

Fair Rules, Just Prizes and Equity in Compensation

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Introduction

The maturing of the welfare state has provoked an intense debate about the concept of justice. Today perhaps welfare state programmes are less grounded in efficiency considerations but are mainly defended because they are believed to enhance social justice. In the trade-off between efficiency and equity distributional matters tend to be decisive. When justice plays such a major role for determining the size of the public sector, then it is little wonder that there is a search in the social sciences for a definition of the concept or for criteria that identify what enhances justice.

Actually, the old discipline of normative political theory has been rejuvenated partly as a response to the attempts at identifying justice. The debate during the past twenty years has resulted in a number of definitions of "justice", but there is little agreement among scholars about necessary or sufficient properties of the concept, if indeed there exists an unambiguous single concept of justice.

Actually, justice seems almost to be the most difficult of all the concepts that are relevant to the concerns of the social sciences. My thesis is that this reflects the fact that the concept of justice in the political economy of the welfare state is called upon to solve two quite different problems in human interaction. First, it is supposed to deliver institutions that define fair play between interacting players. Second, it is asked to bring forward institutions for awarding prizes to so-called "winners" and compensation to "losers", if this terminology is acceptable. The institutional responses to these two problems need not be in harmony, but may require separate conceptions both named "justice" or "just" institutions.

Below justice theory will be discussed in relation to the now widely debated theory that links justice with impartiality and equality (Nagel, 1991; Barry, 1995). Before I embark upon an analysis of the equation:

$$(E) \text{ JUSTICE} = \text{IMPARTIALITY} = \text{EQUALITY}$$

I begin with a few preliminary methodological remarks.

Justice theory as institutional theory

From Brian Barry's analysis of various conceptions of justice it is apparent that "justice" refers to institutions (Barry, 1989, 1995). The search for a definition of the concept of justice involves looking for general norms of human conduct. Reflecting upon just institutions comprises basic problems in constitutional theory from both political and economic points of view. Just institutions may be either rules that are of intrinsic value such as human rights or extrinsic value such as transaction cost saving mechanisms.

Barry states that one may find at least three alternative approaches to justice: (I) mutual advantage; (II) reciprocity; and (III) impartiality. From the way Barry describes these three approaches it is apparent that they all entail a search for institutions. Let us quote:

(I) Mutual advantage: "we are to imagine people with different conceptions of the good seeking a set of ground rules that holds out to each person the prospect of doing better than any of them could expect from pursuing the good individually without constraints." (Barry, 1995: 32)

(II) Reciprocity: "...the criterion of justice is that any mutually advantageous deal this is agreed on is to be deemed just= exactly as in the theory of justice as mutual advantage. What is different from that theory is that, if the parties believe the deal to be fair, that in itself gives them a motive for upholding it." (Barry, 1995: 49)

Barry's argument in relation to these two approaches is very similar to the Knut Wicksell distinction between efficiency and justice. Institutions that derive from agreement among the players will be efficient but not necessarily just, because the positions from which negotiations take place could be unjust. Barry states:

The baseline must itself be fair, and the parties must be well informed and well matched. Thus, for example, we may be prepared to say that the standard baseline in contracts, where either party can maintain the *status quo* in the absence of an agreement, is fair. Yet it will often be the case that the bargaining power of the parties is so unequal as to render suspect any contract between the parties. (Barry, 1995: 50-1)

Thus, institutional arrangements can only be just if they "can be freely agreed on by equally well-placed parties" (Barry, 1995: 51). Wicksell in a similar vein called for *ex ante* or *ex post* changes in the baseline positions of the various players as a complement to the efficiency framework which is basically reciprocity or mutual advantage.

Instead of (I) and (II), Barry argues that the following approach is the one to be preferred:

(III) Impartiality: "The basic idea here is that just rules are those that can be freely endorsed by people on a footing of equality." (Barry, 1995: 52)

Just institutions are thus the rules that equal players will endorse for social interaction, meaning that the concept of justice entails a profound institutional emphasis. However, the basic problem of social justice remains unresolved as we do not know which institutions these players will endorse when they are on

an equal footing. Asking people which institutions they agree upon will not do, because that would entail justice as mutual consent or reciprocity. In any case, the players in existing societies are hardly on a footing of equality. What, then, are the institutions that equal players could endorse?

