the specific case;

V - privacy: the promotion of the rights and protection of children and adolescents must be carried out with respect for their privacy, right to image, and confidentiality of their private lives;

VI - early intervention: intervention by the competent authorities must be carried out as soon as the dangerous situation becomes known;

VII - minimal intervention: intervention must be carried out exclusively by the authorities and institutions whose action is indispensable for the effective promotion of the rights and protection of children and adolescents;

VIII - proportionality and timeliness: intervention must be necessary and appropriate to the situation of danger in which the child or adolescent finds themselves at the time the decision is made;

IX - parental responsibility: intervention must be carried out in such a way that parents assume their duties towards the child and adolescent;

X - prevalence of the family: in promoting the rights and protection of children and adolescents, priority should be given to measures that maintain or reintegrate them

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into their natural or extended family or, if this is not possible, that promote their integration into an adoptive family;

XI - mandatory information: children and adolescents, taking into account their stage of development and capacity for understanding, their parents or guardians must be informed of their rights, the reasons for the intervention, and how it will be carried out;

XII - mandatory hearing and participation: children and adolescents, separately or in the company of their parents, guardians, or a person designated by them, as well as their parents or guardians, have the right to be heard and to participate in the proceedings and in the definition of measures to promote their rights and protection, their opinions being duly considered by the competent judicial authority, in accordance with the provisions of §§ 1 º and 2 º of Article 28 of this Law.

As mentioned above, specific guarantees for adolescents who commit offenses are also applicable, although not explicitly provided for in the law, namely, the presumption of innocence, the right to be heard, legal assistance, parental supervision and support, the right to review decisions, the right to privacy, and the right to an interpreter, if necessary.

7.2. Does the child have the right to refuse any of these measures? Or to challenge any of these measures in court?

As these measures are intended to be educational, they should, as far as possible, be applied by consensus between the protection agencies, particularly the Guardianship Council, the family, and especially the child.

They must therefore be in line with the values enshrined in Article 29 of the International Convention on the Rights of the Child (CRC), namely, an education based on human rights, and therefore non-discriminatory, pluralistic, and respectful of individuality, diversity, and emancipation. Precisely because of this nature, these measures must respect autonomy and seek consensus, so that the participation of all those involved is essential.

Part of this assumption of participatory and consensual respect is that this pedagogical intervention takes place in the living environment of the people involved, thus preserving family and community ties and respecting the territoriality of care (ECA, Article 100, sole paragraph, items IX and X; MLPI, Article 13).

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In this context, as we have already pointed out elsewhere, the proportionality of the intervention is dictated by this equation between the point at which it is applied and the need to affect the life, and particularly the body, of the child, or more precisely the situation in which they find themselves[20] .

The pedagogical purpose of the measure is also only felt when it is current: an intervention is only justified at the moment when the situation of threat or violation of rights is occurring. In order for it to be meaningful, therefore procedural and constructed with the actors in a dialogical manner, it presupposes the pedagogical openness of those who intervene, so that "those who train are trained and re-trained while training, and those who are trained are trained while being trained... In other words, those who teach learn while teaching, and those who learn teach while learning"[21] . We need to experience this reality so that it becomes an experience, both ours and that of the subjects-actors we involve, in a comprehensive way, whether political, ideological, gnoseological, pedagogical, ethical, or aesthetic[22] .

If pedagogical practice must focus on autonomy (and not merely on control, subjection, and homogenized normalization), pedagogical activity necessarily implies a "taste for rebellion" on the part of those who "teach"[23] , because it must arouse the creative force of learning and creating distinct, unique ways of life, and it is up to us to keep this pedagogical and legal curiosity alive, in our case, by seeing the forms of ethical-political and existential differentiation that will arise from these practices.

