Emancipation of Minors

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ABSTRACT

The following article examines the concept of emancipation of minors in family law. In the first part the mechanism of the concept in common law jurisdictions is thoroughly studied. The philosophical discussion has followed about the state paternalistic policies which is the foundation of the same concept. In the last part a thorough analysis is made as to whether the non-existinglaw of emancipation, in India would be beneficial to the country or not. The ending argument which stood as that the law is not viable for the country because of the socio-economic structure of the country.

Introduction

Minors in the eyes of law are amateurs who are yet to achieve the sense of rationality. This is the reason behind making them legally incapable in the world's playfield. However in some countries, due to some facts and circumstances, the minors are emancipated i.e. legal incapacity is uprooted at an early age. The research paper in the first section examines briefly this concept in common law jurisdiction.

The policy of emancipation revolves around the much debated concept of paternalism. Paternalism is responsible for the protectionist policies which curtails freedom of individuals. The state has relied on the principal of beneficence whenever it raises the need for protectionist policies, emancipation is covered under the purview. The arguments of the state are in two fold. First that minors lack rational choice. Second, the harm that such minor can inflict on others and himself. However I have examined both the arguments and have rebutted them by using a pro liberationist perspective.

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The most crucial part of this paper is the policy implementation in India. There are legal as well as social impediments which will make protectionism look better in the front of liberalism. In employment areas there is absolutely no legal capacity. Any such policy implementation is bettered by the constitutional measures in our country. On the top of that there is socio economic scenario of India and the family structure. Arguably, the historical construct of Indian family raises a constitutional claim for Indian family in the non-enactment of any such emancipation policy. All these arguments are condensed in this research paper to make sense of the policy of emancipation of minors in India.

EMANCIPATION IN OTHER JURISDICTIONS

Emancipation inevitably results in a total severance of the parent-child relationship. The test in each case should be whether circumstances have so changed that the original reason for creating a disability in the minor no longer exists.[2] Further in different categories of emancipation, there are further two types in which emancipation can be done i.e.it can be complete or partial.

Judicial emancipation: Under Common law jurisdiction there are certain responsibilities that parents needs to perform towards their children. Such as responsibility for the child's financial support, health, education and morality.[3] In certain facts and circumstances these reciprocal rights and obligations are severed and a minor is treated as an adult.[4] Partial emancipation in this case would only be limited to certain obligations. However complete emancipation is an express agreement by which the parents relinquish their rights vested in their child in exchange for the child's relieving them of all their obligation.[5]

Conduct of the parties: Under this condition a decree of emancipation is made by the implied conduct of the parties. Only marriage and enlistment in the armed services are generally deemed sufficient in themselves to constitute emancipation.[6] The rationale for holding these acts to be presumptive evidence of emancipation is that they reflect such a radical change in his position in the family unit that it would be entirely in consistent to continue to view the minor as unemancipated.[7]

Statutory emancipation: Unlike judicial emancipation, it is concerned with the removal of the disabilities of minority. The manner in which those disabilities are removed distinguishes the first

[2] A. Cooper, *Emancipation of Minors*, 28 J. JUV. L., 428, 432 (1984).
[3] F.C. Cady, *Emancipation of Minors*, 12 CONN. L. REV., 62, 93 (1980).
[4] I. Richardson, *Emancipation of Minors*, 51 M.L. REV, 263, 267 (1956).
[5] *Id.*
[6] *Supra* note 2.
[7] *Supra* note 1.

type of statutory emancipation, an equitable proceeding in which the minor petitions the court to be relieved of the disabilities of non-age, from the second type, a special statutory enactment removing specific disabilities of minority.[8] There are different conditions which are present varying from best interest, financial independence etc. a petition through next friend might be filed (no such age limit is fixed, there are examples from 15 to 13).[9]

The Principle of Beneficence.