What would a definition of justice look like and how would one go about accepting or rejecting various proposals? If someone suggests that an institution I is a likely candidate for being just, and another person disagrees, then how does one go about settling the issue? What is the logic of arguments about just rules for state and society?

Is justice what is reasonable?

A formula for stating various definitions of "justice" could be rendered simply as follows:

DF. "X is a just institution" = def. "X satisfies institutional criteria C1, C2,... CN.

The problem of defining "justice" is to come up with a set of criteria that if present in institutions enhance justice in social life. Can each and every institution be evaluated with regard to social justice?

One may wish to make a distinction between a set of rules on the one hand and their application in concrete cases on the other hand. Thus, one may talk about the rules of chess as the presuppositions for playing the game. Another matter is the application of the rules to an ongoing real life game. One can discuss whether the basic rules of the game are reasonable as well as raise the question whether they are implemented in a just manner in a tournament, for instance by an Umpire. The same distinction is important when one evaluates any kind of social institution:

- (1) Are the rules in themselves just?
- (2) Are the rules being applied in a just manner?

The second question (2) has a legal ring whereas the first question (1) raises an ethical question. I will deal shortly with (2) below, but here we focus upon how arguments about (1) may be decided. Is the choice of just institutions an arbitrary one? Can the preference for one set of institutions as more just than another set be challenged on rational grounds?

If the criterion on justice is a straightforward one that alternative systems of rules may satisfy to a different extent, then the question about just institutions could be settled by empirical research. Thus, we would have:

DF1. "X is a just institution" = def. "X has purposeful consequences",

which could be tested by calculating e.g. the number of purposive outcomes of the operation of the rules in question like in consequentialist ethics.

However, against DF1 it may be claimed that what is a purpose depends upon the values one accepts. Matters of justice typically involve values which tend to differ among people. What is a just institution to one group may be unac-

ceptable to another group, reflecting their different values. Thus, we would have:

DF2. "X is a just institution" = def. "X is an institution that a group G values",

which seems to be in line with communitarian ethics. Yet, DF2 raises another difficulty: What to do if two groups, G1 and G2, have different conceptions about just institutions? If what is just for one group, G1, could at the same time be unjust for another group, G2, then perhaps justice is only a matter of convention (Miller and Walzer, 1995).

Going back to DF and the criteria that confer justice upon a set of institutions, it does not really add much to demand that the criteria be accepted by one group or another. If institutions are truly just, then maybe they are just for each and every group. Thus, we are finally led to the following:

DF3. "X is a just institution" = def. "X is an institution which no one can reasonably reject".

DF3 may actually cover both DF1 and DF2, because if DF3 holds, then no group G1 or G2 reject the institutions and all the relevant purposes have been taken into account, since no one has any reason to object to the rules.

DF3 is called the "Scanlonian approach" after a proposal by T.M. Scanlon about how matters pertaining to right and wrong are to be decided in an ethical argument. Let us quote from Scanlon:

An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement. (Scanlon, 1982: 110)

Accidentally, one may note that the Scanlonian approach to search for the criteria for justice among institutional criteria does not imply the Barry starting point (III) requiring a "footing of equality".

It is often claimed that Rawls' well-known difference principle is a rule than no one can reasonably reject. Why? Surely, one can think about other objectives than maximizing the lot of the least advantaged such as maximizing total output, which conceivably may form the basis for "informed, unforced general agreement".

One should not jump to conclusions about what rules are reasonable, as well as not assume that there would at the end of the day be general agreement about the rules that are reasonable. In deliberations about justice one may find reasonable theories about rights that are in disagreement about fundamentals, for instance about minority rights versus the right of majorities (Kymlicka, 1995) – why expect informed, unforced general agreement in all questions of justice?

Impartiality seems to be a relevant criteria when evaluating institutions from a normative point of view as does equality, but is impartiality the same as equality? It is readily recognized that the Scanlonian approach in no way solves the problem of identifying the criteria of justice. Which criteria, then, would reasonable men/women not reject? Liberty, Impartiality? Equality? Before we

discuss questions relating to the relationship between impartiality and equality in ethical matters we will briefly look at the concerns of legal justice.

