



THE PRINCIPLE OF PROPORTIONALITY ON THE VALIDITY OF ONLINE AGREEMENTS

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Abstract

The principle of proportionality is one of the important principles in the agreement. The development of online agreements makes the principle of proportionality an effort to test the validity of the agreement. This research is oriented to legal issues, namely the implementation of the principle of proportionality in assessing the validity of online agreements. This research is a legal research that focuses on normative analysis of a legal issue with the orientation of obtaining prescriptions from a legal issue. The approach used in this research is the conceptual approach and legislation. The primary legal materials in this study are the Civil Code, the secondary legal materials are books, articles, and research results related to the principle of proportionality and online agreements. Non-legal material is a legal dictionary. The results of the study confirm that the essence of the principle of proportionality is the balancing of positions in online agreements and the importance of the principle of proportionality as an assessor of the validity of the agreement that complements the provisions of Article 1320 of the Civil Code.

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I. INTRODUCTION

Technological developments are one of the things that must be considered in legal practice. Not infrequently, legal practice must see and consider technological developments. Technological developments must be addressed positively so as not to drown humans in a sea of negative excesses of technology. Technological developments must be a study and focus on legal learning (Aulia, 2020). That is so that the law can adapt to each other with technological developments; which to adapt to technological developments, the law must not be drowned in technological developments but must emphasize the existence and substance of the law in technological developments. The existence and substance of the law in technological development must be interpreted as a praxis of morality that aims to provide a sense of peace for the people (Bateman, 2019). This emphasizes that the substance and character of the law must not be lost and reduced due to technological developments. The law's substance and character must exist in tandem with technological developments. The existence of legal substance and character based on morals and legal principles is important as one of the important aspects of the sui generis character in legal science (Julyano & Sulistyawan, 2019).

The science of law has a sui generis character because it is based on certain values and morality.

(Atmadja, 2018). These values and morality are crystallized in legal principles as guidelines and efforts to "enlighten" the substance of legal norms. Thus, reading the rules and legal norms should be coherent with legal principles. (Mahfud, 2019). That is because legal principles are the foundation of law, meaning that without coherence with legal principles, legal norms lose their validity. Thus, even though there are technological developments, the law must still base legal principles in practice and their application. Technological developments affect legal practice, one of which is online agreements. The practice of agreement in law is certainly related to the development of society. The agreement is a legal practice that is close to people's lives. Almost every day, people always carry out good agreements that are simple to complex. That is what makes the practice of agreement must be "flexible and contextual" with the development of society. Even though the practice of agreement must follow society's development, it must also be based on legal principles. That confirms that even though there is technological development, there is an online agreement, but the online agreement must be based on legal principles.

Thus, the exploration of legal principles becomes important in legal practice. It is certainly relevant that legal principles should be a guide in the practice of online agreements. One of the legal principles that need attention in online agreements is the principle of proportionality. In the author's opinion, of the many principles of contract law, the principle of proportionality is a principle that is rarely discussed compared to other principles such as the principle of freedom of contract, the principle of *pacta sunt servanda*, and the principle of *consensualism*. Therefore, exploring the principle of proportionality in contract law is important, especially concerning the development of community law in the form of online agreements. It can be understood that the practice of online agreements is identical to a "fast agreement," which means that it is possible with a minimum of consideration to agree or disagree with an agreement; there may be an imbalance in the legal relationship of the agreement. Balance is an essential thing in the agreement. Based on this, research on the principle of proportionality needs to get a separate study to determine the validity of online agreements in addition to being based on Article 1320 of the Civil Code (*Kitab Undang-Undang Hukum Perdata*).

Research on the principle of proportionality in agreements has been carried out by Mohammad Iqbal Rahmawan P, Aminah, and Budi Ispriyarso (2019) on the *Penerapan Asas Proporsionalitas Dalam Perjanjian Waralaba* which focuses on the practice of applying the principle of proportionality in franchising practices (Rahmawan P, Aminah, & Ispriyarso 2019). Furthermore, research conducted by Muskibah and Naili Hidayah (2020) on the Application of the *Penerapan Prinsip Kebebasan Berkontrak Dalam Kontrak Standar Pengadaan Barang Dan Jasa Pemerintah Di Indonesia* even focuses on the principle of freedom of contract, but in its implementation, the principle of freedom of contract must also be carried out side by side with the principle of proportionality (Muskibah, 2020). Furthermore, Alfis Setyawan and Nur Hadiyati (2021) researched