Still in this vein, this intervention must be early, when the threat to rights is still in its initial stages, because it is in this context that we have the space and time for mutual learning to take place gradually, through dialogue, avoiding the drastic restriction of rights, as occurs in a case of foster care. For this reason, intervention should also be minimal, occurring "only and solely in that extreme situation that may threaten or violate the rights of children and adolescents and lasting only and solely as long as necessary to avoid the occurrence of this risk. The rule is autonomy and respect for diversity. The rule

[20] MELO, Eduardo Rezende. Article 100. *In*: CURY, Munir (ed.). **Comments on the Statute of Children and Adolescents**. 10th ed. São Paulo: Malheiros, 2010. p. 429
[21] FREIRE, Paulo. **Pedagogy of Autonomy.** Knowledge necessary for educational practice. 30th ed., São Paulo, Paz e Terra, 2004, p. 23
[22] Freire, Ibid., p. 24
[23] Freire, Ibid., p. 25

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is the enjoyment of universal social rights, which do not require anyone's intervention in the way they are enjoyed and exercised"[24] . But it is also minimal in the sense we alluded to earlier: it should fall on the environment, in the context of risk, and not on the children's bodies.

However, if a situation of vulnerability is found, measures may be imposed by the Guardianship Council.

In such a context, the Child Protection Council must apply measures to the child, but also to the parents and guardians, with a parallelism in the Statute of Children and Adolescents between the two.

Measures applied to the child (Article 101)	Corresponding measure applied to parents or guardians (Article 129)
I-referral to parents or guardians, subject to a statement of responsibility;	I - referral to official or community services and programs for the protection, support, and promotion of the family; VII - warning;
II - temporary guidance, support, and monitoring;	I - referral to official or community services and programs for family protection, support, and promotion; VII - warning;
III - compulsory enrollment and attendance at an official elementary school;	V - obligation to enroll the child or ward and monitor their attendance and academic performance; VII - warning;
IV - inclusion in official or community services and programs for the protection, support, and promotion of families, children, and adolescents;	VI - obligation to refer the child or adolescent to specialized treatment; VII - warning;

[24] MELO, Eduardo Rezende. Article 100. *In*: CURY, Munir (ed.). **Comments on the Statute of Children and Adolescents**. 10th ed. São Paulo: Malheiros, 2010, pp. 428-429.

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V - request for medical, psychological, or psychiatric treatment, on an inpatient or outpatient basis;	VI - obligation to refer the child or adolescent to specialized treatment; VII - warning;
VI - inclusion in an official or community program for assistance, guidance, and treatment for alcoholics and drug addicts;	VI - obligation to refer the child or adolescent to specialized treatment; VII - warning;
VII - institutional care;	VIII - loss of custody;
VIII - inclusion in a foster care program;	VIII - loss of custody;
IX - placement in a substitute family.	VIII - loss of custody;

According to Article 137 of the Statute of Children and Adolescents, "the decisions of the Guardianship Council may only be reviewed by the judicial authority at the request of those who have a legitimate interest." Thus, the child or their family members may request a review of the measures in court. If the court decision confirms the measure imposed by the Guardianship Council, an appeal may be filed with the Higher Courts.

7.3. What happens if the child does not comply with the obligations inherent in these measures?

The measures should be educational in nature. To this end, the measures should make sense to the child and should be eminently participatory and not imposed, as mentioned above.

A plan for assisting the child and family must be drawn up, subject to periodic review, which sets out a different decision-making paradigm in the event of non-compliance. The efforts of the protection agencies that will assist the child based on the

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measure imposed must always shift from a traditional, more hierarchical decision-making model to a participatory model involving the family and the child[25] :

Traditional model	Participatory model
1. Demand points to weaknesses or shortcomings	1. Demand points to a desire for action and the existence of a contradiction to be overcome
2. Demand highlights the need for technical intervention to solve the problem	2. Demand highlights the need for change in the quality of social relations to strengthen bonds
3. The decision is made by experts, who establish an action plan to be followed by the family	3. The decision is made by the child and the family, promoting empowerment and shared responsibility
4. The family is viewed from a strictly legal perspective and is generally limited to its nuclear character	4. The family is viewed from an anthropological perspective, as people who can be counted on, through their actions and negotiations, expanding to a network perspective, with the involvement of other actors
5. The plan focuses primarily on individual demands	5. The actions focus on collective demands, promoting reciprocity, consistency, and belonging

