

Analysis of Islamic Law and Constitution Number 41 of 2004 About Waqf Towards Cash Waqf Application at BMT itQan

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Abstract. BMT itQan since 2007 has experienced a great development. The company concerned at group financing, not only profit oriented but also social oriented through deposit and charitable fund which implemented such as *Infaq*, *Shadaqah*, *zakat*, and *waqf*. BMT itQan funded cash *waqf* through financing, the costumers have to donor cash *waqf* 0.5% from each financing as a requirement. Collected Cash *waqf* was 305.803.000 IDR, BMT itQan allocated cash *waqf* fund for financing either *murabahah* contract or *Ijarah* contract. Then, the researcher assumed cash *waqf* for financing allocation will be risk and make the corpus was lost, moreover *waqf* should by heartfelt. However within Islamic Law *waqf* are Keeping, holding, and developing, which mean *nazhir* has to keep and to develop its corpus. The purposes of research are (1) How application of Cash *waqf* within Islamic Law and Constitution Number 41 of 2004 about *waqf* ?, (2) How the implementation of cash *waqf* at BMT itQan ?, (3) How analysis of Islamic Law and Constitution number 41 of 2004 about *waqf* towards cash *waqf* application at BMT itQan ?. The researcher used qualitative research which the data were obtained from Islamic law about cash *waqf*, constitution of *waqf* and document of financing. The researcher will compare between theory and practice about cash *waqf* application both Islamic law and *waqf* constitution. This research method use Juridical Normative method. According to research, obtained summaries are Cash *waqf* fund within Islamic Law should fulfill *waqf* pillars and contract principles, Cash *waqf* fund within constitution should be given cash *waqf* certificate and *waqf* pledge depending on his/her own. Cash *waqf* allocation according to Islamic Law i.e. Investment sector should be halal and prohibited from haram investment. According to Constitution Number 41, *waqf* properties was allowed to allocate only for facilities and religious deeds, education, healthy, poverty assistance, homeless child, orphan, scholarship, economic development for societies. BMT itQan funded cash *waqf* from financing requirement and allocated it for financing either. According to Islamic Law, cash *waqf* fund from 0.5% discount of financing is prohibited as long as become requirement to propose financing. According to Constitution, cash *waqf* fund from 0.5% discount of financing is prohibited as long as become requirement of financing propose, *wakif* should declare depending on his/her own. BMT itQan should give *waqf* certificate as an evidence of *waqf* properties which was given. Cash *waqf* for financing is allowed, however, because *waqf* have to keep and to develop its corpus, so business could not avoid risk as its characteristic. According to constitution researcher assesed that cash *waqf* for financing allocation is allowed as long as allocate for economic development and societies welfare.

Keywords: Islamic Law, Constitution No. 41, Cash *waqf* application.

A. Introduction

Islamic concept of society's welfare is basically based on how to distribute the wealth and economic resources in a just and more equitable way. As cited in Achmad and Sadeq opined that Islamic economic system recognizes two mechanisms in the distribution of income and wealth. Achmad explained further that the first mechanism conducts the distribution through market mechanism, while the second one implements the distribution through various instruments such as *zakat*, *infaq*, *sadaqah*, and *waqf*.¹

Waqf was one of the Islamic economic Institutions which has a role at society's economic empowerment for society's welfare. In Islamic history, *waqf* has a large role at social development, economic, education, and culture of Islamic society. In the past, economic rotation through *waqf* property has a large role at society welfare in various Islamic government. Therefore, are reasonable if scholars and intellectuals attempt to review and research towards economic prospect of *waqf* property to develop Islamic

¹ Al Jaberi Ahmad et.al, *Concept and Applications of Cash Waqf Funds for Equity Financing*, 2015, page 3.

civilization as previously.²

In Asia, cash *waqf* has also gained acceptance. For example the Malaysian National Fatwa Council passed the fatwa that permits cash *waqf* in 2007 (*Yayasan Waqaf Malaysia*, 5, July, 2014). In addition, Amir et.al said that, the huge cash *waqf* fund collected by the Selangor State Religious Council (SSRC) gives numerous advantages in developing the Islamic economy, loans in financing small and medium industry business, settling of debts, such as houses, investment in property for the Muslims as property will be rented to generate profits.³

Within Islamic Law and Constitution Number 41 of 2014 the meaning of *waqf* is dedicating of properties to keep and to develop its corpus for societies welfare. BMT itQan has a discount 0.5 % for cash *waqf* from every financing and it was requirement to approve financing. However dedicating of charitable properties should depend on his/her own. BMT itQan has used this sources for financing both *Murabahah* and *Ijarah* contract. Moreover financing has a large risk that caused cash *waqf* value was lost. The problems of research are funding cash *waqf* from 0.5% discount requirement from every financing and cash *waqf* allocation for financing.