regarding *Implementasi Asas Proporsionalitas Dalam Perjanjian Terapeutik Dalam Rangka Mewujudkan Keadilan Bagi Pasien* (Setyawan, 2021); this study focuses on analyzing the principle of proportionality in therapeutic agreements. Based on the three previous studies, research on the validity of agreements based on the principle of proportionality in online agreements has never been carried out by the three previous studies. Thus, this research is an original study. This study seeks to answer two problem formulations: (i) What is the nature of the proportionality principle as a parameter of the validity of online agreements? Moreover, (ii) How to implement the principle of proportionality as a parameter test of the validity of the online agreement?

II. RESEARCH METHODS

This type of research is legal research. Legal research is a (special) research in the field of legal science that tries to answer legal issues. Legal issues occupy a central position in a legal problem (Marzuki, 2016). Legal issues occupy a central position in a legal problem (Hadjon, Philipus M, 2011). This research uses a statutory and conceptual approach. The legal materials in this study include: primary legal materials, namely: Civil Code/*Burgerlijk Wetboek*; secondary legal materials include: books, journal articles, and study results related to the principle of proportionality and online agreements, as well as non-legal materials, including legal dictionaries. The analysis was carried out by conducting an inventory and analysis of the primary legal materials in the form of the Civil Code/*Burgerlijk Wetboek* to find prescriptions as legal recommendations.

III. RESULT AND DISCUSSION

3.1. The Principle of Proportionality's Perspective as a Parameter on the Validity of Online Agreements

The agreement is a dynamic legal process. That is understandable because the agreement has a societal dimension, which means that any progress or change in society must impact the practice of the agreement. An agreement is a legal act with a legal consequence dimension to various agreements made by the parties (Juniardi & Komariah, 2021). As a legal act, of course, an agreement requires the legal capacity of the parties to carry out the agreement. In addition, the agreement attempts to frame a process with an economic dimension in legal relations. That is as in a saying, "Every business move is a legal step (in this case, an agreement)". The agreement, in this case, is interpreted as a "legal frame" for business or other economic processes (Raden Roro et al., 2019). Agreements are important as a frame for business processes or other economic processes. Economic or business processes certainly have risks that the parties can experience. In this case, the agreement as a frame in the business or economic process finds its relevance. That is because the practice of agreement develops following the activities and social development of the community. In this case, technological developments are

no exception, encouraging the practice of changing agreements that, although essentially the same, have certain differences.

The advancement of the digital world has changed many ways of humans in law. The world of the legal profession has changed, as described by Richard Susskind in his book, which describes how technological and digital developments affect the legal world. One of the important legal change paradigms in Richard Susskind's view is the change in the character of legal consultation (advisory service) into information service. That does not only occur in one or two legal practices but must also become the "spirit" of various legal professions and practices in the world community. Furthermore, Richard Susskind stated, "I claimed that information technology generally, and the internet, in particular, were about to precipitate huge changes in legal practices and the administration of justice" (Colombo, 2019). Richard Susskind's view must be understood optimistically and not as an understanding that sees laws that are increasingly "outdated" and out of date. Richard Susskind invited jurists to think creatively and innovatively, initially passive by waiting for a legal problem to become more creative and active and not waiting but trying to offer solutions in every legal relationship. Richard Susskind's views on technological and digital developments are relevant to legal developments where the law must be able to become a frame for various legal actions that develop linearly with the development of society. In the context of an agreement, technological developments have led to the birth of a digital agreement, commonly called an online agreement.

