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## The Council of Europe and *Sharia*: An Unsatisfactory Resolution?<sup>1</sup>

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On 22 January 2019, the Parliamentary Assembly of the Council of Europe agreed the text of Resolution 2253: *Sharia, the Cairo Declaration and the European Convention on Human Rights*.<sup>2</sup> The Resolution begins – on an uncontroversial note – by reiterating ‘the obligation on member States to protect the right to freedom of thought, conscience and religion as enshrined in Article 9 of the European Convention on Human Rights ... which represents one of the foundations of a democratic society’. It then goes on, however, to recall that the Assembly ‘has on several occasions underlined its support for the principle of the separation of State and religion, as one of the pillars of a democratic society’.<sup>3</sup> This statement is not entirely non-contentious: it ignores the situation in several member States of the Council of Europe and is based more on notions of *laïcité* than on the observable facts in countries such as England, Denmark, Finland and Norway that have state Churches.<sup>4</sup> Unfortunately, this simplification and confusion set the tone for what is to follow.

The main thrust of the Resolution focuses on two issues. First, it begins from the premise that ‘the various Islamic declarations on human rights adopted since the 1980s, while being more religious than legal, fail to reconcile Islam with universal human rights’.<sup>5</sup> This leads the Assembly to express ‘great concern that three Council of Europe States – Albania,

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<sup>1</sup> This comment is an expanded version of a blog post originally published on *Law and Religion UK*.

<sup>2</sup> Available at <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25353>>.

<sup>3</sup> Paragraph 3. For example, in Recommendation 1804 of 2007, the Assembly asserted at paragraph 4 that ‘one of Europe’s shared values, transcending national differences, is the separation of Church and State. This is a generally accepted principle that prevails in politics and institutions in democratic countries’.

<sup>4</sup> Finland has two: the Evangelical Lutheran Church and the Orthodox Church. It is also contentious in countries that do not have a state Church as such. In Malta, for instance, Article 2 of the Constitution declares that ‘The religion of Malta is the Roman Catholic Apostolic Religion. The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong’. See generally N Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford University Press, 2011).

<sup>5</sup> Para 4.

Azerbaijan and Turkey’ have explicitly or implicitly endorsed such declarations. Secondly, the Assembly states that it is ‘greatly concerned about the fact that Sharia law including provisions which are in clear contradiction with the Convention – is applied, either officially or unofficially, in several Council of Europe member States, or parts thereof’.<sup>6</sup> In relation to this second issue, the Assembly states that ‘Sharia rules on, for example, divorce and inheritance proceedings are clearly incompatible with the Convention’.<sup>7</sup> The Resolution ‘regrets’ that sharia law is still being applied in Thrace (Eastern Greece) and that ‘muftis continue to act in a judicial capacity without proper procedural safeguard’ and that ‘in divorce and inheritance proceedings – two key areas which muftis have jurisdiction – women are at a distinct disadvantage’.

The Resolution also expresses concern about ‘the “judicial” activities of “Sharia Councils” in the United Kingdom’<sup>8</sup> – hence this Comment. It will discuss two issues: paragraph 8, in which the Assembly identifies why the activities of sharia councils in the UK are of concern, and paragraph 14, which calls upon UK authorities to act in several respects, reporting back by June 2020 on the actions they have taken.<sup>9</sup>

## THE PROBLEM

The text of Paragraph 8 is worth giving in full:

‘The Assembly is also concerned about the “judicial” activities of “Sharia Councils” in the United Kingdom’. Although they are not considered part of the British legal system, Sharia councils attempt to provide a form of alternative dispute resolution, whereby members of the Muslim community, sometimes voluntarily, often under considerable social pressure, accept their religious jurisdiction mainly in marital and Islamic divorce issues, but also in matters relating to inheritance and Islamic commercial contracts. The Assembly is concerned that the rulings of the Sharia councils clearly discriminate against women in divorce and inheritance cases. The Assembly is aware that informal Islamic Courts may exist in other Council of Europe member States too.’

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<sup>6</sup> Para 5.