According to background of research which was explained, therefore the problems of research are how application of Cash *waqf* within Islamic Law and Constitution Number 41 of 2004 about *waqf*?, How the implementation of cash *waqf* at BMT itQan?, How analysis of Islamic Law and Constitution number 41 of 2004 about *waqf* towards cash *waqf* application at BMT itQan?. Furthermore, the research purposes, consist of:

1. To know application of cash *waqf* within Islamic law and Constitution number 41 of 2004 about *waqf*.
2. To know the implementation of cash *waqf* at BMT itQan Padasuka.
3. To know the analysis of Islamic Law and Constitution number 41 of 2004 about *waqf* towards cash *waqf* application at BMT itQan.

B. Literature Review

1. Cash *Waqf* Fund According to Islamic Law

Nash about *waqf* specifically did not find in Alqur-an and hadith, but generally it be able to find both of nash and hadith which recommending to do charity with partly of wealth. Base of *waqf* both Al quran and Hadith:

لَنْ تَنَالُوا الْبِرَّ حَتَّى تُنْفِقُوا مِمَّا تُحِبُّونَ ۚ وَمَا تُنْفِقُوا مِنْ شَيْءٍ فَإِنَّ اللَّهَ بِهِ عَلِيمٌ

Never will you attain the good [reward] until you spend [in the way of Allah] from that which you love. And whatever you spend - indeed, Allah is Knowing of it. (Ali Imran : 92)

Waqf legal criteria has debated among scholars. It was occurred because because of the differences about contract pillars. *Waqf* pillars according to Hanafiyah scoolar are shigat, i.e words which refered *waqf* sense. Therefore, they said *Ijab* is included pillars of *waqf*, i.e declaration from *waqif* which refered on his/her own to donor *waqf*. *Qabul* from *waqf* receiver was not included pillars of *waqf*

² Atabik Ahmad, *Strategi Pendayagunaan Dan Pengelolaan Wakaf Tunai Di Indonesia*, ZISWAF, Vol. 1, No. 2, Desember ,2014, page 315.

³Ahmad Mahadi, *Cash Waqf: Historical Evolution, Nature and Role as an Alternative to Riba-Based Financing for the Grass Root*, Journal of Islamic Finance Vol.4 No.1,2015, page 63.

according to Hanafiyah scholar. Moreover, waqf pillars according to majority of schoolars are waqif, mauquf, mauquf 'alaihi, dan shigat. The requirement of waqif are intelligent, adult, clever, self-will, and the owner of properties.⁴

Agustianto explained, there are 5 principles within contract which are relevant each other, i.e (1) Freedom of contract, Freedom of contract is principle which learn that every people is related to create deal within contract, even contents and engagement material, considering the requirement, determining implementation, creating engagement to everyone, creating engagement either verbal or writing include setting accomplished step in case was occurred lawsuit. Freedom of contract is allowed as long as according to Islamic law, (2) Consensual Principle (ittifaq), the simple meaning of consensual principle is an agreement (ittifaq). Within Islamic law contract was agreed after ijab and qabul. Ijab is desire expression to creat a contract, qabul is acceptance expression of contract. Through reached contract between each side ('aqidain) which was created by ijab and qabul will occur contract. Therefore, it will occur both right and obligation for each people who created contract, (3) Agreement Principle (Al-Ridhaiyyah), this principle implies that all of executed contract should be based on agreement between each other, it was prohibited to force, to press, to deceive and mis-statement, (4) Justice Principle(al-'adalah), Justice principle is the important foundation within economic and financial Islamic transaction. It is prohibited to deceive each other, they should be fair, (5) Pacta Sunt Servanda Principle (law certainty principle and contract principle is bind each other), within syariah economic, there is principle that every contract has to bind each other.⁵