The online agreements, in principle, have similarities to agreements in general, but there are some differences in the level of practice or implementation. In its implementation, the agreement generally occurs with the meeting of the parties and the will of the parties, which is then outlined in a legal formulation called an agreement. In a conventional agreement where the parties meet directly, there is a request, offer, and reasoning from each party regarding the will to be formulated. In this case, the conventional agreement guarantees the negotiation process so that each party's demand, supply, and reasoning can be carried out in-depth and comprehensively. Online agreements certainly have a different character from conventional agreements that guarantee each party's meeting of demand, supply, and reasoning. The character of the online agreement is the existence of 'fast and efficiency' in determining the agreement. The parties do not infrequently pass the online agreement clause because the parties need to fulfill the purpose of the online agreement. In this case, there is a potential for no meeting of demand, supply, and maximum reasoning from the parties. On the one hand, the emphasis on 'fast and efficiency' in online agreements has a positive aspect, namely saving time and making legal actions more efficient (Menashe, 2018). However, it actually has a weakness because the exchange of rights and obligations of the parties has the potential not to be maximally deliberated by the parties. Therefore, even though online agreements have a positive impact, on the other hand, it also has a negative impact.

The online agreement, in this case, requires a proportional deliberation process in addition to the fast and efficient character of the online agreement. Thus, the demand, supply, and reasoning of each party need to get their focus on the online agreement (Hernoko, 2014). That confirms that legal principles such as freedom of contract, the principle of consensualism, and the principle of *pacta sunt servanda* must also be accompanied by the principle of proportionality. In developing the principle of law, the principle of proportionality developed from the idea of contractual justice. In general, the discourse on contractual justice is still a conventional debate, namely between the balance and imbalance in the contract. The debate about the position of the contractors in the perspective of commercial business contracts needs to receive a separate study, especially concerning the study of the structure of relations and the building of legal principles. One of the main characteristics of the principle of proportionality is the effort to guarantee respect for partnerships and business continuity (efficiency and profit-oriented), so that it is not just a mathematical balance. That also confirms the principle of good faith in business law, especially in the practice of agreements. The principle of good faith must be read in full, including the aspects: "good faith and fair dealing; reasonableness and equity; *redelijkheid en billijkheid*" which requires propriety and justice in the practice of agreements. This character emphasizes that the principle of proportionality is related to the proper distribution of burdens and obligations and is not only based on fixed-term mathematical considerations (Hernoko, 2014).

In the principle of proportionality, the uncertainty of the benefits that are divided among the parties must be interpreted as an effort to realize justice which, in fact, in practice, the agreement has a contextual character. The contextual character in the agreement means that justice can be fulfilled if you see the legal acts of the agreement carried out by the parties (Hutagalung & Hasnati, 2021). In this case, the propriety aspect is important in assessing whether or not the principle of proportionality in the agreement is fulfilled. The principle of proportionality is principally based on a win-win solution agreement paradigm) on the one hand, providing "legal certainty" and, on the other hand providing "justice" (Devita, 2021). In commercial business contracts, the parties aim to build a fair business relationship. That is actually to erode the old debate, namely between "imbalance versus injustice in the agreement," but it should be more focused on how the different interests of the parties can be arranged in such a way proportionally (justly). The agreement must be understood as a form of difference or dissimilarity of interest between the parties (Erviana, 2020). In short, the agreement starts from differences in interests that are tried to be reconciled through a contract or agreement in an agreement. That is the true relevance of the principle of proportionality. Jeremy G. Thorn, for example, emphasized that in an agreement, the most important aspect is how the negotiation proceeds fairly.

In Jeremy G. Thorn's view, negotiation is the "spirit" of the agreement; that confirms that if the negotiations run smoothly and proportionally, the agreement will also be more or less fair, proper,

and proportional (Kamilah, 2021). However, the opposite is also true; if the negotiations are not fair, then failure or “one-sided” substance is very likely to occur in the agreement. In principle, an agreement is a forum that brings together the interests of one party with another, demanding a fair form of exchange of interests. We often hear the question of what "justice" is, but the right understanding is complicated and even abstract, especially when it is associated with such complex interests. Some philosophers, such as Aristotle, gave an understanding that justice is "justice consists in treating equals equally and unequal unequally, in proportion to their inequality," so that it is oriented that "the same things are treated equally, and those who are not the same are also treated unequally, proportionally." Ulpianus describes justice as "Justitia est constans et perpetua voluntas ius suum cuique tribuendi" which means that "justice is a will that continues and gives each one what his or her right" (Holijah, 2021). This view is further practiced by Robert Reiner, who asserts that justice is an 'essentially contested concept' (Nahdhah, 2021). In Robert Reiner's view, justice is related to abstract and interpretive-visionary concepts, so it is very dependent on personal and communal judgments about justice.