<sup>7</sup> Para 6.

<sup>8</sup> Para 8.

<sup>9</sup> Para 15.

It should go without saying that discrimination and intimidation are clearly wrong and that governments cannot simply turn a blind eye to them within the context of a religious group. However, like the bald assertions at the start of the Resolution, the language of paragraph 8 lacks precision. Even leaving aside the clumsy reference to ‘the British legal system’, the scare quotes around the words ‘judicial’ and ‘sharia councils’, as well as the final sentence, suggest that the Assembly may not be fully aware of the problem. The Resolution also presents the issue as if it only involved Muslims, despite the fact that other religions have formal tribunals – let alone informal means of dispute resolution – both within their communities and to decide status. Their existence is well-established and may in some circumstances be recognised by the secular courts: for example, in *Kohn v Wagschal & Ors*<sup>10</sup> the Court of Appeal refused to set aside an order for the enforcement of an award made by the London Beth Din under the terms of the Arbitration Act 1996.<sup>11</sup> The research to date suggests that the paragraph is correct to say that the jurisdiction is mostly in relation to marriage and divorce: religious tribunals are primarily concerned with religious and marital status – and this underlines how the issue is not confined to Islam, as with the system of Roman Catholic marriage tribunals.<sup>12</sup>

The issue of concern is whether people are pressurised into the form of alternative dispute resolution provided by sharia councils. The Resolution distinguishes between situations where Muslims submit voluntarily and, alternatively, where they submit under social pressure – but then drops this distinction. This, however, is the nub of the issue. A decision to use a religious authority for dispute resolution which is genuinely voluntary on the part of both parties should be no more objectionable than any other form of alternative dispute resolution.<sup>13</sup> Moreover, the courts should not enforce any adjudication where submission to the authority was not voluntarily – as is the case in relation to arbitrations under the

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<sup>10</sup> [2007] EWCA Civ 1022.

<sup>11</sup> In *Ulman v Live Group Pty Ltd* [2018] NSWCA 338, however, the Court of Appeal of New South Wales upheld a finding of criminal contempt of court against the judges [*dayanim*] and registrar of the Sydney Beth Din for threatening religious sanctions against a party to a commercial dispute who refused to submit to its jurisdiction: see F Cranmer, ‘May a religious tribunal threaten an uncooperative party with religious sanctions? *Ulman*’ in *Law & Religion UK*, 28 December 2018, <http://www.lawandreligionuk.com/2018/12/28/may-a-religious-tribunal-threaten-an-uncooperative-party-with-religious-sanctions-ulman/>.

<sup>12</sup> See, for instance, G Douglas *et al*, ‘The Role of Religious Tribunals in Regulating Marriage and Divorce’ (2012) 24 (2) *Child and Family Law Quarterly* 139.

<sup>13</sup> See G Douglas, ‘Who Regulates Marriage? The Case of Religious Marriage and Divorce’ in R Sandberg (ed) *Religion and Legal Pluralism* (Ashgate, 2015) 53.

Arbitration Act 1996. This, in turn, raises the question of how to determine ‘voluntariness’ and the level of voluntariness required. Most if not all forms of agreement are reached under some form of ‘social pressure’. It would be overly paternalistic and a denial of the free will of parties to say that all such agreements should automatically be regarded as null and void. Determining whether the pressure is ‘considerable’ will be tricky. Sandberg and Thompson have suggested that a relational contract approach that pays particular attention to vulnerable parties could provide a way forward<sup>14</sup> and have suggested applying the approach that Thompson created in relation to prenuptial agreements.<sup>15</sup>

