

# CSIS AFRICA NOTES

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## South Africa: The Politics of Constitution-Making

by Marina Ottaway

The process aimed at structuring a new political system for South Africa stalled in late May 1991, when negotiations between the government and the African National Congress were formally suspended by the ANC. This means that the two sides will continue to talk to each other, but instead of progressing from discussing preliminary problems to negotiating the substance of a new constitution, they will move backward into dealing with a new set of prenegotiations hurdles. Violence in the townships, the role of the Inkatha Freedom Party led by KwaZulu Chief Minister Mangosuthu Buthelezi, and charges of police bias have been added to an agenda that previously focused on the release of political prisoners, the return of exiles, and the repeal of apartheid legislation as the priority obstacles that must be removed before the new political system can be discussed. The expanded agenda is a manifestation of the two sides' attempts to control the constitution-making process and thus the distribution of power in the new South Africa.

The constitutional proposals set forth by the government and the ANC are quite different, despite some superficial similarities having to do with the inclusion of a Bill of Rights and the acceptance of proportional representation. The ANC equates democracy with majority rule, whereas the government equates majority rule with dictatorship and favors instead power-sharing (i.e., a system in which all political parties and groups would be represented not only in the legislature but in the executive as well).

The government's position appears so far to have attracted the largest number of political organizations (white, black, Coloured [mixed race], and Asian), but the ANC could be expected to receive more voter support in an election. Thus, a crucial issue over the long run is whether the constitution will be enacted by an elected constituent assembly in which each party is represented in proportion to the number of votes it receives, as the ANC demands, or by an all-party conference where organizations are guaranteed a voice regardless of the support they can muster at the polls, as the government argues. Political alliances are therefore being shaped by the differences in both the content of the proposed charters and the processes favored by the two parties.



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### The ANC's Constitutional Model

The position of the ANC has been consistent over time, and it has been reconfirmed in two documents, a draft Bill of Rights (made public in November 1990) and a draft constitution (April 1991). The latter settled a major question concerning the position of the ANC—whether it would opt for a list system of proportional representation (as it did) or for an American-style winner-take-all system. Proportional representation would allow all parties receiving more than a certain minimal percentage of the total vote to have seats. The U.S. single-member constituency system would in practice keep small parties out, enhancing instead the control of parliament by the party receiving the largest number of votes. The latter is the system that now guarantees the National Party a solid majority in the tricameral parliament's chamber for whites (the House of Assembly) even though it received only 48 percent of the vote in 1989.

The ANC is arguing for what it describes as a nonracial democracy in a unitary state. "Nonracial" in the South African context means a single voters' roll for elections, with no representation for groups, however defined. More specifically, ethnic groups, linguistic or cultural groups, former homelands, and any other possible corporate entity or community would be denied an official role in the ANC-prescribed political system.

The insistence on a unitary state is apparently rooted in the conviction that any form of federalism would be a disguised form of group representation or a new version of the apartheid era's "constellation of states" concept of a white South Africa around which the independent homelands would gravitate.

Although the ANC draft constitution rejects federalism, it contains an acknowledgment of the dangers of overcentralization and a call for "strong and effective" regional government: "The regions should not be devised as a means of perpetuating privilege, ethnic [distinctions], or racial divisions along territorial zones but should be based upon the distribution of population, availability of economic resources, communications, and urban/rural balance." If the delimitation of the regions respected these conditions, it is possible that the ANC might accept a federal system as part of a compromise solution.

Although the draft constitution reiterates the ANC's commitment to a strong Bill of Rights, separation of powers, and the independence of the judiciary, it calls for a discussion of a range of details concerning the role of the executive and legislature. Among these are whether the president should be elected by the voters or by the parliament; whether the president should be the head of government or a ceremonial figure with the real executive power in the hands of a prime minister; and whether the new parliament should be unicameral or bicameral. The draft tentatively proposes an executive president elected directly by the public but recallable by a two-thirds majority in the parliament, and a bicameral legislature comprised of a National Assembly primarily responsible for enacting legislation and a Senate charged with monitoring the

constitutionality of legislation. Both chambers would be elected by proportional representation, but according to different (still undetermined) mixtures of regional and national lists. In a clear rebuff to ideas floated by the government, "the Senate will be neither a corporatist chamber made up of interest groups (youth, labor, women, or business, or other groups) nor will it represent ethnic or so-called 'community interests'."

