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Same-Sex Marriage and India's Constitutional Impasse

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ABSTRACT

This paper examines the constitutional and legal debate surrounding same-sex marriage in India, with particular focus on the Supreme Court's decision in Supriyo Chakraborty v. Union of India Judgment. It traces the historical treatment of homosexuality in India, beginning with references in ancient texts and cultural practices, followed by the criminalization introduced during British colonial rule through Section 377 of the Indian Penal Code. The paper further analyses major judicial developments, including Naz Foundation v. Government of NCT of Delhi and Navtej Singh Johar v. Union of India, which ultimately decriminalised consensual same-sex relations.

The study critically evaluates the constitutional arguments raised in Supriyo, particularly arguments given by honourable judges concerning equality, dignity, privacy, and the right to form unions. It evaluates each judge's reasoning over the matter. The paper also highlights unresolved issues such as adoption rights, civil unions, inheritance, and legal recognition of queer relationships. It concludes that while same-sex marriage remains unrecognized in India, evolving constitutional values and changing public opinion continue to shape the discourse on LGBTQ+ rights and equality.

I. INTRODUCTION

"The Constitution does not expressly recognize a fundamental right to marry. An institution cannot be elevated to the realm of a fundamental right based on the content accorded to it by law." —Former CJI Justice DY Chandrachud (while passing the Supriyo Chakraborty v. Union of India judgment on the petitions filed for legalizing same-sex marriages in India on 17th October 2023).

Marriage is a part of our society that has been dictated by the various traditional heterosexual social norms. The standard definition of marriage has typically referred to the union of a man and a woman. Homosexuals have faced exclusion and discrimination since the beginning of time throughout the whole of the world. The society treats "heterosexuality" as normal and any

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sexual act other than this is deviant and illegal[1]. However, in recent decades there has been rise for the legalisation of same sex marriage in whole world. Netherlands was the first country in 2001 to legalise same sex marriage followed by many countries like Australia, Canada, Brazil, United Kingdom, United states of America and many more. In India it still remains a matter of constitution debate

The institution of marriage is neither purely a social nor religious nor legal institution. In fact, it is a socio legal religious and economic institution. Since ancient period, it has been recognized by the customs as one of the historic institutions of the civil society. It regulates the social, economic, legal, religious, moral and cultural relations between man and woman in the civilized system by sanctioning certain mutual Rights and obligations towards each other.[2]

Marriage, as a legal institution, is not merely a social contract but a gateway to a range of rights and entitlements, including inheritance, adoption, maintenance, and social recognition. As one of the petitioners argued before the Court, marriage represents a "bouquet of rights" that remains inaccessible to LGBTQ+ individuals.[3]

This paper attempts to understand how same sex marriage developed in India. The paper proceeds in three parts. The first section describes the history of homosexuality and Law in India. The second section analyses the deciding case of Supriyo vs. Union of India[4] and its impact in India. In the final sections, the author concludes the paper that will help to understand the present situation.

II. HOMOSEXUALITY IN ANCIENT AND COLONIAL INDIA

Ancient India was about acceptance and celebration of all forms of love. This can be seen in Indian religious books which contained homosexual characters and themes in their texts which were neutral to the idea of homosexuality.

The Rigveda contains the phrase 'Vikriti Evam Prakriti' meaning what seems unnatural is also natural. Kamasutra[5] mentions that lesbians were called 'Swarinis', who often married each other and raised children together and the presence of transgenders 'Tritiya Prakriti'. A story in Padma Purana describes how two widows of King Dilip, who died without an heir, conceived a son (the future King Bhagirath) after making love to each other following a divine vision from

[1] Gomes, T. C., Kanungo, S., & Sengupta, S. (2026). Same-sex love and marriage: understanding the Special Marriage Act, 1954. *Frontiers in sociology*, *10*, 1622997. https://doi.org/10.3389/fsoc.2025.1622997.
[2] Mohana Rao Pedada, Concept of Marriage, Matrimonial Causes in Conflict of Laws - Issues and Challenges, 2 INDIAN J.L. & LEGAL RSCH. , June-July 2021, at 1.
[3] Supriyo and Ors. vs. Union of India (UOI) (17.10.2023 - SC): MANU/SC/1155/2023.
[4] Supriyo and Ors. vs. Union of India (UOI) (17.10.2023 - SC): MANU/SC/1155/2023.
[5] Ancient Indian Hindu text, written in Sanskrit, that describes sexual positions, intimacy, and desire.