In this part of research paper, I have examined the jurisprudential basis of emancipation. I have also addressed the argument that while using the philosophical basis i.e. beneficence, the state cannot prevent itself from enacting this policy.The principle of beneficence states that it is a duty to prevent harm or evil and promote good.[10] The state technically uses this principle in order to attain certain parameters under which state guarantees or take away freedom of individuals.[11] This same consideration is taken into account while determining the rights to be granted to the minors.[12] Through a measured study of this principle there are two broad arguments on which state can possibly argue the non-enactment of emancipation of minors. First, an assumption that, the children lack the capacity for a rational choice. Second there is close proximate relationship between the freedom given to achild and harm inflicted on society and himself.[13] These arguments narrow down to one broad principle which is to determine whether a legal right will promote good or prevent evil.[14] Therefore according to state, the emancipation of minors cannot be done because the harm which society and child is likely to suffer. Therefore state has to deny this legal capacity to minors.

In such a claim, it is crystal clear that there is an element of prediction involved that what would happen to minors under certain conditions. This claim is more of an empirical claim which is generally verified by gathering data.[15]Now here my argument is that the pre requisite for emancipation of minors should be self-determining capacity rather than the rational choice.To substantiate my claim above, self-determining capacity is the capacity to determine the good or bad result as a consequence of their action.[16] However, rationality on the other hand is secondary thought of judging the consequence itself and follow up actions.[17] It is highly unlikely that those

[8]N. MULCAHY, DOMESTIC RELATIONS, 23 GA. ST. U. L. REV, 79 (2007).
[9]*Id.*
[10]M. KING, CHILDREN'S WELFARE AND LAW, 20 (2nded. 1992).
[11]*Id.*
[12]*Supra* note 9.
[13]J GOLDSTEIN, BEYOND THE BEST INTEREST OF THE CHILD, 107 (1st ed. 1973).
[14]B. HOGGETT, PARENTS AND CHILDREN, 43 (3rd ed. 1973).
[15]*Supra* note 12.
[16]J.S. MILL, LIBERTY, 77 (1st ed. 1869).
[17]E. KANT, WHAT IS ENLIGHTENMENT? 2 (2nd ed. 1996).

minors on or above 14 years of age would lack the capacity to for self-determination, they are most likely to execute plans of their own.[18]But the paternalistic views of the state still insists that they lack the capacity to execute these plans in the rational manner. This implies that further there is a degree on which this threshold of attaining rationality is fixed.[19] But to argue my claim as to justification of liberty, there is absolutely no empirical claim to justify this above.[20]

Now I will argue on this principle of beneficence and show how the state by denying the liberty to minors has gone in the violation of the same principle. A simple example to substantiate the claim would be the example of mountain climbing. It is said that this activity is likely to bring death or serious injury to an amateur. In spite of such risks or harm which an adult is likely to suffer, we don't see any restriction on such adult rights.[21] According to the principle of beneficence state must deny them this liberty and curtail every such right which is likely to contravene the principle. There are several examples which can be laid down to show that the principle of beneficence in turn is just an arbitrary and an inexplicable principle which should be struck down. However Lord Devlin presents another set of arguments where he has cut down the rigid standards of this principle**.** He argues that principle of beneficence places the prior duty to promote good so wherever this duty comes into conflict with the duty to prevent harm the former takes the precedence**.**[22] But again this involves a lot of conundrums because then there has to be a balance struck between the grant and denying of rights**.** It might be suggested that since the duty of promoting good is prior consideration over the duty of preventing harm, whenever we are deciding certain grant of rights to the individuals, we should attempt to bring the balance into consideration**.**[23] Therefore the researcher concludes here by saying that it is too broad for a principle to take the decisions on the grant of certain rights to only a particular class of individuals.

After discovering the fatal flaw in the principle of beneficence, the researcher has tried to incapacitate this principle completely. This principle has argued that a minor lacks the capacity to make rational decisions. As has been stated above, two main things have to be questioned**.** First as to the specific standards prescribed of making rational decisions. Secondly the evidence that there is to prove that minor lack the capacity for making a rational choice. On this point there is

[18]*Supra* note 9.
[19]*Supra* note 12.
[20]L. D. HOULGATE, THE CHILD & THE STATE, 110 (4TH ed. 1980).
[21]*Supra* note 18.
[22]*Supra* note 15.
[23]*Supra* note 15.

a whole dilemma between a correct choice and that of a reasonable choice.[24] The state recognizes former as the rational decision which apparently they are unlikely to make.