The problem arises, however, where non-voluntary religious adjudications are not legally enforced but are enforced religiously and socially. It is arguable that this is where the secular authorities need to play a role and consider how oversight might be achieved – especially in a way that does not stigmatise the Muslim community – and how it might be extended to other situations of patriarchal or community pressure. However, such an approach will inevitably mean getting involved in the religious affairs of these groups and, in any event, the subject-matter of some adjudications by religious tribunals will mean that they are unlikely to be legally enforced. This is true of the ‘marital and Islamic divorce issues’ mentioned in paragraph 8 of the Resolution. Religious institutions are not concerned with the status of a marriage or of its termination under State law: they are concerned solely with religious marriages – whether or not someone is married in the eyes of the faith. For some adherents, marriage can have both a religious and a legal dimension – but it should be borne in mind that religious institutions such as sharia councils are only concerned with the religious dimension. Adherents who have undergone a religious marriage that complied with the legal requirements may still feel married in the eyes of their faith after a civil divorce because they may feel that the civil divorce does not dissolve the religious marriage. However, the use of a religious institution is unlikely to be problematic in this scenario because the legal aspects of relationship breakdown will already have been dealt with. The abolition of most legal aid for family law cases under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

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<sup>14</sup> R Sandberg and S Thompson ‘Relational Autonomy and Religious Tribunals’ (2017) *Oxford Journal of Law and Religion* 137.

<sup>15</sup> S Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart, 2015); S Thompson, ‘Feminist Relational Contract Theory: A New Model for Family Property Agreements’ (2018) 45(4) *Journal of Law and Society* 617. Thompson’s suggested approach was applied by the Australian courts in *Thorne v Kennedy* [2017] HCA 49; see S Thompson, ‘Thorne v Kennedy: Why Australia’s Decision on Prenups is Important for English Law’ (2018) 48 *Family Law* 415.

provides a caveat to this;<sup>16</sup> but for most of the time, the role of the sharia tribunal will be unproblematic.

The problematic scenario is where the parties have gone through a religious marriage but have not complied with the legal requirements. This would give them little to no redress under civil law unless children are concerned.<sup>17</sup> If their relationship broke down, their only port of call would be a religious authority such as a sharia council. The academic and policy literature has highlighted these so-called ‘unregistered marriages’ as the problem – and one that is specific to the Muslim community – but academic comment has often paid little attention to the reasons why unregistered marriages are taking place. The answer is not clear-cut.<sup>18</sup> Having a religious marriage that does not comply with the law on marriage registration might be deliberate or accidental. It might be because the law is unduly complex or restrictive. Alternatively, it might be because of a conscious choice by one or both parties not to have a civil marriage: observant Muslims often have a *nikah* just so that they can be together without being chaperoned. Equally, it might result from a lack of awareness that the religious marriage has not been registered. Another possibility is that a couple might simply be unaware that a marriage under the secular law is needed in order to establish rights on separation and death – a possibility buttressed by recent research showing the general persistence of belief in ‘common law marriage’.<sup>19</sup>

There are numerous ways in which this issue could be tackled. Education and awareness would be key. Some legislative reform might be necessary: Sandberg and Thompson have

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<sup>16</sup> See J Mant and J Wallbank, ‘The Mysterious Case of Disappearing Family Law and the Shrinking Vulnerable Subject: The Shifting Sands of Family Law’s Jurisdiction’ (2017) 26(5) *Social and Legal Studies* 629; J Mant, ‘Neoliberalism, Family Law and the Cost of Access to Justice’ (2017) 39(2) *Journal of Social Welfare and Family Law* 246

<sup>17</sup> In *Akhter v Khan* [2018] EWFC 54 the core issue was whether or not a *nikah* ceremony that had never been validated by a subsequent civil registration was a non-marriage or gave rise to a void marriage; Williams J held that, because the couple had four children, it was appropriate to take their interests into account (para 93b): see F Cranmer ‘Does an unregistered *nikah* wedding give rise to a valid marriage, a void marriage or a non-marriage?’ (2019) 41 (1) *Journal of Social Welfare and Family Law* 96.

<sup>18</sup> In the same way that there will be differing intentions or lack of intentions amongst cohabiting couples generally as discussed by A Barlow and J Smithson, ‘Legal Assumptions, Cohabitants’ Talk and the Rocky Road to Reform’ (2010) 22(3) *Child and Family Quarterly* 328.