Legal justice

It seems undeniable that the concept of justice has a closeness to basic legal concepts. The crucial question is just how close that relationship is. If one person asks what is justice, then it seems reasonable to refer somehow to law, at least at one stage in the answer. Thus, we have:

DF4. "X is just" = def. "X is lawful".

Although a legal definition of the justice concept would be eminently suitable in many discourses, it is hardly generally adequate. The crux of the matter is that it is not always meaningless or without relevance to ask still: Are institutions that are lawful really just?

The problem with DF4 is that it may not close the issue of what is just. Stating that a rule that is lawful is not just does not appear to result in a contradiction in spite of the fact DF4 forbids this. If a rule is just because it is lawful, then such a institution cannot be unjust. But surely there are many cases of rules that are sanctioned by law, but which men/women could reasonably reject.

In addition, lawfulness is a concept at least as troublesome as justice. It was argued by the legal positivists and the legal realists that a strictly positivistic account of the concept of law could be rendered. Thus, legal positivism implies that:

(LP1) X is lawful if and only if there exists a rule of recognition such that it recognizes X (Hart), or

(LP2) X is lawful if and only if X can be derived ultimately from one basic norm that is the foundation for the legal order (Kelsen).

And Scandinavian legal theory stated that it would be possible to establish what is the law in a country by looking at the actual and recurrent behaviour practices among those involved in making and implementing rules. Thus, legal realism entails:

(LR1) X is lawful to the extent that there is a high probability that X is implemented (Hedenius), or

(LP2) X is lawful to the extent that it enters into the language that is employed in the courts and public administration (Olivecrona).

Whereas the legal positivist approaches the legal order by isolating rules as norms, the legal realist proceeds towards the legal order interpreting the rules as behaviour regularities or as speech acts. However, could not "rules" in either those two senses be unjust even though they form part of a legal order and are thus to be called "lawful"? The legal approach to the justice concept suffers from two drawbacks, whichever interpretation of the concept of the legal order one chooses.

On one hand, there is the problem whether any legal order could be identified within a positivist or realist framework, stemming from the making of a sharp distinction between law and justice. Dworkin's arguments against any such claim about a radical difference between questions of existing law and about justice as being reducible to the well-known IS versus OUGHT separation seems powerful (Dworkin, 1986).

On the other hand, the problem of identifying the legal order by means of alternative positivistic criteria is not decisive for the plausibility of DF4. Even if the legal positivists or the legal realists were correct, it would still be an open question whether what is the law is also just. The crux of the matter is that if X is lawful, e.g. a rule X exists in the law of a country, then it still remains an open question whether X is just.

There is no way in which it could be considered unreasonable or irrelevant to question whether the law is just or not. Although questions about justice may very much involve alternative interpretations of the law, the ethical questioning of the law cannot be resolved within a legal positivist or legal realist approach. In short, even if one knew the answer to the question about what is lawful, there would still remain a second problem of whether what is lawful is just.

Often the problem in legal argument is not whether an institution itself belongs to the law, but whether it has been applied in a just manner. Justice under the law requires that the rules of the legal order be applied in specific ways. Here no doubt impartiality is a strong requirement. However, those that argue that impartiality is justice is not content with such a narrow role for the concept of impartiality. What is at stake is whether the institutions themselves satisfy the requirement of impartiality. Even if the institutions of Apartheid had been applied in a predictable and impartial manner, still most people would reject them as unjust, reasonably so I assume.

Institutions that make up the law may be unjust because they are unfair rules. What, then, is fairness?

Fairness and institutions

It is often argued that justice is or demands fairness. Such an approach is close to the ethical connotations of the concept of justice, because any argument about fairness seems to belong to ethical or moral discourse. Asking whether an institution is fair, is to ask for criteria that would sort out fairness from unfairness. Thus we have:

DF5. "X is a just institution" = def. "X results in actions and outcomes which satisfy fair treatment".

The definition of justice in terms of fairness does not result in the same difficulties as the legal approach has. When asked about what fairness implies, it seems irrelevant to answer in terms of the concept of justice again, and the concept of fairness does not allow the objection that a fair rule may be unjust.