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Lord Shiva .Another very visual example is the Khajuraho temple of Madhya Pradesh, built in the 12th century, known for their overt erotic sculptures showcasing the existence of sexual relation between homosexuals.

During the medieval times there was some dissent for homosexuality, but LGBT people were not excluded from community. The society was tolerant towards them and nobody was hounded for having a different sexual preference. Many Sultans and Emperors such as Babur expressed their love for same gender but faced no hate or repercussion.

It was during the British colonial. The lives of Queer people were disrupted due to the British values on homosexuality. They saw homosexuality as a "crime" or "sin," which was against the law of nature.

Lord Macaulay, the President of Indian Law Commission introduced IPC (Indian Penal Code) in 1860 in Chapter XVI Section 377 observed that

Section 377 - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 377 had no concept of any consent therefore amounting any homosexual intercourse to rape, this formed the image of queer people as criminals.

III. HOMOSEXUALITY IN CURRENT TIMES

The issue of homosexuality was first time raised in PIL filed by AIDS Bhedbhav Virodhi Andolan (ABVA) in Delhi high court challenging the constitutionality of Section 377 followed by Naz Foundation in 2001 which was initially dismissed but later heard on when supreme court ordered the Delhi high court to acknowledge the PIL.

The case of Naz Foundation v. Government of NCT of Delhi[6], was first case to succeed to decriminalize section 377 of IPC stating

"Only the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our Fundamental rights"[7]

This was a big success for the queer people but in 2013 another case filed by the coalition of

[6] Naz Foundation v. Government of NCT of Delhi, 160 (2009) DLT 277.
[7] Naz Foundation v. Government of NCT of Delhi, 160 (2009) DLT 277.

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the Christian to challenge the High court and the judgment of Naz Foundation v. Government of NCT of Delhi was reversed in Suresh Kumar Koushal & Anr vs Naz Foundation & Ors[8].

The Court begins noting that pre-Constitution laws, since parliament has had an opportunity to remove them and hasn't, should be given a presumption of constitutionality equal to a post-Constitution law. The Court concludes that "unless a clear constitutional violation is proved" a court cannot strike down a law simply because of disuse or changing social norms. This duty should be left to parliament. Thus Section 377 was held valid.

The year 2018 marked an important milestone in the history of LGBTQ rights in India as Section 377 of the IPC was scrapped, thereby decriminalizing homosexuality. The Supreme Court, led by a five-judge bench comprising Chief Justice Misra, Justice Khanwilkar, Justice Nariman, Justice Chandrachud, and Justice Malhotra, ruled unanimously in Navtej Singh Johar v. Union of India[9] that Section 377 was unconstitutional because "it criminalizes consensual sexual conduct between adults of the same sex."

While delivering this verdict, the Supreme Court had extensively referred to the NALSA[10] judgment (2014) and the Yogyakarta principles (2006) and stated that the Yogyakarta principles[11] "conform to our constitutional view of the fundamental rights of the citizens of India and persons who come to this Court" (Paragraph 84, Justice Indu Malhotra)

Although this judgment decriminalised homosexuality but did not legalise same sex marriage. After this enormous victory the next step for the Queer community was legalisation of Same sex marriage.

IV. CULTURAL AND RELIGIOUS INFLUENCE

Marriage is frequently seen in India as a social compact entwined with custom, family, and religion. Many people believe that marriage is essentially a connection between a man and a woman, which is essential to social structure and the formation of families. The acceptance of same-sex unions is hampered by this conventional viewpoint. The teachings or interpretations of the major Indian religions- Hinduism, Islam, Christianity, etc. are against same-sex marriage.