The proposed Bill of Rights is exhaustive, including, as explained by ANC constitutional expert Albie Sachs, three "generations" of rights. The first includes civil and political rights, comparable to those protected under the U.S. constitution. The second adds the social, economic, and cultural rights listed in the United Nations Charter. The third generation also envisages the right to peace, development, and a clean environment. It is a reflection of the peculiarities of the South African situation that some ANC writing about these issues, particularly that of Albie Sachs, devotes considerable space to refuting the idea that a Bill of Rights is a device to protect white privilege.

### The Government's Vision

Because no draft has been made public, the government's vision of a new constitution can only be inferred from statements made by officials, and in particular by Minister of Constitutional Development and Planning Gerrit Viljoen. Since the statements are often deliberately vague, they must be assessed in the context of discussions and proposals of the last 15 years. In particular, the debates leading to the 1983 constitutional referendum, the National Party's statements on power-sharing issued at its 1986 party congress, and its 1989 "plan of action" provide a useful record of the evolution in the government's thinking and some help in deciphering its present position.

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Underlying all these shifts is the demographic reality of South Africa. Whites are not only a minority, but a shrinking minority because of emigration and a lower birth rate than that of other population groups. While new immigrants continue to come into the country (most recently there has been a considerable influx from Eastern Europe), they do not necessarily become citizens. Moreover, the official statistics probably do not show the full extent of emigration, particularly of young people going abroad to study or work with no intention of coming back. In 1990 the white population of South Africa was officially estimated to be 4.5 million, of whom about half a million were not citizens. According to the University of South Africa's Bureau for Market Research, the total population numbered 37.5 million, including those living in the so-called independent homelands, which will undoubtedly be reincorporated into the new South Africa. It seems reasonable to say that whites with South African citizenship constitute only about 11 percent of the total population. Guaranteeing them a role in government thus requires considerable constitutional engineering.

The debate on constitutional reform was triggered in the 1970s by questions relating to the status of the Coloured and Asian populations, which remained disenfranchised even by the fictional standards of apartheid. Africans, the government reasoned, were gaining political rights in their own homelands, but Asians and Coloureds had no separate territory and thus needed to be accommodated in some fashion. A 1977 proposal called for three distinct legislative bodies—white, Coloured, and Asian—each with its own cabinet and structure of regional and local government, to deal with “own affairs” (those affecting only the ethnic group in question), “General affairs” (those affecting all groups) would be in the hands of a superexecutive, composed of members of the three cabinets in proportion to the sizes of the three ethnic groups. Decisions in this executive would be taken by consensus, giving each group *de facto* veto power.

Six years later, a constitution based on an amended version of this proposal was approved in a whites-only referendum and went into effect in 1984. This constitution retained the notion of separate parliamentary chambers and cabinets for each of the three groups to deal with own affairs, but provided for little meaningful power-sharing on general affairs in the national executive. The national cabinet was appointed by the president as he saw fit (so that the guaranteed representation of all groups featured in the 1977 proposal was missing) and decision making was *not* by consensus (thus denying veto power to disadvantaged groups).

In 1986, a National Party congress reversed the 1983 position by readdressing the idea of power-sharing. A position paper prepared by Stoffel van der Merwe, the minister in charge of black education in the present cabinet (and a member of President F.W. de Klerk's inner circle), undertook to explain both the meaning of power-sharing and the government's about-face. The latter was only apparent, the paper argued. During the

earlier debates, the original meaning of the power-sharing concept had been distorted. The National Party, van der Merwe claimed, had not opposed the genuine concept, but only the distortion. Genuine power-sharing would entail full participation, to the highest level of government, by all South African citizens; no domination of one group by another (i.e., no majority rule); self-determination over own affairs for each group, defined racially in terms of the Population Registration Act; joint decision making concerning general affairs; and negotiations among the leaders of all groups to reach consensus on a constitution embodying these principles. By this time the National Party had come to view negotiations as an alternative not only to the cycle of violence and repression plaguing the country, but also to the election of a constituent assembly in which the representation of whites would be limited by their number.