My argument is that minors can be emancipated because they have the capability of making correct decisions. To give an example is to say that a minor gambling may impulsively put few dollars and might just win. In those circumstances it might be a correct decision to make. But this happy go lucky attitude is not what society desires to achieve.[25] It is where the realm of reasonability comes to dominate. To examine the above example it was not at all reasonable for a minor to take that decision because he might have just lost that whole amount. This concept has certainly created impediments to the argument. But in counter to this the reasonableness is always attained after seeing the proper circumstances in which a person is generally situated.[26]

Therefore keeping in the mind a child's cognitive and emotional capabilities, it will also form a part of the circumstances. So academically speaking a minor can surpass the test of reasonableness. Another argument which I want to make here is that the minor even have the capacity to make a rational choice. The state has asserted that minors are prone to put themselves in such a position that put them in a risk atmosphere which showed that they lack rational choice. However the same is not true, the existing statistical data on the causes of death of minors both in India and U.S. are inconclusive.[27] It is showed in both the countries that accidents are the fourth big cause for the death of minors among the total population. In India however we have several other consideration which shall be considered later. But taking into account the example of accidents it is really inconclusive to speak about minors being prone to danger.[28]

Therefore I conclude here by saying that the foundation on which negation policy for emancipating the minor is simply void. However in India there are such socio-legal hindrances which may just dilute the whole philosophical winning argument presented in this chapter. Legality of this concept with emphasis on practical and social scenarios is examined in the next section of this research paper.

The misconception of *Parens Patriae*

Since ancient days, king and the State were said to be under a duty to care for the class of persons who are incompetent to take care of themselves because of their immature intellect,

[24] *Supra* note 12.
[25] *Supra* note 18.
[26] *Supra* note 18.
[27] D.E. ABRAMS, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE, 343 (3rd ed. 2005).
[28] *Supra* note 25.

imperfect discretion etc. arising from their age.[29]Under the Hindu Law, the king was supposed to exercise *parens patriae* jurisdiction. The king may issue such directions in relation to infants, in the interest of their general welfare.[30]Under the statutory law, this protection has changed hands coming to the Courts as representative of the sovereign.[31] It was made applicable to whole of India.

The argument which liberationist here are likely to make that state can emancipate the minors using the*parens patriae* jurisdiction vested in it. The framework of the Indian policies is shaped by the directive principles and fundamental rights of the Indian constitution, where welfare of the minors is the paramount consideration.[32] The argument could be that in the presence of the fundamental rights there can be valid constitutional claim under article 21. Considering minor have a right to life and are not just chattel or inanimate objects, they have a valid claim for their emancipation. In *L Chandran* v. *Venkatlakshmi*[33]it was held:

> *"[A] child has to be regarded as a person who is guaranteed right to life under article 21. In view of this the court held that the theory of fathers unconditional rights to child person and custody contravened this constitutional guarantee, since adherence to that theory would reduce the child position of a chattel to the person"*[34]

There are many high court judgements in support of the above principle but none by the Supreme Court. Therefore in the absence of a binding precedent there is rebuttable presumption that even parents have a right over their children impliedly exists in such interpretation of the law.[35] This issue will be considered a little bit later. To begin with, it is argued that it is only the judicial activism in India which can make emancipation of a minor possible.

First *parens patriae* jurisdiction in the family law cases concerning minor has always been considered specifically only in the custody cases. There the issue always has been regarding the placement of the minor considering a trade-off between parents. This can be seen in Section 13 (read with section 4) and 7 of the, Hindu Minority and the Guardianship Act and Guardians and Wards Act respectively, under which court has exercised its *parens patriae* jurisdiction.[36]

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[29] Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42.
[30] Mausami Moitra Ganguli v. Jayant ganguli, 2008 (7) SCC 678.
[31] Gaytri Bajaj v. Jiten Bhalla, (2012) 12 SCC 471.
[32] J. Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 OX.G. L STU, 188 (1994).
[33] AIR 1981 AP 1.
[34] L Chandran v. Venkatlakshmi, AIR 1981 AP 1.
[35]A.B. BOSE, THE STATE OF CHILDREN OF INDIA, 115 (1st ed. 2003).
[36] The section reads that whenever the court is unable to find anyone for placing the child. In such a case the court has the right to place the child in a foster house or someone suitable for his custody. There is no such provision for emancipation of minors.