2. Cash Waqf Fund According to Constitution Number 41 of 2004

Within point 2 Constitution number 41, i.e *waqf* is allowed in case was executed according to syariah. *Waqf* which was declared is prohibited to be canceled.⁶ *Waqf* aims to utilize *waqf* properties according to its function, the function of *waqf* is creating both potential and economic advantage of *waqf* properties for religious importance and societies welfare.⁷

Within point 6, the pillars of *waqf* are *wakif*, *nazhir*, *waqf* properties, *waqf* declaration, *waqf* allocation, and *waqf* period. At least these pillars fulfilled when *waqf* declaration was executed. The requirements of *wakif* are adult, sensible person, unblocked with legal action, the ownership of *waqf* property.⁸

According to field 10, point 28 about movable *waqf* with cash, *wakif* was allowed to donor movable *waqf* with cash through syariah finance institution which was dicided ministry. According to point 29, (1) movable *waqf* with cash which was intended at point 28, *wakif* performed through written, (2) movable *waqf* with cash which was intended at number (1) was established within cash *waqf* certificate, (3) cash *waqf* certificate which was intended at number (2) was established and delivered by syariah finance institution to *wakif* and *nazhir* as a evidence of *waqf* property transfer.⁹

⁴ Rozalinda, *Manajemen Wakaf Produktif*, 2015, Jakarta, Raja Grafindo Persada, Page 21-24.

⁵ Agustianto, *Membangun Literasi Keuangan Syariah di Indonesia*,

<http://www.iqtishadconsulting.com/content/read/blog/membangun-literasi-keuangan-syariah-di-indonesia>, was accessed at Monday 31 July 10.14 AM.

⁶ *Constitution number 41 of 2004*, point 3.

⁷ *Constitution number 41 of 2004*, point 4 and 5.

⁸ *Constitution Number 41 of 2004 about Waqf*

⁹ *Constitution, Op.Cit, Constitution Number 41 of 2004 about Waqf*

3. Cash Waqf Allocation According to Islamic Law

عَنْ ابْنِ عُمَرَ رَضِيَ اللَّهُ عَنْهُمَا أَنَّ عُمَرَ بْنَ الْخَطَّابِ أَصَابَ أَرْضًا بِحَيِّبٍ فَأَتَى النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَسْتَأْمِرُهُ فِيهَا فَقَالَ يَا رَسُولَ اللَّهِ إِنِّي أَصَبْتُ أَرْضًا بِحَيِّبٍ لَمْ أُصِبْ مَلَاقُطُ أَنْفَسٍ عِنْدِي مِنْهُ فَمَا تَأْمُرُ بِهِ قَالَ إِنْ شِئْتَ حَبَسْتَ أَصْلَهَا وَتَصَدَّقْتَ بِهَا قَالَ فَتَصَدَّقْ بِهَا عُمَرُ أَنَّهُ لَا يُبَاعُ وَلَا يُوهَبُ وَلَا يُورَثُ وَتَصَدَّقْ بِهَا فِي الْفُقَرَاءِ وَفِي الْفُرْقَى وَفِي الرِّقَابِ وَفِي سَبِيلِ اللَّهِ وَابْنِ السَّبِيلِ وَ الصَّيْفِ لِأَجْنَحٍ عَلَى مَنْ وَلِيَهَا أَنْ يَأْكُلَ مِنْهَا بِالْمَعْرُوفِ وَيُطْعِمَ غَيْرَ مُتَمَوِّلٍ (رواه البخاري)

The word *habasta aslaha wa tashaddaqa biha* in hadith define waqf as an act of law with releasing the right of ownership from property to do charity and to allocate the benefit for public, social, and religious.¹⁰

Cash waqf be able to be invested both financial asset and real asset. Financial asset investment be able within capital market such as stock, bond, warrant, and option. While real asset investment such as purchasing productive asset, establishing factory, establishing of mining, and estate.¹¹ As a comprehensive solution that supports the *maqasid syariah*, Lukamn et al. recently introduced faith-based model to complement the conventional poverty reduction model to eradicate of poverty in Muslim majority nations. It is an integrating system of a corporate social investment which is funded extensively from *zakah* and *waqf* funds. As a result the funds were polled to deploy in a strategic eradication poverty including the infrastructure development, education, micro-credit assistance, training and social assistance and welfare for the poor people, and other economically unfortunate groups.¹²