[25] Melo, Eduardo Rezende. Care by the extended family or close relatives: a paradigm shift in guaranteeing the right to family and community life for children and adolescents. In: Cabral, Claudia (ed.) Care of Children and Adolescents by Extended Families and Close Relatives. Rio de Janeiro: Brazilian Association Terra dos Homens, 2025, p. 63 et seq.

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6. The plan focuses on weaknesses to be overcome	6. Actions focus on strengths to be enhanced (lifelines, not treatment plans)
7. The space for intervention is that of programs (shaped around problems)	7. The space for negotiation is the environment where the child lives (community-based), shaped around strengthening strategies
8. Intervention is carried out by formal services	8. Formal and informal actions are intertwined in the weaving of networks
9. Children and families are parties, clients, or patients	9. Children, families, and networks are the actors in the process, with the right to speak and decide
10. Decision-making model is heteronomous	10. Decision-making model is based on decision-making participation, negotiation, and respect for autonomy
11. Non-compliance is considered recalcitrance	11. Non-compliance is considered an inadequacy of the plan
12. The role of interveners is to teach how to do and how to care	12. The role of the professional is to build networks of competence, mobilize latent energies, and create innovations that diversify the participation of network actors
13. Plans tend toward standardization and rigidity	13. Actions tend toward individualization, flexibility, and creativity

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14. Care tends to be specialized and segmented, with weak coordination	14. Service is comprehensive, provided by the primary network, with coordinated and complementary support from agencies
15. Weak cultural competence to deal with diversity	15. Attention to diversity

However, if the family does not show the slightest openness to reviewing attitudes, behaviors, and patterns of behavior that favor the involvement of the child in situations of vulnerability and lead them to commit offenses, it is possible that the Guardianship Council will represent the judicial authority to impose other measures, including fines on those responsible for the child.

This means that, in case of non-compliance, no sanction will be imposed on the child, but the focus will be on assessing the protective capacity of the parents and their efforts to ensure a context of care and protection for the child.

According to Articles 249 and of the Statute of Children and Adolescents, it is an administrative offense to "intentionally or negligently fail to comply with the duties inherent to parental authority or arising from guardianship or custody, as well as the determination of the judicial authority or Guardianship Council, subjecting those responsible to a fine of three to twenty reference salaries, with double the amount applying in the event of a repeat offense.

If the parents are unable to provide the necessary care for the child, despite the support provided, it is possible to place the child in the care of extended family or close friends, or in a foster family or institutional care. However, foster care is an exceptional measure and must be reviewed quarterly, with a maximum period of 18 months.

If the child's behavior is dictated by medical needs, compulsory treatment may be imposed, but always subject to a medical report.

Psychiatric hospitalization is also an exceptional measure, as provided for in Law 10.216/2001,

"Art. 6ºPsychiatric hospitalization shall only be carried out on the basis of a detailed medical report that characterizes its reasons.

Sole paragraph. The following types of psychiatric hospitalization are considered:

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I - voluntary hospitalization: that which occurs with the consent of the user;

II - involuntary hospitalization: that which occurs without the consent of the user and at the request of a third party; and

III - compulsory hospitalization: that determined by the courts.

Art. 7ºA person who voluntarily requests admission, or who consents to it, must sign, at the time of admission, a statement that they have opted for this treatment regime.

Sole paragraph. Voluntary hospitalization shall end upon written request by the patient or by determination of the attending physician.

Art. 8º Voluntary or involuntary hospitalization shall only be authorized by a physician duly registered with the Regional Medical Council (CRM) of the state where the facility is located.