<sup>19</sup> The first findings from the latest British Social Attitudes Survey have revealed that almost half of respondents in England and Wales – 46 per cent – believed that unmarried couples who live together had a ‘common law marriage’ with the same rights as couples that are legally married and that only 41 per cent knew that common law marriage is a myth: National Centre for Social Research (2019) ‘Almost half of us mistakenly believe that common law marriage exists’, available at <<http://www.natcen.ac.uk/news-media/press-releases?altemplate=SharedNews&y=2019&m=january&n=almost-half-of-us-mistakenly-believe-that-common-law-marriage-exists>>.

argued that the changes that are arguably necessary in family law generally (namely the modernisation of marriage formalities and rights for cohabiting couples) would also mitigate the ‘unregistered marriages’ issue.<sup>20</sup> However, doing what the Resolution does – condemning sharia councils in general and broad terms for their ‘judicial’ activities – is unhelpful and emphatically not the answer. Denying religious groups any form of adjudicatory function would render them unable to operate. All social groups need rules and need to interpret and apply their rules. The Resolution names sharia councils in the United Kingdom because research and policy documents have highlighted their existence. But we only know the tip of the iceberg. We know what the most **high-profile** and mainstream sharia councils want to tell us about themselves: we know next to nothing about how other institutions within religious and cultural bodies formally and informally adjudicate. That final sentence of paragraph 8, which states that ‘informal Islamic Courts may exist in other Council of Europe Member States too’, is also true of the UK. It would be more accurate to say that ‘informal means of religious adjudication probably exist in all Council of Europe Member States’. It is difficult to shake off the impression that the Assembly is unable properly to identify the issue – let alone the solution – and so has opted for a simplistic and ultimately counterproductive reductionist tirade against sharia.

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#### SUGGESTED ACTIONS

The lack of nuance and understanding is even more evident, however, in paragraph 14 where the Assembly calls on the authorities of the United Kingdom to take various actions:

‘The Assembly, while welcoming the recommendations put forward in the conclusions of the Home Office Independent review into the application of Sharia law in England and Wales, as a major step towards a solution, calls on the authorities of the United Kingdom to:

14.1 ensure that Sharia councils operate within the law, especially as it relates to the prohibition of discrimination against women and respect all procedural rights;

14.2 review the Marriage Act to make it a legal requirement for Muslim couples to civilly register their marriage before or at the same time as their Islamic ceremony, as is already stipulated by law for Christian and Jewish marriages;

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<sup>20</sup> R Sandberg and S Thompson, ‘The Sharia Law Debate: The Missing Family Law Context’ (2016) 177 *Law & Justice* 181.

14.3 take appropriate enforcement measures to oblige the celebrant of any marriage, including Islamic marriages, to ensure that the marriage is also civilly registered before or at the same time as celebrating the religious marriage;

14.4. remove the barriers to Muslim women's access to justice and step up measures to provide protection and assistance to those who are in a situation of vulnerability;

14.5. put in place awareness campaigns to promote knowledge of their rights amongst Muslim women, especially in the areas of marriage, divorce, custody of children and inheritance, and work with Muslim communities, women organisations and other non-governmental organisations to promote gender equality and women's empowerment;

14.6 conduct further research on "judicial" practice of Sharia councils and on the extent to which such councils are used voluntarily, particularly by women, many of whom would be subject to intense community pressure in this respect.'

Paragraph 14.1 is laudable but rather general and raises the issue of how the procedures of sharia councils will be monitored or regulated without, in so doing, giving them some kind of formal recognition and legitimacy. The fact that we do not know how many such councils there are, let alone the number or existence of less formal religious forms of adjudication, makes this recommendation difficult to fulfil in a meaningful way. Furthermore, in its *Integrated Communities Strategy Green Paper*<sup>21</sup> the UK Government has already dismissed the idea of any kind of formal recognition. Referring to the proposal for regulation made by the independent review into the application of sharia law in England and Wales,<sup>22</sup> commissioned by the Home Office and chaired by Professor Mona Siddiqui, the *Green Paper* stated categorically that though the Government 'will explore the legal and practical challenges of limited reform relating to the law on marriage and religious weddings', it considered that 'the review's proposal to create a state-facilitated or endorsed regulation scheme for sharia councils would confer upon them legitimacy as alternative forms of dispute resolution' and that such a scheme would be inappropriate.<sup>23</sup>

Paragraph 14.2 appears to be based both on a misunderstanding of the law in England and Wales and on a misunderstanding of the wider issue. The Marriage Act already requires civil

<sup>21</sup> HM Government. *Integrated Communities Strategy Green Paper*, Cm 9560 (London, HMSO 2018).