According to Anwar et.al, Based on the priority vector, education sector become the first priority and then followed by health, mosque, social care and welfare, trade and commerce, environment infrastructures and finally is art, culture and heritage. This finding is similar with the Islamic history of *Waqf* development where education becomes the first preference of donor to contribute for philanthropy *Waqf*.¹³

Standard of waqf property investment based syariah control¹⁴ :

- Investment sector should be halal and prohibited for haram investment, such as invest to the institution with haram act, conventional banking, institution with the act listed between halal and haram, likewise invest to bond.
- Use Islamic investment model and within implementation requirement should accord to *fiqh* principle.
- To do *visibility study* before investment for protecting the implementation purpose of investment.
- Following *waqif* requirement if decided the current investment model.
- Selecting the investment model with the large return.
- Investment is prohibited causing waqf was lost.

¹⁰ Rozalinda, *Manajemen Wakaf Produktif*, 2015, Jakarta, Raja Grafindo Persada, page 20

¹¹ Mubarak J, *Wakaf Produktif*, Bandung, 2008, Simbiosis Rekatama Media, Page 129.

¹² Mahat et al., *Potential of Micro-Waqf as an Inclusive Strategy for Development of a Nation*, *Procedia Economics and Finance* 31, 2015, Page 296.

¹³ Pitchay AA et.al, *Priority of Waqf Development among Malaysian Cash Waqf Donors: An AHP Approach*, *Journal of Islamic Finance*, Vol. 3 No. 1 (2014) 013 – 022, page 20

¹⁴ Rozalinda, *Op.Cit.*, page 159

- g. To extend with various investment for decreasing of risk.
 - h. Investment is distributed in the country according to the ownership of waqf property in order that they enjoy with the return of investment.
 - i. Keeping the risk and applying risk management.
 - j. Continuously controlling the investment to know the progress.
4. Cash Waqf Allocation According to Constitution Number 41 Of 2004
- Within point 9 and 10, *nazhir* be able by individual, organization, and institution. In case *nazhir* is institution that it should fulfill the institution *nazhir* requirement, institution which was created should conform with applicable law, and institution activated within social field, education, society, and Islamic religious.¹⁵
- According to point 22 Constitution Number 41 of 2004 about Waqf, to achieve both purposes and waqf function, waqf properties was allowed to allocate only for facilities and religious deeds, facilities and education deeds either healthy, assistance for poverty, homeless child, orphan, and scholarship, economic development for societies, and welfare development for public which was allowed with Islamic Law and Constitution. According to point 23, if *wakif* not decided waqf allocation, *Nazhir* could decide waqf allocation according to purposes and waqf function.¹⁶
- According to Chapter IV point 40 about status change of *waqf* property, *waqf* property was prohibited to guarantee, to confiscate, to give as charty, to sell, to inherit, to change, and to displace its right. Within point 42 and 43, *nazhir* has to manage and to develop *waqf* propertiy suitable with its purpose, function, and allocation. Moreover, management and development should according to *syariah* principal, productive, and using sharia guarantee institution.¹⁷

C. Data Analysis and Findings

1. Data Collection

At BMT itQan, cash *waqf* was collected 0.5 % from every financing, then allocated cumulative cash waqf fund for financing either. Discount 0.5% for cash waqf was taken from financing after it had been contracted on mutual contract. it has been included in financing system that the financing costumors have to donor cash *waqf* 0.5% discount of financing propose. Total of cash waqf was Rp. 305.803.000 since this year, with benefit Rp. 17.500.000.

Within cash *waqf* allocation, BMT itQan used financing intermediary to creat profit of *waqf* properties. Obviously through 2 financing contract, both *Murabahah* contract and *Ijarah* contract. Specially for financing groups there are discount 10% from every financing, consist of, 7% for Investment deposit, 1.5% for administration payment, 1% for insurance payment (*Ta'awun*), and 0.5% for cash waqf.