During the 1986 congress, de Klerk, then minister of national education, further spelled out the party's and his own position concerning group rights and own affairs. Peace in South Africa, given its diverse population, could only be attained in the framework of group recognition and group security: “The National Party is committed to the principle of group recognition. Own schools and residential areas, own institutions with exclusive decision-making authority in respect of own affairs and effective protection of commensurate group rights. . . are the essential means by which the National Party wishes to ensure group security.”

The National Party's restrictive concept of power-sharing was further underscored by its immediate rejection of the proposal for power-sharing at the provincial level set forth in late 1986 by the KwaZulu-Natal “Indaba” (conference). The Indaba, reflecting the views of Inkatha and white business interests in Natal, called for a two-chamber provincial legislature. One chamber would be elected by proportional representation. The other chamber would be composed of 50 members, with 10 to be elected by each of five groups to be given official recognition. These five categories would be Africans, Afrikaners, English-speaking whites, Asians, and “South Africans,” the last a catchall category embracing people who either did not belong to one of the other four categories, such as Coloureds, or refused to be classified ethnically. The executive would be appointed by the legislature and would include at least one member from each group. In addition, the proposed constitution would accord official recognition to cultural councils to deal with the religious, linguistic, and other cultural rights of the various groups. Any officially recognized cultural council would have the right to be consulted on all matters affecting its particular group.

It took the usually ponderous National Party only 48 hours to reject the Indaba's proposal. As Minister of Constitutional Development and Planning Chris Heunis phrased it, the Indaba plan offered “insufficient minority protection.” The likelihood that the first chamber and the executive would be controlled by blacks amounted to

unacceptable “domination” in the eyes of the National Party.

The National Party’s 1989 electoral platform, called the “five-year plan of action,” nevertheless indicated some change in the party’s position. Most notably, it recognized that the government’s definition of groups on a strictly racial basis was controversial and that a new definitional process was needed. The possibility of recognizing a general South African group, as the KwaZulu-Natal Indaba had proposed, was also deemed worthy of consideration.

Since 1989, some members of de Klerk’s inner circle appear to have moved even farther—although it is still unclear how far. It is the view of Bertus de Villiers of the Center for Constitutional Analysis at the Human Sciences Research Council that a broad range of opinion still exists in the National Party caucus. He notes that some members cling to the 1986 position, others have shifted to 1989, and some have moved to a postapartheid perspective. Other analysts are inclined to argue that the bulk of the party probably still adheres to the 1986 position. The ambiguity is illustrated by government spokesmen, in particular Minister Viljoen, who are deliberately vague in their statements on the issue of power-sharing, invariably raising more questions than they provide answers.

There is, however, no ambiguity about the government’s continuing rejection of majority rule. A political system allowing the party or coalition of parties that receives a majority of the popular vote to control the executive, even in a system providing separation of powers and checks and balances, is rejected as “simplistic majoritarianism.” Addressing parliament on May 2, 1991, President de Klerk reiterated that “power-sharing is the only viable solution for our country. . . . The conviction that race and numbers are the only decisive factors in a heterogeneous society is a fallacy. . . .”

In sum, the government is trying to walk a narrow line between whites worried about being swamped by the black majority and blacks suspicious of white privilege. The varying terminology used by government officials is a manifestation of this attempt to find a formula acceptable to all. The search is on for a system that allows whites to retain their communities, their schools, their language, and their economic assets without the protection of overtly discriminatory legislation. Viljoen has declared on many occasions that whites have to learn to rely on themselves, rather than on government protection, to maintain their language, culture, and community life, and cites the example of Jews as an indication that this is possible. But officials are also trying to provide the added protection of a consociational constitution or a very decentralized federal system in which cultural groups, local governments, and even neighborhoods would have a great deal of autonomy.

The de Klerk government also appears to have accepted the idea that assigning people to groups by official fiat, particularly on the basis of race, is no longer workable. The Population Registration Act will be abrogated before the end of the current parliamentary

session, although it is arguable what repeal means. According to the bill now before parliament, all provisions based on the Population Registration Act, including group representation in the tricameral parliament, will remain in force. The only immediate effect specified is that newborn babies will no longer be registered by race. Although statutory groups will cease to exist, it is the government’s expectation that individuals will declare their membership in a group on a de facto basis by voting for a political party or possibly by joining together to obtain official recognition as a cultural organization. Groups thus formed through a process of free association will be represented as such not only in the parliament but also in the executive. The postapartheid cabinet, as envisaged by government strategists, would not be formed by the majority party or coalition of parties (which would amount to “simplistic majoritarianism”) but would include representatives of all organizations. Whether such a cabinet would take decisions by majority vote or would have to reach a consensus is not clear from the discussions to date.