Many religious leaders and adherents still believe that same-sex marriage are against divine

[8] Suresh Kumar Koushal & Anr vs Naz Foundation & Ors; AIR 2014 SC 563.
[9] Navtej Singh Johar V Union of India, AIR 2018 SC 4321.
[10] National Legal Services Authority (NALSA) vs. Union of India (2014) is a landmark judgement that recognized transgender individuals as the third gender under the Indian Constitution.
[11] The Yogyakarta Principles are a document outlining 29 principles on LGBTQ rights, which were drafted and developed by the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, activists, and jurists. This was a product of a meeting held at Gadjah Mada University in Yogyakarta, Indonesia, from November 6 to 9, 2006.

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law. The political discourse and public opinion surrounding the subject are greatly influenced by this religiously motivated resistance. Rigid gender norms and heteronormative assumptions about marriage and sexual orientation have long existed in India. people's perspective on same-sex marriage and LGBTQ+ rights in general are greatly influenced by these social standards. Redefining these cultural viewpoints in favour of a more inclusive view of identity, relationships, and love is the difficult part.[12]

India's marriage laws, including the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, are fundamentally structured around a heterosexual understanding of marriage. Similar heteronormative frameworks can also be seen in personal laws governing other religious communities, such as Muslim and Christian marriage laws. Statutes like the Indian Christian Marriage Act, 1872 and principles derived from Muslim Personal Law (Shariat) Application Act, 1937 also conceptualize marriage as a union between a man and a woman. Across these legal frameworks, the repeated use of gender-specific terms such as "husband," "wife," "bride," and "bridegroom" implicitly excludes same-sex couples from legal recognition.

Special Marriage Act, 1954

The Special Marriage Act was enacted in 1954 to provide an alternative to these individual personal laws. This act was created to facilitate inter-caste and inter-religious marriages that were previously prohibited under their personal laws. Couples undergo a civil registration process, and their issues related to marriage, divorce, and succession are governed by a secular state law. The SMA is one of the most progressive and secular laws in India, as it allows individuals to marry partners of their own choice, free from the restrictions of caste, religion, and community.[13]

The LGBTQ community seeks same sex marriage in Special Marriage Act, but it is not feasible because the act's language contains genderised terms like 'Wife' and 'Husband' and 'Male' and 'Female'.

For example, Section 15 (a) of SMA states that a marriage can be registered if "a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since." The language clearly reveals that this act cannot accommodate same sex couples.

[12] Kirti Sejwal and Komal Dalal, *Same-Sex Marriages: The Indian Context*, Vol. 6 Iss 6; 194,
[13] Gomes, T. C., Kanungo, S., & Sengupta, S. (2026). Same-sex love and marriage: understanding the Special Marriage Act, 1954. *Frontiers in sociology*, *10*, 1622997. https://doi.org/10.3389/fsoc.2025.1622997.

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V. ANALYSING THE SUPRIYO V. UNION OF INDIA CASE

The Supriyo v. Union of India[14] case stemmed from writ petitions filed in November 2022 by two same-sex couples - Supriyo Chakraborty and Abhay Dang, and Parth Mehrotra and Uday Raj Anand - who challenged the constitutional validity of Section 4(c) of the Special Marriage Act, 19542. The petitioners contended that this provision, limits the scope of marriage to heterosexual relationships, and thus violates their fundamental rights to equality, non-discrimination, privacy, and dignity.

The case was further bolstered by the transfer of similar petitions from various High Courts, collectively challenging the exclusion of same-sex couples from the purview of marriage laws like the Hindu Marriage Act. This convergence of legal challenges underscored the growing momentum and urgency for addressing the long-standing demand for the legalization of same-sex marriage in India.

On March 13th, 2023, a 3-judge Supreme Court bench led by Chief Justice D.Y. Chandrachud referred the case to a 5-judge Constitution Bench for a comprehensive examination. After 10 days of extensive hearings, concluding on May 11th, 2023, the 5-judge bench reserved its judgment, which was finally pronounced on October 17th, 2023.