The benefit of cash waqf distributed to *Biatul Maal* itQan, the company has separated management between *Baitul Maal* itQan and *Baitul Tamwil* itQan, they would more concern if they would have separated they management because of social fund more sensitive and it wil be guaranteed in the hereafter.
2. Data Analysis

The researcher used qualitative research which the data were obtained from

¹⁵ Constitution Number 41 of 2004 *about Waqf*

¹⁶ *Ibid*, Constitution Number 41 of 2004 *about Waqf*

¹⁷ *Ibid*, Constitution Number 41 of 2004 *about Waqf*

Islamic law about cash *waqf*, constitution of *waqf* and document of financing. The researcher will compare between theory and practice about cash *waqf* application both Islamic law and *waqf* constitution. This research method use Juridical Normative method.

3. Findings

According to Islamic Law *waqf* pillars are *waqif*, *mauquf*, *mauquf 'alaihi*, dan *shigat*. The requirements of *waqif* are intelligent, adult, clever, and self-will, and the owner of properties. *Waqif* requirements should fulfill to be legal *waqf*, because they are relevant each other, the person who is crazy and is forced, then his/her *waqf* properties was not legal. While *shigat* which is *Ijab* should declare on his/her own. Cash *waqf* fund should consider the contract principles either i.e Freedom of contract, consensual principle (*ittifaq*), agreement principle (*Al-Ridhaiyyah*), justice principle (*al-'adalah*), *Pacta Sunt Servanda* Principle (law certainty principle and contract principle is bind each other).

According to Constitution Within point 6, the pillars of *waqf* are *wakif*, *nazhir*, *waqf* properties, *waqf* declaration, *waqf* allocation, and *waqf* period. According to field 10, point 28 about movable *waqf* with cash, *wakif* was allowed to donor movable *waqf* with cash through syariah finance institution which was decided ministry. According to point 29, (1) movable *waqf* with cash which was intended at point 28, *wakif* performed through written, (2) movable *waqf* with cash which was intended at number (1) was established within cash *waqf* certificate, (3) cash *waqf* certificate which was intended at number (2) was established and delivered by syariah finance institution to *wakif* and *nazhir* as a evidence of *waqf* property transfer.

According to Islamic Law towards cash *waqf* allocation, standard of *waqf* property investment based syariah control are investment sector should be halal and prohibited for haram investment, use Islamic investment, to do *visibility study* before investment for protecting the implementation purpose of investment, following *waqif* requirement if decided the current investment model, selecting the investment model with the large return, investment is prohibited causing *waqf* was lost, to extend with various investment for decreasing of risk, investment is distributed in the country according to the ownership of *waqf* property, keeping the risk and applying risk management, continuously controlling the investment to know the progress.

According to Constitution towards cash *waqf* allocation, to achieve both purposes and *waqf* function, *waqf* properties was allowed to allocate only for facilities and religious deeds, facilities and education deeds either healthy, assistance for poverty, homeless child, orphan, and scholarship, economic development for societies, and welfare development for public.

At BMT itQan, cash *waqf* was collected 0.5 % from every financing, then allocated cumulative cash *waqf* fund for financing either. Discount 0.5% for cash *waqf* was taken from financing after it had been contracted on mutual contract. It has been included in financing system that the financing costumors have to donor cash *waqf* 0.5% discount of financing propose. Total of cash *waqf* was Rp. 305.803.000 since this year, with benefit Rp. 17.500.000.

According to Islamic Law towards *waqf* fund within *waqf* requirements, i.e intelligent, adult, clever, and self-will, and the owner of properties. Cash *waqf* at BMT itQan unfulfilled the requirement, because *wakif* not depended on his/her will but it was financing requirement, therefore *wakif* was forced to dedicate cash

waqf for financing propose. It was allowed if it would not be requirement within financing propose.

According to Islamic Law within contract principles, cash *waqf* fund from 0.5% discount of financing is prohibited as long as become requirement to propose financing. While *waqf* is not compulsory for muslims. If it become requirement, it will oppose freedom principle of contract, because the primary contract was either *murabahah* or *ijarah*, then outside these contract, the member should give choosen between will be *wakif* or not. If he/she does not want, then it is prohibited to force, because it will oppose *an taradhin* principle. The entire contract should be agreed between each other till no one feel disappointed, because contract should fulfill law certainty principle, in case become requirement that the member did not give choosen which caused unsatisfaction of contract for disagreed member.