Yet, DF5 needs to be developed further. The fairness concept is important when it comes to evaluating institutions, focussing upon the actions or outcomes that the institutions in question result in. Fairness is to be fair towards someone. Thus, fairness seems to be incomplete without a reference to who should be treated fairly. Trivially, it is true that institutions are fair to the extent that the actions sanctioned by them or the outcomes that result from them involve that people are treated in a fair manner. Fair institutions give fair actions and outcomes, at least probably so.

Fairness refers to how people are treated under a set of rules. To treat someone fairly implies that the actions taken under the institutions or the outcomes that a set of institutions result in for people are reasonable. Since no one could reasonably reject what is fair, it would seem that the fairness criteria must be the same as the justice criteria or constitute some subset of the criteria of justice.

When the concept of fairness is related to institutions, then what is at stake is not whether the institutions are being applied in a fair manner but whether the institutions themselves are fair.

A definition of fairness would have to specify how a group of people, X and Y, is to be treated fairly with respect what. Thus, we need a stronger formula:

DF6. "X and Y are treated in a fair manner in terms of Z with regard to W" = def. "X and Y are treated by criteria c_1, c_2, \dots, c_N on Z with regard to W".

The size of what "X" and "Y" denotes may vary from a group of brothers or sisters in a family, over a set of participants in a chess club to large scale communities or social groups in a polity or an economy. "Z" ranges over benefits, costs, rewards, punishments, burdens, favours, permissions, obligations, competences, and so forth. And "Z" may stand for abilities, needs, desires, endowments, capacities, accomplishments, etc.

It has been suggested that the criteria for fair treatment are conceived of in a different way from one sphere of human interaction to another (Walzer, 1983). Thus, athletics are treated fairly in one way and chessplayers in another. The institutions of the economy and the political system offer in a similar way different criteria for how people are to be treated.

However, we may always ask whether the criteria actually employed are really fair, or what is the same question, truly just. Fairness requires not only that a single individual be treated fairly, but also that each and every one be treated in the same way. Fairness implies universalizability as Kant emphasized. All people that may fall under "X" and "Y" are to be treated in the same way with regard to Z and W. Surely fairness must involve something that is general across various spheres of justice.

Looking at the different criteria that are used for treating persons one may ask whether there are any criteria that would occur constantly across different forms of human interaction. Impartiality may be such a criterion in so far as there is fair treatment in a group of X and Y persons. Thus, we have:

DF7. "X and Y are treated in a fair manner in terms of Z and W" = def. "X and Y are treated impartially in terms of Z and W".

Thus, criminals may be treated impartially with regard to punishment or permissions (Z) in relation to the crime committed (W), job applicants may be treated impartially with regard to job promotion (Z) based upon their achievements or abilities (Z), and so on. What is crucial in the impartiality concept is to come up with the criteria in terms of which people are to be treated, if they are to be treated truly fairly, i.e. to decide upon the content of "Z" and "W".

Impartial treatment seems to meet the Scanlonian test. In many circumstances no one would reasonably object to that in a group of people of A and B each person is treated in a just manner when they are treated in an impartial way with regard to Z and W. However, Barry takes the argument one step further by claiming that impartial treatment is the same as equal treatment. He states:

A society with a norm of universal impartiality, however, would be one in which everybody was supposed to show equal concern for all. (Barry, 1995: 204)

Yet, to treat people in an impartial manner does not imply to "show equal concern for all". The impartial treatment of X and Y depends upon the Z and W involved. If X and Y differ with regard to W, then impartiality may require different treatment on Z. Not making such distinction would in some cases raise accusations of partial treatment. Thus, if criminals have different histories (W), then their treatment on Z must differ. People with different abilities (W) must be given different rewards (Z), because otherwise they are not treated in an impartial way. Impartiality is not the same as equality.

Once again it is timely to point out that impartiality has a double usage. First it may be applied onto existing institutions evaluating whether they are implemented in an impartial manner. Second the existing institutions themselves may be evaluated with regard to impartiality. In neither of these two usages does impartiality entail "to show equal concern for all", because X and Y may have to be treated differently depending upon the relationship between Z and W. What impartiality in both usages prohibits is that X and Y be treated differently without any reason as to the relationship between Z and W.