According to the author, in the context of the principle of proportionality, Robert Reiner's view must be understood in three ways of thinking. First, the abstract nature of justice as the essence of the principle of proportionality must be understood that justice requires a foothold in the form of a social reality called propriety. In discussing justice, one must look at the context of justice being discussed, whether business justice, contractual relationship justice, or justice in social relations. That is because justice has its dimensions according to the context. Second, justice must be understood as applying morality based on legal norms and rules. The thing that must be seen is how the legal rules and norms that govern society are then explored for their philosophical foundations that lead to a noble goal called justice. Third, justice must pay attention to the relations of the parties, including the potential inequality of one party against the other. That further indicates the importance of the principle of proportionality in the practice of agreements, especially online agreements. The principle of proportionality departs from two forms of similarity that are commonly known in the context of philosophy, namely: (i) proportional equality (*acqualitas proportionis*) and (ii) similarity in quantity or amount (*acqualitas quantitas*) (Murdiana, 2021). From these two things, the principle of proportionality approaches the first aspect, namely *acqualitas proportionis*.

Acqualitas proportionis is an *argumentum a contrario* of a mathematical similarity that is identical to the equation of the sum. In proportional equations, the role of morals and propriety occupies the highest aspect so that everything mathematically the same is not necessarily the same as appropriate, nor is something appropriate also not necessarily the same mathematically. In another view, this is relevant to the views of John Boatright and Manuel Velasquez, which outline that justice has a distributive character, namely the proper distribution of risks and benefits. This view requires a classification of the meaning of justice in the principle of proportionality, which must be seen

formally and materially (Hernoko, 2010). Formally, justice must be understood as "equals ought to be treated equally and unequally may be treated unequally so that *ceteris paribus* in the same situation and condition is prohibited from any difference in treatment (discrimination). Even so, different treatment is needed in unequal situations and conditions to allow positive discrimination (affirmative action) (White, 2021). Materially, the substantive aspect of the treatment award for each party must be seen to balance the benefits and risks shared by the parties. The philosophical view related to the principle of proportionality was also specifically developed by Beauchamp and Bowie (Hernoko, 2010), which provides six options for justice in the principle of proportionality, which includes: (i) equal parts for everyone, (ii) providing according to individual needs, (iii) giving according to their rights, (iv) giving according to their efforts and contributions, (v) giving according to services, and (vi) giving appropriately according to the benefits and risks.

Referring to this view, the principle of proportionality needs to look at the sixth aspect, especially in giving properly according to the benefits and risks. In online agreements, the principle of proportionality must be implemented and used as the basis for every online agreement. It should be understood that online agreements further minimize the role of individual judgment in the agreement. Therefore, the principle of proportionality must be used as the basis for online agreements, which include: (a) Looking at the relationship between the parties (whether the character of the agreement is equivalent such as a sale-purchase agreement or an unequal one, such as a work agreement between an entrepreneur and an online worker); (b) Looking at the substance between the parties (ie, by properly applying the benefits and risks, for example in an online sale and purchase agreement it is clear the compensation to be borne and the insurance) to minimize the risk to one of the parties; and (c) Seeing the good faith of the parties in carrying out and implementing the agreement (i.e., by asking for contact or number that can be contacted in monitoring the implementation of an agreement and if there is bad faith, you can use the screenshot feature as digital evidence of bad faith in the agreement). Based on the description above, the essence of the proportionality principle in the validity of the online agreement is not looking at the technical-juridical validity as specified in Article 1320 BW/Certificate of Civil Code but looking at the validity based on the proportionality principle which looks at the relationship, substance, and good faith of the parties.

3.2. The Implementation of the Principle of Proportionality as a Parameter on the Validity of Online Agreements

The principle of proportionality in the agreement should be applied "linearly" with an understanding of the concept of justice as fairness. The idea of justice as fairness or pure procedure justice proposed by John Rawls does not require that everyone involved and taking the same procedure must also get the same result. On the other hand, the results of a fair procedure must be accepted as fair, even if everyone does not get the same result (Safira, 2019). Thus the concept of

justice born of a procedure accepted by all parties must also be accepted as a concept that is appropriate to apply to the public. Therefore, it must be understood that justice does not always mean that everyone should always get something in the same amount, regardless of the differences that exist in each individual. Thoughts on the principle of proportionality need to be put forward in addition to the principle of balance in contracts that have been known for a long time (textually) but are not necessarily understood contextually. The principle of balance in the agreement has been known for a long time, but its practical dimensions have not been widely understood. The principle of balance emphasizes the balance of positions of the parties who contract or enter an agreement. Therefore, in the event of an imbalance in a position that causes disturbance to the contents of the contract, the intervention of a certain authority (government) is required.