According to point 6, *Wakif* is member who proposed financing, *Nazhir* is BMT itQan, property waqf is cash, waqf pledge was not provided only written on financing contract, waqf allocation not provided, therefore BMT itQan decided to allocate for financing, period of waqf is etrnal. BMT itQan should offer cash *waqf* allocation preferences, they could not depend only at 0.5% discount of financing, because it unfulfilled *wakif* requirement. BMT itQan should give preference bettween would be *wakif* or not. As we knew that *waqf* was not compulsory charity among muslims. It should depend on his/her will.

BMT itQan should offer *waqf* pledge for *wakif* to declare cash *waqf*. *Waqf* declaration should be written on the paper of *waqf* pledge and *wakif* should not in forced condition. According to point 29, BMT itQan should give cash *waqf* certificate to *wakif* as an avidence of dedicating *waqf*.

According to Islamic Law, cash waqf for financing at BMT itQan is allowed, however, because waqf have to keep and to develop its corpus, so business could not avoid risk as its characteristic, but every business have risk management which mean although financing have NPF risk, *Nazhir* has to manage its risk.

According to point 22 within Constitution number 41 of 2004 that cash *waqf* for financing allocation is allowed as long as allocate for economic development and society welfare, and financing have similar purpose that to develop economic societies and to increase societies welfare. Although cash *waqf* was used for financing it was prohibited to give as charity if experienced NPF risk.

D. Conslusion

1. According to Islamic Law Cash Waqf Fund should fulfill the requirement of *waqf* pillars and contract principles. According to constitution, Cash Waqf Fund should fulfill *waqf* pillars, institution should give both *waqf* pledge, cash *waqf* allocation preferences and cash *waqf* certificate. According to Islamic Law about cash waqf allocation are Investment sector should be halal and prohibited from haram investment, have to use Islamic investment model within implementation requirement and principle according to fiqh. According to Constitution Number 41, waqf properties was allowed to allocate only for facilities and religious deeds, facilities and education deeds either healthy, assistance for poverty, homeless child, orphan, and scholarship, economic development for societies, and welfare development for public which was allowed with Islamic Law and Constitution.
2. At BMT itQan, cash *waqf* was collected 0.5 % from every financing, then

allocated cumulative cash *waqf* fund for financing either. BMT itQan used both contract to finance, *Murabahah* contract and *Ijarah* contract. Specially for financing groups there are discount 10% from every financing, consist of, 7% for Investment deposit, 1.5% for administration payment, 1% for insurance payment (Ta'awun), and 0.5% for cash *waqf*. The benefit of cash *waqf* distributed to *Biatul Maal* itQan.

3. According to Islamic Law, cash *waqf* fund from 0.5% discount of financing is prohibited as long as become requirement to propose financing because it unfulfilled *waqf* pillars and contract principles. According to Constitution, it should declare that wakif would like to donor cash *waqf* depending on his/her own and it is prohibited as long as become requirement of proposed financing. BMT itQan should give *waqf* certificate as an evidence of *waqf* properties which was given. According to Islamic Law through analysis verses that cash *waqf* allocation for financing is allowed, however, because *waqf* have to keep and to develop its corpus, so business could not avoid risk as its characteristic. Analysis of Constitution Number 41 of 2004 about *waqf* towards cash *waqf* allocation for financing is allowed as long as allocate for economic development and society welfare.

E. Suggestion

1. To fund cash *waqf* not only depend on 0.5% discount of financing but also they could rely on platform of cash *waqf* with decided allocation to create societies welfare through they sources, such as expanding SD IT itQan School through itQan foundation, building of Supermarket, building of school canteen, creating farms to eradicate the unemployment and poverty, and another business which had an opportunity either, providing masjid facilities or rebuilt it, expanding BMT itQan, BMT itQan should not determine cash *waqf* as requirement for financing, it should give chosen between will be *wakif* or not.
2. To execute risk management especially for cash *waqf* investment and create a system such as requiring deposit specifically for NPF Risk, providing deposit from capital or piece of *waqf* investment profit, obligating costumers to create Business Plan to successfully execute the business.
3. To add point of constitution number 41 of 2004 such as lost *waqf* consequences specially for moveable *waqf*, point of risk management executing, special point for management cash *waqf*.

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