<sup>22</sup> Home Office, *The independent review into the application of sharia law in England and Wales* (2018).

<sup>23</sup>Ibid 58.

registration in order for marriages to become lawful; but how that registration is achieved depends on the denomination in question. In the case of ‘Christian and Jewish marriages’, it is not ‘stipulated by law’ that the parties should always ‘civilly register their marriage’. Under the terms of the Marriage Act 1949, marriages conducted in the Church of England and the Church in Wales are valid marriages in secular law *ipso facto*, without any additional formalities. As to Quakers and Jews, the procedure is laid down by their respective communities and recognised under the 1949 Act. Two Quakers who wish to marry, for example, must complete a joint declaration of an intention to marry and give it to the Area Meeting registering officer and, in England and Wales, give notice of intention as required by the civil law to the appropriate registrar and obtain the necessary certificates. The Area Meeting’s registering officer must then arrange for public notice of the intended marriage in the meeting or meetings to which the couple belong or which they usually attend, arrange for the solemnisation of the marriage at the meeting for worship and, immediately after the meeting for worship in England and Wales, arrange for the registration of the marriage.<sup>24</sup> *But there is no separate act of civil registration*: the ceremony is what happens in the meeting house and the ‘civil part’ is effected by the registering officer’s return to the General Register Office.

Muslims are in the same position as all other religious groups apart from the Church of England, the Church in Wales, Quaker and Jews but, in essence, the law is the same: for there to be a lawful marriage, *the Marriage Act 1949 must be complied with*. The issue is not that the Act itself needs reviewing (or, at any rate, not on those particular grounds) but that *some couples in the Muslim community are not using the Act*. As noted above, this might be for a variety of reasons. A ‘legal requirement’ could be added if it was decided to make religious marriages unlawful and, at the moment, purely religious marriages without civil registration are not valid marriages under English law – but we would argue that making such marriages unlawful would not increase the rights and protections for the parties within them.

The same is true of the requirement in paragraph 14.3. This would require the State to police religious acts of worship and to outlaw anything that looks like a religious marriage unless the 1949 Act is complied with. As Sandberg has argued elsewhere, imposing criminal or

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<sup>24</sup> Britain Yearly Meeting (2018) *Quaker faith & practice*: ‘Quaker marriage procedure’ 16.18, 16.20, 16.61, available at <<https://qfp.quaker.org.uk/chapter/16/>>.

indeed civil liability upon celebrants misses the point.<sup>25</sup> There is no evidence that celebrants are advising couples that the Marriage Act 1949 does not need to be complied with and if there were such evidence, then surely it would be best dealt with by means other than legal sanction. If celebrants are deliberately not following the procedures in the Act, it already includes a number of existing provisions to deal with that: section 75 provides a number of offences when marriages are solemnised but the Act is not complied with, while section 76 provides for offences relating to the registration of marriages.

The recommendations in paragraphs 14.4 and 14.5 are unobjectionable. Education and awareness raising is clearly needed, especially with regard to gender disadvantage. However, the fact that the Resolution itself is unclear shows a significant obstacle to this. Although ‘the religious marriage’ is mentioned in paragraph 14.3, elsewhere the Resolution adopts a very State-centric view of marriage. Paragraph 14.2 sharply distinguishes between ‘Islamic ceremonies’ and ‘Christian and Jewish marriages’. This is why the call for more research in paragraph 14.6 is sound, but such research should be the foundation for the recommendations rather than an afterthought. Any research needs to do much more than focus ‘on “judicial” practice of Sharia councils’: for it to be worthwhile, its focus needs to be on religious adjudication more broadly and on the overall legal framework pertaining to marriage and divorce. This involves asking the big questions about the essence of marriage and the role and interest of the State.<sup>26</sup> There is also a need to focus more on the structural and personal disadvantages that exist: as Thompson and Sandberg have argued more generally, work in Law and Religion needs to centre ‘upon gender and the questions of power this raises’.<sup>27</sup>