§ 1º Involuntary psychiatric hospitalization must be reported within seventy-two hours to the State Public Prosecutor's Office by the technical manager of the establishment where it occurred, and the same procedure must be followed upon discharge.

§ 2º Involuntary hospitalization shall end upon written request by a family member or legal guardian, or when determined by the specialist responsible for treatment.

Art. 9 Compulsory hospitalization is determined, in accordance with current legislation, by the competent judge, who shall take into account the safety conditions of the establishment with regard to the protection of the patient, other inmates, and employees.

Resolution No. 487 of February 15, 2023, of the National Council of Justice, instituted the Anti-Asylum Policy of the Judiciary and establishes procedures and guidelines for implementing the International Convention on the Rights of Persons with Disabilities and Law No. 10,216/2001, in the context of criminal proceedings and the enforcement of security measures. Although aimed at adults formally accused of crimes, it can be applied supplementarily and analogously. According to this Resolution:

Art. 3 The principles and guidelines governing the treatment of persons with mental disorders within the scope of criminal jurisdiction are:

I – respect for the human dignity, uniqueness, and autonomy of each person;

II – respect for diversity and the prohibition of all forms of discrimination and stigmatization, with special attention to intersectional aspects of aggravation and their

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impacts on the black population, LGBTQIA+, women, mothers, fathers or caregivers of children and adolescents, the elderly, convalescents, migrants, the homeless population, indigenous peoples and other traditional populations, in addition to persons with disabilities;

III – due process of law, full defense, adversarial proceedings, and access to justice on equal terms;

IV – the prohibition of torture, ill-treatment, cruel, inhuman, or degrading treatment;

V – the adoption of an anti-asylum policy in the execution of security measures;

VI – the exclusive interest of treatment for the benefit of health, with a view to psychosocial support and rehabilitation through social inclusion, based on the reconstruction of family and community ties and references, the enhancement and strengthening of the person's skills, and access to social protection, income, work, and health care;

VII – the right to comprehensive healthcare, prioritizing care in a therapeutic environment in non-institutional healthcare facilities, using the least invasive means possible, with a ban on disproportionate or prolonged physical, mechanical, or pharmacological restraint methods, excessive medicalization, denial of access to treatment or medication, compulsory isolation, accommodation in an inappropriate environment, and electroconvulsive therapy that does not comply with medical protocols and human rights standards;

VIII – the indication for hospitalization based exclusively on clinical health reasons, giving priority to the multidisciplinary assessment of each case, for the period strictly necessary to stabilize the patient's health and only when extra-hospital resources prove insufficient, with hospitalization in asylum-type institutions, such as Custody and Psychiatric Treatment Hospitals (HCTPs) and similar establishments, such as psychiatric hospitals, being prohibited;

IX – permanent interinstitutional coordination between the Judiciary and health care and social assistance networks, at all stages of criminal proceedings, through the preparation of PTS in cases covered by this Resolution;

X – restorative justice as a means of promoting social harmony, by guaranteeing access to fundamental rights and reversing social vulnerabilities;

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XI – attention to the secular nature of the State and religious freedom integrated with the right to health, which result in the impossibility of compulsory referral to establishments that are not part of the Raps or that condition or link treatment to religious conversion or the exercise of religious activities; and

XII – respect for the territoriality of services and treatment in the social environment in which the person lives, always aiming to maintain family and community ties.

8. The role of the judicial system

8.1. In your country, is it possible for the judicial system to become involved in these situations? In what situation (for example, to impose the measure or review it, in case of resistance from the child or their family, or to impose some order of protection on the child)? For what purpose? Which branch of the judicial system is involved (juvenile court, family court, child protection court, criminal court...)?

As stated above, children who commit acts equivalent to offenses should be dealt with by the Guardianship Council. However, the Judiciary may intervene directly if the application of a protection measure is requested, since it is not conditional on the action of that body.