As seen above emancipation of minor in foreign jurisdiction has worked in cases where essentially the control over the minor by the parents has been lost.[37] First the law states that one of the parent must be chosen, second in the scenario where the both the parents have been found unsuitable, it is more likely that emancipation in India will occur. Here lies the crux of the argument where the position of law states that the minor shall not be liberated. Instead a guardian will be appointed by the will of minor's parents or a guardian which is declared by court.[38]

The liberationist in a superfluous approach has forgotten the crucial point about the nature of parens patriae jurisdiction. In western or common law countries[39] where such concept resides, the established law has explicitly recognized the rights of such minors. In India first these rights of minor have originated from the several unrecognized rights under the broad nature of Article 21. Second the nature of parens patriae jurisdiction has certain implied limits. The nature of such emancipation conceptually resides on the release of control that parents invests in their child. However in India the state exercises parens patriae not to release the control but to assign it in a different form.[40] The nature of such parens patriae is more inclined towards the protectionist policies. Therefore my argument prevails that where the court considers the constitutional claim under 21, relatively the cases of judicial activism, only then a minor can be emancipated and not otherwise. First, the stringent laws in the area of commercial law.

Second, Neither in United States nor in common law there is varying age limit only over which an emancipation can be gained. In the statutes there is a varying age limit, where some have put it as 16 other put a bar on 12. But the statutes have a clause of an utmost consideration of the best interest of the minor.[41] Therefore fixing the age limit for emancipation is one of the biggest concern in India. In the cases of emancipation considered above there is a high probability that those minors are likely to get attracted to the industrial work at an early age.[42] Any kind of laborious work whether in a hazardous industry or in an active market economic circle. The state here cannot even raise the argument about child labour because an emancipated minor will have the legal capacity to enter into employment contracts as he wishes. It would in a way lead to the exploitation on a mass scale in India. Since in India almost 49% of population is below poverty line, in these families especially minors are pushed into this labour employment. So minors here

[37] S. D. Katz, *Emancipating our Children-Coming of Legal Age in America*, 7 FAM.L.QUA, 234 (1973).
[38] Hindu Minority and Guardianship Act 13(1955).
[39] India is excluded in such consideration from the common law.
[40] Thirty Hoshie Doikuka v. Hoshiam Shavakasha Dolikuka, (1982) 2 SCC 544.
[41] R.M. Lyon, *Speaking for a Child: Role of Independent Counsel for Minors*, 75 C. L. REV, 681, 684 (1987).
[42] K. Basu, *The Economics of Child Labour*, 88 T.A. ECO REV, 412, 426 (1988).

are likely to gain financial independence sooner than those minors in 51%.[43] This implies that the state while enacting such legislation has to make a trade-off between child labour policies and its beneficial legislations to minors.

It has been globally accepted that the only cure to the problem of child labour is by providing other alternatives such as education.[44] The constitution in both its directive principles and fundamental rights has been quite explicit in imparting the right to education.[45] Emancipation affects both because as soon as legal capacity is gained, the control over minor is taken away. Therefore even if the incentive is created, money as a more crucial factor for survival in India, will be taken up by the minor as a trade-off between the education and money. But the constitutionalism to an extent can prevent the state from enacting such policy.[46] The doctrine which can be made use of is the waiver of fundamental rights, in *Baseshar nath*[47], Supreme Court held that the fundamental rights cannot be waived by a particular individual. Therefore neither a minor can chose to waive his right to education nor can the state repeal it because of it being a part of basic structure.[48] The fatal flaw which might be pointed out in this argument is that the child labour only prohibits the children working under the age of 14 years and same goes with right to education. Therefore an argument from the liberationist side would be that the petition for the emancipation of minors will only be admitted after the minor has obtained an age 15 or 16. This would require only a slight alteration in the Indian Contract Act and side by side an absolute no repeal of legislations. On the top of that the age limit can be put up on the legislative enactment, it makes a whole lot of obscurity crystal clear. Here though the argument may seems to be academically valid but there are certain glitches.