Fair rules may be devised for handling two quite different social problems. On the one hand, there is a search for fair rules of interaction. And one may introduce fair rules of compensation on the other hand. The first set of fair institutions regulate competition as for instance market rules or rules for hiring or promotion in bureaucracies. The second set redistributes income and wealth. Both sets may offer fair rules, but hardly in the same sense of "fairness". I will discuss this distinction between competition rules and compensation rules below. Together they regulate the conditions for interaction as well as the prizes to be won and the losses to be made.

Fair play and impartiality

It is impossible not to bring up the economy and the question of state intervention into markets. Although justice has many other fields of application, the present debate about the implications of the concept of justice focuses very

much upon the distribution of economic rewards. After all, justice is a distributional conception and there is a search for a theory of justice that is relevant for the problem of distribution of income and wealth in any society. Such a theory would have profound implications for basic questions in public policy concerning what the state should do in relation to markets and market outcomes.

One may employ the model of chess game in order to identify two concerns for public policy derived from a theory of justice. If human interaction is approached as a game of chess, then justice would require that the institutions of chess are fair and that the set of rules are implemented by fair umpires. Justice would certainly not be the only requirement upon the rules of the chess game. A number of other requirements are very much at stake such as for instance technical considerations of various kinds, calling for an exciting game as well as a feasible game. But as to the requirement of fairness impartiality would loom large. X and Y would have to follow the same rules, implemented in the same way for both players, have the same pieces and the same amount of time for play.

But fairness also entails that there be a clear connection between prizes and outcomes: the winner takes all on the basis of his/her successful completion of the game in accordance with the institution of chess. The players are equal under the rules, but they are certainly not to be treated with "equal concern" in terms of rewards.

The economy is to a considerable extent like a game of chess. Various players interact under more or less clearly specified institutions governing the interaction in various markets for labour, capital, equities, goods and services. Justice requires that the interaction is fair. Let us put forward the following requirement on a fair game of interaction (FG):

(FG) A game is fair only if there is a set of impartial rules that are implemented in an impartial manner.

Impartiality could hardly be both a necessary and sufficient condition for fairness in human interaction. Fair games would require additional things such as feasibility measured among other things by means of transaction costs. But the requirement of impartiality would be a necessary condition, both with regard to the institution itself and with regard to its implementation.

Can markets satisfy this condition for a fair game? Can markets be impartial? Barry denies that so may be the case, stating about a so-called Nozickean society or the ideal type of a market society:

Strict impartiality will in such a society be an obligation almost entirely confined to people acting in juridical and bureaucratic capacities, whose functions will be very limited. (Barry, 1995: 202)

Partiality will be the characteristic feature of a market society, because:

People would be free to do anything they chose to do provided only that they did not overstep the boundaries set by the persons and property of others. However, against this advantage have to be offset the disadvantages of leaving people on such a loose rein, and these tell conclusively against it. (Barry, 1995: 202)

This is not an adequate description of market institutions. It is important to emphasize that markets do have institutions which operate under a requirement for impartiality which is polized in various ways (Williamson, 1985). Whether the institutions of the market economy can be improved upon is certainly a very important matter of public policy-making, as one may wish to argue the case that state intervention could be expanded in quantity or strengthened in quality.

A quite different matter of justice concerns whether the outcomes of market operations are acceptable. The institutions of real life games just as the game of chess separates between winners and losers, so to speak. No one would reasonably reject these institutions as long as they are impartial in themselves and they have been implemented in an impartial manner. But once the game is over and X has been declared the winner to receive the prize, then what to do with Y who lost the game and receives nil?

Justice as fairness in human interaction is one thing, whereas justice in income compensation or maintenance is another. Scoring the right winner requires certain institutions, but the amelioration of the predicament of the losers calls for other kinds of institutions. Impartiality is certainly a very important feature of the first kind of justice institutions, but what does impartiality entail for the construction of the second type of justice institutions. Barry writes in his rejection of the market society:

To begin with, almost everyone would have reason to fear the prospect of being reduced to destitution by the operation of an economic system in which the only sources of money were inheritance, gift, savings, selling one's labour power to an employer, and providing goods and services to the market. ...At the very least, the parties to the hypothetical contract would insist on a 'safety net' to avert destitution. (Barry, 1995: 203)

Here there is talk about an entirely different matter, namely the maintenance of income or compensation against losses in the face of adversity, poor performance or merely bad luck. Such demands may be just even if the the operation of the institutions has been fair. The critical question for the welfare state is now: How much security or compensation should government provide? What levels of income maintenance would no one reasonably object to?