The primary argument in favour of same-sex marriage is rooted in the principles of equality, dignity, and non-discrimination. Marriage is not merely a social institution but a legal status that confers a range of rights and benefits. Denying these rights to LGBTQ+ individuals effectively creates a second-class citizenship.

During the hearings, it was argued that LGBTQ+ individuals have the right to "dignity and marriage." Furthermore, many rights, including inheritance, maintenance, and adoption, flow directly from marital status. Without legal recognition, same-sex couples remain excluded from these essential protections. Additionally, global trends indicate a growing recognition of same-sex marriage as a fundamental human right. The judgment had had two contradictory sides with different perspectives. The majority opinion was composed of Justice S.R. Bhat, Justice P.S. Narasimha, and Justice Hima Kohli. The minority opinion was composed of Chief Justice of India (CJI) D.Y. Chandrachud and Justice S.K. Kaul. Their opinions were as follow

Minority verdict

Former CJI Justice D.Y. Chandrachud observed that queer persons possess a constitutional

[14] Supriyo and Ors. vs. Union of India (UOI) (17.10.2023 - SC) : MANU/SC/1155/2023.

right to form unions under Articles 14, 15, 19, and 21. He emphasized that sexual orientation is protected under Article 15 and that denying legal recognition and benefits to queer couples results in discrimination. While the Court could not judicially rewrite the Special Marriage Act, 1954, he recognized the State's obligation to provide legal and social entitlements to queer unions. He further affirmed that transgender and intersex persons have the right to marry under existing laws, and that unmarried and queer couples can jointly adopt children. CJI Chandrachud also directed the Union Government to constitute a committee to examine and implement welfare measures and legal benefits for queer couples, including rights relating to ration cards, joint bank accounts, medical decision-making, succession, pensions, and other social entitlements.

He held that the queer couples are protected by Fundamental Rights and can jointly adopt a child if they seek to, however the state could impose regulations which will subserve the best interest and welfare of the child in terms of the exposition in the judgment saying

"*The freedom of all persons including queer couples to enter into a union is protected by Part III of the Constitution. The failure of the state to recognise the bouquet of entitlements which flow from a union would result in a disparate impact on queer couples who cannot marry under the current legal regime. The state has an obligation to recognize such unions and grant them benefit under law*".[15]

Justice S.K. Kaul observed that the Special Marriage Act was enacted to provide a secular framework for marriage irrespective of religion, and its objective was not to exclude non-heterosexual couples. He disagreed with the view that the Act was intended solely for heterosexual marriages, stating that the existence of heterosexual provisions does not determine the true object of the statute.

Justice Kaul further observed that legal recognition of queer unions is an important step towards substantive equality under the Constitution. Equality, according to him, requires respect for individual autonomy and personal choice in all spheres of life. He emphasized that non-heterosexual couples are equally capable of love, commitment, and responsibility, and their relationships deserve the same constitutional protection and dignity as heterosexual relationships, so long as they do not infringe upon the rights of others.

"The SMA postulates a special form of marriage available to any person in India irrespective of faith. Therefore, the SMA provides a secular framework for solemnization and registration of marriage. Here, this court disagree with my brother Justice Ravindra Bhat, that the sole

[15] Supriyo and Ors. vs. Union of India (UOI) (17.10.2023 - SC) : MANU/SC/1155/2023.