According to *Fuller* every legislation has certain inherent moralities which are classified as morality of duty and morality of aspiration.[49] A good piece of legislation is that which is complacent in both the categories. My argument here is that, even though the state might accrue the first part in this case but will deliberately fail on the other account. The aspirational value that the child labour or the right to education act envisages is uplift of literacy rates and to impede the exploitation which a child is likely to be face in this industrialization era in thedeveloping countries such as in India.[50] So even though a child has crossed the age of 15 but still in all

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[43] *Id.*
[44] *Supra* note 40.
[45] IND. Const. art XXI.
[46] ASHA BAJPAI, CHILD RIGHTS AND INDIA: LAW, POLICY AND PRACTICE, 223, 229 (2nd ed. 2005).
[47] Basheshar Nath v. I.-T. Commr, AIR 1959 SC 149.
[48] Basheshar Nath v. I.-T. Commr, AIR 1959 SC 149.
[49] L.L FULLER, THE MORALITY OF LAW, 34 (1st ed. 1965).
[50] *Supra* note 45. It is also empirically justified that the industrialization is the cause of the child labour.

probability is likely to end up working in industry rather than accumulating higher knowledge. A large mass of minors are likely to be diverted towards it because the essentials required for emancipation are fulfilled in the cases of minors BPL on an ease level. Abdication, financial dependency and marriage, three major factors are empirically fulfilled in the BPL cases specifically.[51] In the long run, the minors among that 49% of population will be the cause of increasing unemployment and several other such impediments in development. Therefore it is against the policy interest of India. In other words, considering the socio economic conditions which India has, the protectionism is arguably justified. It will be against the welfare interest of India to enact a legislation emancipating the minors.

There is another legal argument which is rather escalated against emancipation. The acts related to the children which have been enacted can be construed as subordinate legislations under the international convention. In the decision of *Pratap* v. *State of Jharkhand*[52] it was held that every legislation having the subject matter related to children would be bound by the convention on the rights of the child.[53] One of the articles clearly states that parents are obliged to render the utmost support in any circumstances whatsoever, till he/she reaches the age of majority.[54] It stated

> "*[L]aw in the form of international conventions can contribute considerably. International instruments stress participation as a core value along with the survival, protection and development. Laws and legal strategies must be devise to encourage these values. Once signed an international treaty or convention will be treated as a part of law unless stated otherwise*"[55]

Enacting law related to emancipation of the minors would be in the contravention of this international treaty. As Supreme Court's decision is law according to article 142, in the interest of justice and rule of law.[56] Such an enactment would be void ab initio.

The last and the most important argument I have against the emancipation of minors paradoxically originates itself from Article 21. To rewind, the substantial argument we made that the child should not be treated as a chattel and has a life of his own.[57] Therefore deciding in the best interest, he could be emancipated. This argument is rather very parochial because it on the other hand ignores the interest of the parent especially in the Indian scenario.[58] Therecould be a very iconic argument where parents can raise a claim under article 21. Considering the family

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[51] *Supra* note 48.
[52] AIR 2005 SC 2731.
[53] Pratap v. State of Jharkhand,AIR 2005 SC 2731.
[54] Convention of Child Rights, 5 (1989).
[55] Pratap v. State of Jharkhand,AIR 2005 SC 2731.
[56] DDA v. Skipper Construction Co. (P) Ltd., (1996) 4 SCC 622.
[57] L Chandran v. Venkatlakshmi, AIR 1981 AP 1.
[58] J. Anderson, *Sailing Alone: Teenage Autonomy and Regimes of Childhood*, 31 L. PHIL, 522, 524 (2012).

structure in India, the right to life of a parent includes governing the child until he reaches the age of majority. Therefore it's the laws related to the empowerment of a minor should be overtly tried rather than emancipation.