## CONCLUSION

The Parliamentary Assembly is right to be ‘concerned’.<sup>28</sup> However, its articulation of the issue and its recommendations show that its concern is based largely on moral panic about sharia councils. This moral panic needs to be contextualised in several respects. We need to look more broadly at religious adjudication, at how law can deal with adjudications that are

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<sup>25</sup> R Sandberg, ‘Criminalising Imams will not Solve the Problem of Unregistered Marriages’ LexisNexis Family Law blog, 15 January 2019 <[https://www.familylaw.co.uk/news\\_and\\_comment/criminalising-imams-will-not-solve-the-problem-of-unregistered-marriages](https://www.familylaw.co.uk/news_and_comment/criminalising-imams-will-not-solve-the-problem-of-unregistered-marriages)>.

<sup>26</sup> Nicola Barker’s work usefully distinguishes between the structure, consequences and ideologies of marriage: N Barker, *Not the Marrying Kind: A Feminist Critique of Same Sex Marriage* (Palgrave, 2012) 22-23.

<sup>27</sup> S Thompson and R Sandberg, ‘Multicultural Jurisdictions: The Need for a Feminist Approach to Law and Religion in R Sandberg (ed) *Leading Works in Law and Religion* (Routledge, 2019) 179, 195.

<sup>28</sup> Para 8.

enforced religiously and socially in contexts where legal enforcement has not been sought or is irrelevant, at how the law can determine whether or not an agreement is voluntary, at why unregistered marriages are taking place, at whether there are similarities in cause and effect between the issues that unregistered marriages raise and at more general concerns about whether family law reflects and facilitates the ways in which adult personal relationships are formed, exist and are publicly marked in the twenty-first century.

The way in which sharia councils are represented as a discrete problem that requires ad hoc and often kneejerk reform is deeply problematic. Not only does it caricature the issue as a Muslim problem, but it both creates an expectation that there will be a solution and, crucially, obscures the need for wholesale reform. Examining the merits of specific changes means that a considered examination of different options is not undertaken. This is especially to be regretted in the Family Law context, given that comparative insights can be gleaned from the different jurisdictions within the British Isles and, of course, further afield. The Resolution itself, though relating to the UK, gives the impression of having been conceived exclusively in terms of the law of England and Wales. Wedding law in Northern Ireland and in Scotland proceeds from an entirely different principle: the registration of celebrants for religion or belief marriages rather than the registration of buildings. Cranmer and Thompson have argued that, while no system can be proof against a determined intention to subvert it, the relative clarity of marriage procedure in Northern Ireland and in Scotland compared that of England and Wales makes it considerably less likely that a marriage ceremony could be defective merely because of incompetence or ignorance on the part of the couple or the celebrant.<sup>29</sup> This underlines the need for a considered, comparative approach that places the 'sharia problem' not only in the wider context of the law on adult relationships but also within the context of how different jurisdictions (including different jurisdictions within the UK) regulate intimate personal relationships.

The Resolution's call for further research is a welcome and necessary precursor to identifying and remedying the matters of concern and, though not always as well articulated as they might be, the Assembly's misgivings are generally sound. In our view, however, its

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<sup>29</sup> F Cranmer and S Thompson, 'Marriage and Civil Partnership in Northern Ireland: A Changing Legal Landscape' (2018) 30(3) *Child and Family Law Quarterly* 301.

Pre-print of an article subsequently published in (2009) 21 (2) *Ecclesiastical Law Journal* 203-212.

recommendations are misguided, naive and likely to hinder the laudable aims behind the Resolution. A considered, comparative and comprehensive approach is required.