The relationship between consumers and producers is assumed to be a subordinate one, so consumers are in a weak position in forming their contractual will. Subordinate relationships, weak bargaining positions, producer dominance and several other conditions are assumed to have an imbalance in the relationship between the parties. Moreover, this is common in online agreements where there is a legal relationship between buying and selling, which is currently commonly done online. This has the potential to harm consumers if the construction of the application of the principle of proportionality is not emphasized in the online agreement. The understanding of the principle of proportionality can be understood with several options (Hernoko, 2014), namely: (a) more towards the balance of the positions of the parties, meaning that in the contractual relationship, the position of the parties is given a balance charge; (b) the equal distribution of rights and obligations in a contractual relationship as if without regard to the process that takes place in determining the outcome of the distribution; (c) balance as if merely the result of a process; (d) state intervention is a coercive and binding instrument in order to achieve a balanced position of the parties; (d) the balance of positions of the parties can only be achieved on the same terms and conditions (*ceteris paribus*). Of the five options in applying the principle of proportionality, it should be emphasized that the principle of proportionality is not seen from the context of mathematical equilibrium, but from the process and mechanism for the fair exchange of rights and obligations (Hernoko, 2010).

As emphasized by Aristotle, the meaning of justice states that "justice consists in treating equals equally and unequals unequally, in proportion to their inequality". This emphasizes that the element of fairness should be put forward in viewing an agreement. The understanding of justice in the principle of proportionality is in line with the views of Paul Tillich, L.J. van Apeldoorn, J. van Kan and J.H. Beekhuis, who stated that justice is treating the same to the same and treating the unequal in proportion to the inequality (Hírlav, 2019). Beauchamp and Bowie, with their proportional distribution criteria, and John Rawls's idea of "justice as fairness" emphasizes the principle of rights based on rationality, freedom and equality (Said, 2021). Further, P.S. Atijah provides a rationale for the principle of proportionality concerning the role of contracts as a basis for fair exchange in the

business world, that the transactions of the contracting parties are following what they want (proportion in what they want) (Hernoko, 2014). The views of the scholars mentioned above are the basis for the arguments I build to formulate the meaning of the principle of proportionality. Lyons' view reinforces that a real contractual climate essentially provides opportunities for differences of opinion, bargaining, or even relevant differences between the parties (DiMatteo, 2018). Only in such a process does the outcome of an agreement truly reflect the interests of all parties. In the agreement there are also differences of opinion, bargaining, or even relevant differences between the parties, especially if this is carried out online.

The existence of technical problems such as network problems, unclear voice, and too fast online approval is one of the obstacles to implementing the principle of proportionality related to its practice in online agreements. Peter Mahmud Marzuki mentions the principle of proportionality with the term "equitability contract" with elements of justice and fairness. The meaning of "equitability" indicates a relationship that is equal (equality), impartial and fair, meaning that the contractual relationship takes place proportionally and fairly (Marzuki, 2017). By referring to the principle of *aequitas praestacionis*, namely the principle that requires a guarantee of balance and the teaching of *justum pretium*, namely appropriateness according to law. It is undeniable that the similarities between the parties never existed. On the other hand, when the parties enter into a contract, they are in unequal circumstances. However, the dominant party should not take advantage of this inequality to impose its will inadequately on the other party. In such a situation, the principle of proportionality means equitability. The principle of proportionality is the embodiment of the doctrine of "fairness of contract," which corrects the dominance of the principle of freedom of contract, which sometimes causes injustice. Konrad Zweigert and Hein Kotz criticize the practice of the principle of freedom of contract, which is considered too excessive. In his view, the principle of proportionality should be a counterweight to freedom of contract (Muskibah, 2020).