In addition, the Judiciary may review any measure applied by the Guardianship Council if requested by the child's parents or guardians or by the child themselves, duly assisted by a defense attorney or guardian.

In the event of the application of a measure that removes the child from the family environment, legal action must necessarily be brought against those responsible, in a contradictory procedure, observing due process and inherent guarantees, with the proper participation of the child.

Similarly, if there is a request for involuntary psychiatric hospitalization, the Public Prosecutor's Office must be notified to monitor the measure.

In the event of compulsory hospitalization requested by the Public Prosecutor's Office, based on a psychiatric report, the action must also be brought before the court.

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These actions will be judged by the Juvenile Court, whose jurisdiction is dictated, under the terms of Article 98 of the Statute of Children and Adolescents, by the finding of a threat or violation of children's rights according to three fundamental axes:

I - by action or omission of society or the State;

II - due to the fault, omission, or abuse of parents or guardians;

III - due to their own conduct.

Thus, the Court handles class actions to guarantee social, economic, and cultural rights against the State or Municipalities, aiming at the implementation or structuring of public policies provided for by law for children and adolescents; protective actions against parents or guardians aimed at applying measures to them and, h , protective measures for children and adolescents; and juvenile justice actions in relation to adolescents who commit criminal acts.

In some situations where it is identified that the child's vulnerability is dictated not only by the action, omission, or failure of the parents or guardians, but also by the action or omission of the State, the Public Prosecutor's Office may jointly file a lawsuit against both the State and the parents to provide the necessary care for the child.

8.2. In cases involving the judicial system, can you briefly describe the procedure?

As mentioned above, if judicial protection measures are necessary, the action is brought against the parents and guardians to apply measures to them and the children.

The procedure is dealt with in Articles 194 to 197 of the Statute of Children and Adolescents:

“Art. 194. The procedure for imposing administrative penalties for violations of child and adolescent protection rules shall begin with a complaint filed by the Public Prosecutor's Office or the Guardianship Council, or a notice of violation prepared by a permanent or accredited volunteer employee and signed by two witnesses, if possible.

§ 1 In the procedure initiated with the notice of violation, printed forms may be used, specifying the nature and circumstances of the violation.

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§ 2 Whenever possible, verification of the violation shall be followed by the issuance of the notice, otherwise certifying the reasons for the delay.

Art. 195. The defendant shall have ten days to present a defense, counted from the date of the summons, which shall be made:

I - by the issuing officer, in the report itself, when it is drawn up in the presence of the defendant;

II - by a bailiff or legally qualified official, who shall deliver a copy of the report or representation to the defendant or their legal representative, drawing up a certificate;

III - by mail, with return receipt requested, if the defendant or their legal representative cannot be found;

IV - by public notice, with a period of thirty days, if the whereabouts of the defendant or their legal representative are uncertain or unknown.

Art. 196. If the defense is not presented within the legal deadline, the judicial authority shall review the case files of the Public Prosecutor's Office for five days and decide within the same period.

Art. 197. Once the defense has been presented, the judicial authority shall proceed in accordance with the previous article or, if necessary, shall schedule a hearing for investigation and judgment.

Sole paragraph. Once the oral evidence has been taken, the Public Prosecutor's Office and the defendant's attorney shall speak in turn, for twenty minutes each, extendable for a further ten minutes at the discretion of the judicial authority, which shall then deliver its judgment.

The Statute dates from 1990 and still reflects some practices in force in the previous paradigm, in which the Judiciary had complementary services, such as enforcement agents, who could issue fines in cases of violation of rights, thereby initiating proceedings.

This practice is apparently in the minority in the country. The initiation of proceedings usually occurs through representation by the Guardianship Council or through action by the Public Prosecutor's Office.

Instead of a linear process, with summons, defense, investigation, and trial, a more conciliatory and empowering practice is often adopted, incorporating the experience

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adopted in hearings to review individual care plans for children and adolescents in foster care (so-called concentrated hearings) in actions to apply protective measures.