The government clearly favors a federal system and may be laying the groundwork for it even before the rewriting of the constitution begins. In November 1990, de Klerk created a Ministry for Regional Development, tasked with facilitating the reform of the industrial decentralization policy. This policy, as originally designed, focused on providing incentives and subsidies to industries being set up in, or relocated to, the industrial parks that the government had established on the borders of the homelands. The aim was to keep blacks in the areas reserved for them by providing jobs within commuting distance, while maintaining the industrial assets in the white areas. The policy has admittedly been an expensive failure, but it could have been reformed without setting up a new ministry. The creation of the ministry has led to conjecture that it is de Klerk’s intention to enhance the importance of the nine development regions as a first step toward federalism. Speculation has been heightened by an announced reorganization of the police force that would bring its structure in line with that of the development regions.

It still remains unclear how all these ideas would combine in a new constitution, but it is likely that the structure proposed by the government will be intricate, with an interlocking system of representation for states, self-defined groups, cultural councils, and local communities. The stress on consensus and veto power for groups on matters affecting them directly suggests a system that only modifies the status quo rather than a program of radical reform. It is an understatement to say that this is not what the black majority has in mind.

### **The Process**

The sequence of steps leading up to the enactment of a new constitution will undoubtedly be a prolonged one. Although ANC Director of International Affairs Thabo Mbeki recently declared that there was no reason why a new charter could not be enacted by the end of 1991,

other principals believe that it could be several years before an agreement is reached. Under the present constitution, new elections are not mandatory before March 1995, but the political consequences of so prolonged a delay could endanger the whole process. The government and the ANC agree that discussions on the constitution cannot start immediately, and that the process will have to take place in three phases. And although they envisage the first and second phases in fairly similar terms, they are far apart concerning the third.

**Phase One.** In the first phase, the government and the ANC, as the sole official participants, are seeking to remove the major obstacles to negotiations. This phase was to have been completed by April 30, 1991, but it appears stalled. The major obstacles originally identified were the lifting of the state of emergency, the repeal of the major apartheid laws, the release of political prisoners, and the return of exiles.

The state of emergency has been lifted, and bills to repeal the apartheid laws have been introduced in parliament and will be enacted before the end of the session—although, as previously noted, it can be questioned how much effect the repeal of the Population Registration Act will have in practice. The most obvious lapse is that, as of April 30, the date by which political prisoners were to have been released and exiles returned (under the terms of an August agreement between the government and the ANC), a large majority of exiles were still outside South Africa and several hundred political prisoners remained in jail, with the two sides accusing each other of being responsible for the delay.

Although the political prisoners issue could be solved fairly quickly, it is now acknowledged that the return of exiles will take much longer than anticipated. Indeed, the ANC *de facto* is no longer making total resolution of the exile issue a precondition for further talks. Fewer than 1,000 have come back out of an estimated 40,000, of whom 20,000 are affiliated with the ANC. An attempt to involve the United Nations High Commissioner for Refugees in the process stalled when the UNHCR concluded that the procedure established by the South African government violates UN rules for repatriation. Talks are now being held to resolve this problem, but even if they are successful the repatriation of 40,000 people will take months at best.

The most critical obstacle to the completion of the first phase has become the ultimatum issued by the ANC in late March 1991, calling off further talks unless the government met a number of conditions by May 9. The ultimatum was prompted by the explosion of violence between Inkatha and ANC supporters that has turned the townships around Johannesburg into battlegrounds. There is a growing conviction among ANC leaders and sympathizers that the police are not really trying to stop the violence and are instead contributing to it by helping Inkatha.