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intention of the SMA was to enable marriage of heterosexual couples exclusively. The stated objective of the SMA was not to regulate marriages on the basis of sexual orientation. This could not be so as it would amount to conflating the differentia with the object of the statute. Although substantive provisions of the SMA confer benefits only on heterosexual relationships, this does not automatically reflect the object of the statute. For as this court were all aware, this court often act in ways that do not necessarily correspond to our intent. Therefore, this could not look at singular provisions to determine substantive intent of the statute. Doing so would be missing the wood for the trees.."[16]

Majority vedict

Justice S.R Bhat observed that the creation of a legal framework recognising queer unions falls within the domain of the legislature and not the judiciary. Therefore, courts cannot direct the State to establish a new legal regime granting marital or civil union status to same-sex couples. At the same time, he acknowledged that queer couples suffer indirect discrimination because many social welfare schemes, benefits, and entitlements are linked to marital status. He emphasized that the State has a constitutional obligation to address and remove these discriminatory impacts through appropriate legislative and policy measures. However, according to him, such reforms require detailed social, legal, and policy considerations involving a multidisciplinary approach, making the legislature and executive better suited than courts to provide comprehensive remedies saying

"There is no unqualified right to marriage except that recognised by statute including space left by custom. An entitlement to legal recognition of the right to union - akin to marriage or civil union, or conferring legal status upon the parties to the relationship can be only through enacted law. A sequitur of this is that the court cannot enjoin or direct the creation of such regulatory framework resulting in legal status"[17].

Justice P. S. Narasimha observed that marriage in India is shaped simultaneously by legislation, customs, and religious traditions, all of which are constitutionally protected under Articles 25 and 29. Because marriage exists within this complex social and constitutional framework, the right to choose a partner does not automatically translate into a fundamental right to legal recognition of marriage for all relationships.

Justice Narasimha acknowledged the concerns of LGBTQ+ couples regarding exclusion from benefits and entitlements available to married couples, such as property rights, compensation,

[16] Id.
[17] Id.

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leave, and compassionate appointments. He noted that existing laws define concepts like "family," "partner," and "dependent" in ways that often exclude same-sex partners, live-in relationships, and other caregiving relationships, resulting in unequal and sometimes discriminatory outcomes.

However, he held that these issues involve diverse policy and legislative considerations that cannot be comprehensively resolved through judicial intervention alone. According to him, reviewing and reforming these legal frameworks requires a broad consultative and legislative process, which is constitutionally the responsibility of the legislature and executive

Justice Hima Kolhi concurred with the majority opinion authored by S. Ravindra Bhat. She agreed that while queer persons have a constitutionally protected right to choose their partners and form relationships under Articles 14, 19, and 21, there is no fundamental right to marry that can be enforced through judicial interpretation of the Special Marriage Act, 1954.

Justice Hima Kohli emphasized that the recognition of same-sex marriage or civil unions involves complex social, legislative, and policy considerations which fall within the domain of Parliament rather than the judiciary. She also acknowledged the discrimination and exclusion faced by queer couples in accessing social and legal benefits, but held that such reforms must be addressed through legislative action and executive policy measures.

The Court unanimously held that the Indian Constitution does not recognize an unqualified fundamental right to marry. While earlier precedents affirmed the right to choose a partner, the majority distinguished this from an inherent right to have the legal institution of marriage recognized by the State. The majority ruled that marriage is a statutory institution, meaning its legal recognition and the benefits flowing from it (like inheritance or tax benefits) are created by legislation, not the Constitution. Therefore, any legal recognition of same-sex marriage or "civil unions" must come from Parliament, not the judiciary. The court also refused to include same sex couples in Special Marriage Act, 1954. The majority held that interpreting gender-neutral terms into the SMA would amount to judicial legislation and would violate the principle of separation of powers.

VI. WHAT SUPRIYO LEFT OPEN

The judgment did not completely resolve the issue of recognizing queer relationships in India. Instead, it left unresolved many key constitutional and legal issues after the Supriyo v. Union of India decision. The Court recognized the dignity and equal rights of queer individuals but disagreed about how far those rights extend into family law areas.

One of the key unresolved issues is adoption for same-sex couples. Chief Justice D. Y. Chandrachud and Justice Sanjay Kishan Kaul believed that prohibiting joint adoption by queer couples violated the principle of equality. However, most judges held that the current CARA regulations still apply to all couples, including those in same-sex partnerships, and, therefore, there is no legal recognition of same-sex couples as adoptive parents.