Redistribution and equality

Searching for a just solution to the problem of income and wealth distribution we turn back to the three fold distinction between justice as mutual advantage, justice as reciprocity and justice as impartiality. If we reject the first two approaches to justice when it comes to the identification of institutions for fair play, then they would presumably be equally deficient when it comes to redistribution. But can really impartiality provide redistributive criteria?

We remind again of the distinction between impartial institutions and the impartial application of institutions. Impartiality is highly relevant when it comes to the application of redistributive criteria – why should X and not Y

receive income compensation if both are sick, unemployed, old, young or are otherwise qualified to participate in redistributive programmes in the public sector? Yet, what about the distributive criteria themselves? We have:

DF8. "X is a just distribution of wealth and income" = def. "X distributes income and wealth according to criteria C".

The difficulty is to identify the criterion C, or the set of criteria C, if one wishes to employ several ones. In order for C to be just it must be the case that:

(C) The distributive criterion C is one that no one could reasonably reject,

as long as we follow the Scanlonian approach. There is no lack of candidates: need, desert, aggregate utility, liberty, endowments and equality. But which one is it that no one can reasonably object to when these criteria have different implications? Barry suggests that impartiality is a strong candidate for C as the criterion on a just income distribution. Really?

Although few have spoken about impartial distributions of income and wealth or an impartial redistributive income policy, it is still possible to conceive of a definition along the following lines:

DF9. "The distribution of income and wealth is just in society S" = def "In S income and wealth are distributed in an impartial manner".

Yes, but impartially in relation to what? DF9 is elliptic or opaque, because it leaves out the crux of the matter, viz the norm against which impartiality is to be tested. Income and wealth may be distributed in an impartial manner according to a lot of criteria: achievement, wants, endowments, and so on. Impartiality is a powerful criteria – that is true, because it prohibits discrimination. But it is not powerful enough to identify the necessary and sufficient condition for a distribution of income and wealth to be just.

To link impartiality with equality is erroneous. A distribution of income and wealth can very well be impartial but comprise sharp income differences as long as there is no discrimination involved. Successful tennis players are better paid than university professors simply because their accomplishments carry higher prizes. Should government tax tennis players sharply and redistribute to the lower income strata? Is that a policy no one could reasonably reject meaning that it is just? Perhaps such a redistributive policy would entail a partial treatment of the achievers?

Conclusion

The equation (E) of justice = impartiality = equality cannot be explained by the choice of an ideosyncratic starting-point for people to agree upon what is justice:

The essential idea is that fair terms of agreement are those that can reasonably be accepted by people who are free and equal. (Barry, 1995: 112)

But people are not equal. People have different tastes, skills, ambitions and accomplishments and heritage. In any case, even if the differences between people could be minimized, it does not follow that people "who are free and equal" would necessarily agree on an equal distribution of income. They would most certainly favour impartiality but they need not underline equality.

There is a more fundamental misunderstanding in (E) of what the concept of impartiality is all about. This is how a society where impartiality would be maximized is described:

In an attempt to secure strict impartiality in all areas of life a huge number of decisions would have to be turned over to public officials; and all decisions left in private hands would be open to scrutiny and censure on the basis of the hypertrophied positive morality of the society. (Barry, 1995: 205)

Surely each and every one could reasonably reject such a conception of a just society.

The error in (E) is that impartiality can only be maximized with regard to some norm or set of criteria such as skill in playing chess, seniority or achievement when hiring or promoting bureaucrats or the payment of income compensation according to a fixed level of income maintenance. Without the norm or the criterion impartiality is nonsense.

In the discussion about justice in the social sciences one step ahead could be to make the following distinctions, which have been analysed above:

- (1) Impartial institutions versus an impartial application of institutions;
- (2) Institution for the competitive interaction between persons versus institutions that compensate those who would fare less well in competitive interaction or fail to enter competition.

The concept of impartiality is relevant both in political theory and political practice. Like proportionality it is highly relevant for justice, but it is not the same as justice. And since justice is not merely impartiality and impartiality does not entail equality, it follows that equality is not justice, or vice versa.

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