The balance carried out by the principle of proportionality can lead the contract to the doctrine of "contractual justice," emphasizing the parties' agreement and fair justice. In this case, the agreement is always based on the parties' freedom and whether it is relevant, appropriate, and proportional to the parties. This confirms that of the many obstacles that exist, online agreements should also look at the aspect of "contractual justice" as a condition of doctrinal validity so that it completes the provisions in Article 1320 of the Civil Code. The important thing from the principle of proportionality is the principle of accuracy (*zorgvuldigheid*), feasibility (*redelijkheid*; reasonableness) and propriety (*billijkheid*; equity) (Pane, 2022). It should not be interpreted that the findings will be in mathematical figures. The principle of proportionality does not question the mathematical balance (similarity) of the results but rather emphasizes the proportion of the distribution of rights and obligations between the parties that takes place fairly and reasonably. In Niewenhuis' view, the way the contract is formed, and not on the final result of the achievement in question (Hernoko, 2014).

Niewenhuis's view is certainly relevant to the principle of proportionality in commercial business contracts, which emphasizes the equality of positions and the exchange of achievements between the contracting parties (Hernoko, 2014). Thus the expression that develops in business practices in various places can be used as a moral basis for the principle of proportionality, especially in the context of commercial business contracts, that "equal pay for equal work," "you pay peanut, you get monkey". The essence of contract law is basically to meet the legal needs of business actors, in the sense that it does not merely regulate but, more than that gives business actors complete flexibility and freedom to determine their needs.

Agreements or contracts cover a wide range of aspects of public relations, as stated by D.G. Cracknell is "contract is one of the few areas of law with which almost everyone comes into day-to-day contact." (Jamil, Nury & Rumawi, 2020). Regarding its validity, Article 1320 of the Civil Code explains that the conditions for the validity of an agreement are as follows: (a) There is an agreement for those who bind themselves; (b) Ability to enter into an engagement; (c) A certain matter; and (d) A lawful cause. In simple terms, First, the terms of an agreement for those who bind themselves within the principle of proportionality are not only meant by the two parties have agreed. However, it must be interpreted that the parties "have agreed fairly." This confirms that in the context of the agreement, the parties are not forced, or because of their ignorance or lack of reasoning, they are immediately deemed to have agreed and agreed to an online agreement. Therefore, in the principle of proportionality, the agreed elements must be read together with applying the principle of proportionality. Second, regarding the ability to make an engagement with a futuristic interpretation, a minimum age of 18 years must be seen, and it is not following the Civil Code, which states that you must be 21 years old. This is because there are legal developments that make 18 years of age can be referred to as adult age. In addition, with the proliferation of free online agreements, so for sales that require careful reasoning and consideration, it is necessary to provide a minimum age limit of adulthood, namely 18 years of age, to ensure proper consideration and equal position of the parties as to the implementation of the principle of proportionality. Third, by applying the principle of proportionality, a certain thing in an online agreement should also economically see a fair exchange for that particular thing. This is not only based on the mathematical aspect but also the fair aspect, which is equally beneficial to the parties. Fourth, a halal cause is interpreted as only permitted by law and proportionally has a quality that follows proper economic exchange with parties who make transactions in online agreements.

Based on the description above, the implementation of the proportionality principle as a parameter to test the validity of the online agreement is by still paying attention to the legal terms of the agreement, namely based on Article 1320 of the Civil Code by emphasizing the proportionality aspect in each element of the agreement, namely agreeing fairly, proportionally competent in carrying

out legal relations, certain things that can economically guarantee a balanced relationship, as well as things that are *halal* proportionally including the quality of something that is agreed upon online.

IV. CONCLUSION

The essence of the proportionality principle in the validity of online agreements is not looking at the technical-juridical validity as specified in Article 1320 of the Civil Code but looking at the validity based on the proportionality principle, which looks at the relationship, substance, and good faith of the parties. That ensures a fair relationship between the parties in the online agreement. The implementation of the proportionality principle as a parameter to test the validity of the online agreement is to pay attention to the legal terms of the agreement, namely based on Article 1320 of the Civil Code, by emphasizing the proportionality aspect in each element of the agreement, namely agreeing fairly, proportionally competent in carrying out legal relations, certain things that are economically viable. It can guarantee a balanced relationship and a proportionally *halal* thing, including the quality of something that was agreed upon online.

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