Another major issue is that the Court rejected a request to establish a binding legal framework for civil unions and/or domestic partnerships. While some judges expressed hope that the government would implement limited legal recognition of these types of relationships, most judges held that any reforms would have to be made by Parliament rather than through judicial action. As a result, many same-sex couples are not able to access several critical legal benefits that come only as the result of a recognized relationship including, but not limited to, inheritance, maintenance, insurance, and medical decision-making.

A significant and unresolved issue is the application of current marriage laws to transgender people living in heterosexual marriages. While gender identity was recognized in the National Legal Services Authority v. Union of India, the concept of marriage continues to operate under rigid categories of "husband" and "wife." The Court did not specify how self-identified gender would be applied within existing marriage statues; therefore, transgender spouses are currently experiencing a legal grey area.

The judgement also failed to resolve whether the state legislatures will be able to create their own framework for the recognition of gender identity in marriage in the future. However, there are currently pending review petitions filed with the Supreme Court to continue the debates regarding the constitutionality of the majority opinion.

In addition to the above-mentioned cases, there is an increased focus on the incremental rights that exist outside of full marriage recognition. Some examples include rights to visit a partner in the hospital, adding a partner to an insurance policy, naming a partner as a nominee, and establishing joint tenancy. Therefore, the original judgement did not provide full recognition of same-sex marriages, but did not end the broader issue of equal family rights in India.

VII. CONCLUSION

In the end, Supriyo exposes a fundamental divide in Indian constitutional law between the desire for constitutional changes and respect for existing institutions. In cases of National Legal Services Authority v Union of India (2014) (NALSA), Joseph Shine v Union of India (2018) and Justice K.S. Puttaswamy v Union of India (2017), the Supreme Court has interpreted the Constitution to facilitate social change, thereby expanding the Constitution's definitions of

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dignity, equality and autonomy. However, in Supriyo v Union of India (2023) the majority of the Court retreated from this position by holding that the recognition of same-sex marriage through a legal framework is primarily a legislative matter.

The comparative experience of other countries that have constitutional democracies illustrates that the line between courts and legislatures is not a fixed point and it is not inevitable. As constitutional democracies develop around the globe, courts around the world have developed methods through constitutional interpretation to provide recognition of same-sex relationships. The Indian Constitution contains all of the principles necessary to ultimately provide for the legal recognition of same-sex marriage, but the real debate is on who has the authority and responsibility to provide the legal effect of those principles.

The Supreme Court in Supriyo Chakraborty v. Union of India has not accepted the legal validity of same-sex couples' marriages. Nevertheless, the same principles of equality, dignity, privacy and autonomy that underpin the Constitution still apply when we are talking about the protection for individuals in the LGBTQ community. The legal recognition of marriage is not only symbolically significant; it also provides people with access to several civil and social rights, such as the right to inherit property and receive other properties upon your death or to give your children an adult relationship with their parents or through adoption. Therefore, Indian public opinion about same-sex marriage has changed quite a bit recently and it is only likely to change more as time passes. According to a 2023 study from the Pew Research Centre, 53% of Indians now support same sex marriage, which indicates that there is an accepted level of social support despite no legal recognition.

The Indian Penal Code, 1860, has now been replaced by the Enforcement of The Bharatiya Nyaya Sanhita Act, which will take effect from 1 July 2024. In essence, this new legislation aims to provide an entirely different type of criminal law that is suitable for modern India. As the Bharatiya Nyaya Sanhita (BNS) has been promoted as a reform to modernise existing laws, one of the biggest dilemmas with the BNS is the complete omission of Section 377 of the IPC.

Section 377 has been heavily criticised for criminalising consensual sexual acts between adults of the same sex, but also created a legal basis for prosecuting adult males for sexual assault and for the sexual abuse of animals. The absence of this law creates a legislative void or gap as there are no comprehensive laws that apply to males aged over 18 who are victims of sexual violence or any other form of sexual abuse. The significance of this fact demonstrates the need for genderless sexual offence laws that protect all people, including LGBTQ+ people, regardless of gender or sexual orientation.

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