The major conditions imposed by the ANC include the firing of Minister of Defense Magnus Malan and of Law

and Order Minister Adriaan Vlok, the creation of an independent body to investigate the violence, and a ban on the carrying of so-called cultural or traditional weapons. Such weapons—supposedly spears and fighting sticks, but in practice also including pangas (machetes), knives, axes, and the occasional AK-47—have become the hallmark of Inkatha supporters and undoubtedly contribute to the violence that tends to follow Inkatha rallies. The resignation of Malan has been asked by all opposition parties in the tricameral parliament. In the climate of suspicion and violence prevailing in the country, the demand for an independent commission is being heard with increasing frequency.

Although the ANC demands are not preposterous, the fact that they were presented in the form of an ultimatum makes it politically impossible for the government to accede to them. As a result, talks have been officially broken off. With an ANC congress scheduled for July, the assumption is growing that no compromise allowing the resumption of talks will be reached before that meeting takes place.

**Phase Two.** Paradoxically, it now seems more difficult to complete the first phase than to start the second. The government and the ANC agree that, once the present impasse is resolved, an all-party conference can and will be convened to discuss both the broad principles on which the constitution must be based and the process for making it the law of the land. The idea of an all-party conference was first suggested by de Klerk in late 1990, then relaunched by Mandela in January 1991. It has been accepted in principle by Inkatha, by most of the white, Coloured, and Asian parties in the tricameral parliament, and as far as can be determined by all homeland political organizations. It has been rejected by the Pan-Africanist Congress (PAC), AZAPO, and the white Conservative Party.

Participation in the conference will be open to all parties "with proven support," a formula certain to give rise to endless controversy. Support for political parties is normally proven in elections, but the conference will be convened before any elections involving black voters take place. Membership claims are difficult to confirm and are meaningless in the case of homeland political parties that tend to make membership compulsory for residents wanting to register their children in school, visit a clinic, or obtain any other services from the homeland administrations.

In the end, there will be no argument concerning attendance by most of the parties in the tricameral parliament, Inkatha, the ANC, the South African Communist Party, the PAC, or AZAPO. The four "independent" homelands (Transkei, Bophuthatswana, Ciskei, and Venda) will also be represented, since their reincorporation into South Africa will be on the agenda. Moreover, all self-governing homelands have in theory transformed their "cultural movements" into multiethnic political parties, following the example of Inkatha.

It remains open to question whether a number of other organizations being launched or emerging from obscurity

actually exist in political life or only on paper. Some of these groups, whose political presence is not observable in the townships, are setting forth extravagant membership figures in a bid to assert their importance. For example, the United Christian Party claims 2 to 3 million members; the National Forum, over 1 million; the Federal Independent Democratic Alliance, between 400,000 and 600,000. Inkatha says it has more than 2 million members and even the PAC claims 800,000. The ANC, which has only some 200,000 registered members, is being made to look small in comparison. (Some of the reasons for this lag are discussed in "The ANC in Transition: From Symbol to Political Party" by Marina Ottaway, *CSIS Africa Notes* no. 113, June 1990.)

The government appears ready to accept a broad range of organizations at the conference. In a speech to parliament on May 2, de Klerk referred to the ANC as one party among many, although important, and pointed out that the all-party conference may have to go ahead without ANC participation if its leadership refuses to attend because the government has not met the conditions imposed in the March 1991 ultimatum. Numerous important extraparliamentary parties were ready to participate, de Klerk added, suggesting that the government will accept marginal organizations as legitimate participants.

Another problem looming in the second phase is the conference agenda. Both sides agree that it is important to discuss the principles on which the constitution will be based, but then they part ways. The government wants the conference to reach an agreement on the composition of the forum at which the negotiations over the constitution will take place—probably in the form of another all-party conference. The ANC wants agreement on the modalities of the election of a constituent assembly.

**Phase Three.** The character of the third phase will depend on whether the government or the ANC is then in a stronger position. If Pretoria has the stronger hand, the present government will remain in power until negotiations on the new constitution are completed and probably until the document is submitted to a referendum (or separate referenda for different ethnic groups). De Klerk would like to co-opt some black leaders into the cabinet or set up formal consulting mechanisms, but he has made it clear that the present government is a legitimate one and will not be replaced prematurely. If the ANC has prevailed in the opening phases, elections for a constituent assembly will take place first, followed by the formation of an interim government that will remain in power until the enactment of the constitution and the election of a parliament.