As far as the history is concerned it is undisputed that the nature of family in India has always been a joint family.[59] The Hindu families are specifically patriarchal families where the decisions regarding the welfare of families are taken by the male elders of the family. However after the 19th century when Indian societies faced Industrialization it was argued that the ancient joint family has been ripped apart.[60] In 21st century there is nothing as joint family, however the same argument has a fatal empirical flaw. Some authors lays down this proposition, where the children after a certain age might have broken apart but it cannot be concluded that it is no more a joint family.[61] In fact it has been empirically proved that the ties unlike in west the crucial emotional ties are not severed.[62] To use a little materialistic language, the wages are still vexed with the joint family. Only 1.8% of the families have made a decision on its own rather than consulting the joint family.[63] So, Indian families follow a cycle of joint-nuclear-joint, irrespective of urbanisation and industrialisation. All scholars of Indian family agree that India had and will have, joint and nuclear families side-by-side. The Indian family is considered as a unit, of both consumption and production.[64] The ideal type of a western family is a conjugal family. In conjugal families there is an autonomous selection of mates, marriage as a contract, and establishment of a self-sufficient social and economic unit as a pair, recognition to the rights of a child.[65] On the other hand the family in India is just opposite, specifically there is an element of parent domination and non-recognition of the rights. Some authors have based their results on the implication that spirit of individualism depends on the number of members in family. Since in urban areas the number of members in a family have decreased the logical implication is that there is a spirit of individualism as a result of westernization. This argument I have already shown as flawed but to counter this substantially, these families have been given the classification of extended family.[66] Though severed from the joint one but still maintaining equal ties is the extended family of India. Therefore the other side manifests the rights of an adult, serving as parents, to raise their children as they see fit. This also means negation of any possible intervention by state, free of law aided and law abetted harassment by disappointed adult

[59] L. Mullati, *Families in India: Beliefs and Realities*, 26 J. COMP. FAM. STU,25 (1995).
[60] D. G. Mandelaum, *The family in India*, 42 SOU. J. AN., 139 (1948).
[61] H. Orenstein, *The Recent history of the extended family in India*, 8 SOC. PRO, 345 (2005).
[62] *Supra* note 61.
[63] *Supra* note 63.
[64] A. A. Katri, *The Adaptive extended family in India Today,*37J. MAR. FAM, 637 (1975).
[65] *Supra* note 60.
[66] *Supra* note 62.

claimants.[67] Despite the sympathetic concern for adults faced with thetragedy, the choice before the courts or legislature is no different though apparently difficult than it often seems in foster common law adoption cases. Whatever the court decides there will be hardship. It may be the parents already victimized by poverty. Poor education ill health, prejudice their own ambivalence or other circumstances who are denied their children for whom they have long and faithfully cared or in a family well off but still denied the right over the children.[68] To conclude the right to govern the child will also be an enumerated right under article 21 of the Indian Constitution. Therefore to conclude I have presented two sides of argument one on the very jurisprudential area and on the other hand the socio-legal consideration in India. In this case I myself seem much confabulated to take side but under such compulsion, I would rather choose that emancipation is very unlike in Indian jurisdiction.

Conclusion

In conclusion it is submitted that emancipation of minors is not feasible in India, subject to the arguments that were addressed in this research paper. As observed in the common law and United States there are different grounds where the court considering the best interest of the child has laid down the condition for emancipating these minors. Such grounds varies from abandonment and intra torts to financial independence etc.

However the jurisprudence behind the non-emancipation did not reflect any strong argument in the state favour. The state relies on the principle of beneficence which is basically the ground for such policy framework. It was further argued that state has gone in contravention of the same principle while not enacting such policy for emancipation. So philosophically it was examined that the state's argument for emancipation is not sustainable.

However it is also submittedthat while examining such scenario in India the above principle of beneficence applies because of the socio economic scenario of India. The nature of India's jurisdiction over minors if read through the acts relevant to them reflects the protective nature of state. Then the constitutional measures happens to be of such nature which are responsible for such protectionism framework. Lastly, since the argument resorted to was the over broad article 21. Considering the family structure in India, depriving the parents of its child is likely to have a grievous effect which is against their right to life. The researcher would like to conclude that to overcome these problems there would be enough complexities which in Indian framework might just take years to resolve. Hence it would not be prudent to suggest this policy in India.

[67] All parents are subjected to state intervention for delinquency, neglect, abandonment, and child abuse. This observation does not imply that the law has developed adequate standards for making such findings.
[68] *Supra* note 60.

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