Thus, families are summoned and subpoenaed to a preliminary hearing to attempt conciliation, in which the care network participates (usually health, education, and social assistance, but may include sports, culture, and housing, depending on the case).

If previous reports show that the child's vulnerability is dictated not only by the action, omission, or failure of the parents or guardians, but also by the action or omission of the State, the Public Prosecutor's Office may jointly file a lawsuit against both the State and the parents to provide the necessary care for the child.

In this context, an attempt is made to define a plan to improve care, often on a case-by-case basis, covering actions by the State, the family, and the child.

8.3. What are the rights of the child in this procedure? Does the child have the right to legal assistance? Does he or she have the right to appeal?

The action is directed against the parents or guardians or, eventually, against the parents. However, as the child is affected by these decisions, they can count on specific legal assistance, although this is not yet widely available in the country.

The child is heard and informed of the procedure, the situation being dealt with, and the actions planned for each party. Everyone participates in the decision-making process, which, as far as possible, is based on consensus.

If no agreement is reached, or if the parents or the State fail to comply with the agreement, the proceedings continue, with the parties having the opportunity to defend themselves and present evidence, with the possible hearing of witnesses and a decision.

In this case, the parties, but also the child, may appeal, although this is not usual.

9. Assistance or support

9.1. In addition to the measures imposed, is there any other type of voluntary or optional assistance available to children in this procedure (social, psychological, medical, or other)?

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The protective measures are all assistance-based, in the areas of social assistance, health, including mental health, and education.

As the actions involve – or should involve – the care network, the subject of discussion is the support to be provided, the goals to be met by the family to avoid the continuation of the process (which may result in a fine, both to the State and to the family).

The judiciary has a multidisciplinary technical team (social workers, psychologists, and, in some places, educators) that assesses not only the care provided by the family, but also the quality of care provided by the State. They also provide support for the participation of children in legal proceedings.

10. Participation of children

10.1. Is the child heard in this procedure? By whom? At what stage of the procedure?

The child is heard. They may be heard directly by the judge or by the Judiciary's multidisciplinary technical team.

If the practice of hearing the child at the initial conciliation hearing is adopted, the child is usually heard in this context.

10.2. Was the child heard more than once in this procedure? How many times?

Usually, the child is heard only once. However, there are hearings in which there are provisional plans to adapt the care, with solutions being developed between the parties, including the child. In these situations, the child may participate in more than one hearing to share their impressions of each stage of this adaptation and how they want the new stages to proceed. It is not an inquiry into facts, but a conversation about the care provided.

10.3. Is there a protocol or guideline on how to hear the child in this situation? Can you share it?

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There are rules for concentrated hearings that can serve as guidelines, although they are not specifically focused on this matter (Provision No. 165 of 04/16/2024 of the National Justice Council, which establishes the National Code of Standards of the National Justice Council of the National Justice Council – Judicial Forum (CNN/CN/CNJ-Jud), which regulates judicial forums – articles 68 to 74)[26] .

There are courses for magistrates on the participation of children in protection hearings, such as those organized by the São Paulo School of Magistrates.

11. Legal implications

11.1. Are there any records of legal offenses committed by children below the age of criminal responsibility? When the child reaches the age of criminal responsibility, are these records taken into account?

There is no record.

11.2. In the event of damages, what rights and remedies does the victim have in relation to the child and the family? In addition to financial compensation, does the victim have the opportunity to express an opinion on the measures applied to the child?

Under Article 932, item I, of the Civil Code, parents are liable for civil damages for minor children who are under their authority and in their company.

Thus, the victim may file a civil suit against the parents in civil court. The child is not a party to this proceeding and is not heard.

The victim does not have the opportunity to express an opinion on the protective measures applied to the child in the context of juvenile justice.

12. Ongoing reforms

12.1. Are there any reforms underway on this issue?

No.

[26] https://atos.cnj.jus.br/atos/detalhar/5527

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