### **The Emerging Coalitions**

**The Government's Strengths.** At the present time, the government is trying, apparently successfully, to win over to its side a wide range of organizations. Among the parties that could conceivably attend the all-party conference only the PAC, AZAPO, and possibly the Transkei leadership unequivocally support the ANC's call

for the election of a constituent assembly and the creation of an interim government.

The government's success in gaining a level of support from a range of organizations derives from the fact that its proposals for a broad negotiating forum and for a constitution based on power-sharing and decentralization hold the promise of a political role for parties that would have much trouble carving a niche for themselves at the national level even under a system of proportional representation, but might do well on a regional basis.

All of the homelands, even the independent ones (except for a still hesitant Bophuthatswana), have accepted that they cannot continue in their present form. This does not mean that the homeland leaders have shed all political ambitions, or that their civil servants are ready to lose their jobs. Thus, they perceive decentralization as an attractive solution. Although Mandela's personal authority allowed him to rally the homeland leaders to his side for a brief time (in April 1990 he convinced most of them to boycott a meeting called by de Klerk), his success was short-lived. De Klerk quietly reopened a dialogue with the leaders, apparently convincing them that they would fare better under the decentralized system favored by the government.

The government may have done more than just talk. The Democratic Party has accused Pretoria of financing the newly launched homeland political parties. The government has denied this allegation, but the issue may be moot. The government finances the homelands, whose regimes could easily divert money from administration to political organization, particularly given that the chief ministers of the homelands are also the heads of the homeland parties.

Inkatha plays a pivotal role in the government's alliance policy. Among the homeland political parties, it is the only one that has a visible presence outside its territory, above all in the heavily populated industrial area around Johannesburg. Buthelezi is a well-known, albeit enormously controversial, figure both inside the country and abroad. Although opinion polls suggest that he commands surprisingly little support, he meets frequently with de Klerk, has managed to arrange several encounters with Mandela on stopping violence between ANC and Inkatha supporters, and has succeeded in establishing himself as a major figure in the unfolding drama. The importance the government attaches to Inkatha's role was underscored recently by a decision (later changed) not to ban the carrying of spears and fighting sticks in unrest areas. The ANC demanded the ban, but Buthelezi made it clear that he would consider a ban on "cultural weapons" as a sign that the government had turned against Inkatha and all Zulus.

**The ANC's Strengths.** To strengthen its position vis-à-vis the government and its newfound allies, the ANC is participating in an effort to launch a "patriotic front" of organizations that support elections for a constituent assembly and the formation of an interim government. Talks held with the PAC in Harare in April 1991 have led

to an agreement in principle and to the decision to hold a conference in August 1991 to launch the front officially. A subsequent meeting of the PAC and AZAPO confirmed both groups' commitment to establishment of the front.

In the area of alliance-making, the government will continue to retain the advantage in terms of the number of organizations it can rally to its side. But a patriotic front of ANC, PAC, and AZAPO would probably have the upper hand in terms of popular support. Although many ANC supporters are dissatisfied with the performance of the organization at present, this does not mean that they would switch their allegiance to another party in an election.

Recent opinion polls point to a decrease in Mandela's popularity among urban blacks, from over 60 percent in early 1990 to around 45 percent now, but he still has a two-to-one lead over de Klerk, while Buthelezi is favored by only 2 to 3 percent of those polled. Support for the ANC as an organization appears higher, with studies indicating that in a general election it might get around 50 percent of the vote while the National Party would get about 20. Although the reliability of opinion polls in South Africa is problematic, the observed differences in the level of support for different leaders and parties seem too wide and too consistent across polls to be attributed purely to sampling errors.

### Looking Ahead

The political situation in South Africa has reached a critical and dangerous point. Negotiations are stalled and violence in the townships is escalating. The personal relationship between Mandela and de Klerk that helped

launch the process in 1990 is under strain. Black political parties have been unbanned, organizations are multiplying, and political activity is increasing, but there are still no rules of the game or channels through which popular support can be translated into a legitimate political role. A new constitution is urgently needed, but the constitution-making process is slowing down as violence rises, and the prospects for its completion are receding. Unless the process resumes soon after the ANC's congress in July, the situation is likely to deteriorate even more, leading to a vicious circle difficult to break.

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