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German Unification and the Federal Constitutional Court

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I. Background: Setting the Scene

From the time of its founding in 1871 until after the World War I, the German Empire ("Reich") extended from Alsace-Lorraine, west of the Rhine, all the way to the Russian border in the northeast. After each of the two World Wars, however, Germany lost significant portions of this extensive territory. At the end of World War II,

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For earlier writings of the author discussing the themes considered in this essay, see, e.g., The Imperfect Union: Constitutional Structures of German Unification (Princeton University Press 1997); "The Constitutional and Legal Framework of German Unification," in Schluchter & Quint (eds.), Der Vereinigungsschock. Vergleichende Betrachtungen zehn Jahre danach 19-38 (Velbrück Wissenschaft 2001); "60 Years of the Basic Law and its Interpretation: An American Perspective," 57 Jahrbuch des Öffentlichen Rechts der Gegenwart 9-11 (2009). See also note 14, infra.

for example, the Postdam agreement recognized the transfer of significant portions of eastern Germany into the "administration" of Poland and the Soviet Union -- in part, to compensate Poland for territory that had been annexed by the Soviet Union. Moreover, Germany was completely occupied by the victorious Allies whose governments agreed to administer Germany in four separate zones.

The Potsdam agreement contemplated the eventual unification of these occupation zones, but with the coming of the Cold War -- almost immediately following World War II -- the prospect of unification appeared increasingly dim. Instead, these western zones coalesced to form the Federal Republic of Germany (West Germany) in May 1949, followed shortly thereafter by the creation of the German Democratic Republic (GDR or East Germany) in the Soviet zone. The framers of the West German Constitution ("Basic Law") of 1949, however, were unwilling to accept the division of Germany as a permanent _fait accompli_. Accordingly, the Basic Law contained two separate methods of achieving unification of the Federal

Republic and the GDR (Articles 23 & 146), and the desired goal of unification was proclaimed in the Preamble.

Although the quest for German unification was sometimes derided as the “essential lie” (Lebenslüge) of the Federal Republic, the Constitutional Court of the Federal Republic of Germany clearly recognized that the goal of unification was one of the principal pillars of the Basic Law.[1] Accordingly, when a great movement of history rather surprisingly opened the way in the years 1989-1990, German unification was swiftly accomplished under Article 23 of the Basic Law which allowed the GDR to “join” the Federal Republic. This achievement could clearly be seen as the fulfillment of one of the central “state goals” of the Basic Law, and this fundamental fact set the tone for the decisions of the Federal Constitutional Court arising out of German unification.

[1] See, e.g., 36 BVerfGE 1 (1973) (Basic Treaty Case).

Because unification was a primary constitutional goal (and because it was overwhelmingly supported by the populace), it was clear that the Constitutional Court could not -- either from the point of view of constitutional doctrine, or from the point of view of practical reality -- interfere in any serious way with the political movement toward unification. On the other hand, by 1990 the Constitutional Court had become one of the most powerful and highly respected of all governmental institutions in Germany, and it was therefore not to be expected that the Court would simply defer, without examination or analysis, to every choice that had been made by the political branches. Among other things, such a course might have looked too much like the adoption of an American-style "political question" doctrine, and most German constitutionalists have accepted the view -- correctly or incorrectly -- that German constitutional law recognizes no such doctrine. Moreover, of course, the detailed settlement upon unification had conferred advantages and disadvantages on various groups and individuals,

and there was certainly the possibility of undue oppression in some cases.

The result of these contending factors was a carefully calibrated set of cases relating to German unification which, broadly speaking, shared the following three characteristics:

(1) The major political decisions relating to German unification were uniformly upheld by the Constitutional Court; there was no serious judicial interference with the process of unification;

(2) Yet in a significant number of cases, the Constitutional Court required rather nuanced adjustments of the relevant rules for unification in a manner that granted a certain measure of protection to the losers in the unification process -- whether, in any given case, the losers happened to be economically weak citizens of the former East Germany, or more prosperous former landholders now living in the West;

(3) Overall, therefore, the Constitutional Court frequently acted as a type of mediator, accepting the basic principles of unification but seeking to assure that the losers were not unduly disadvantaged in the process. In these cases, the Court also seemed to be serving notice that, even in the most sensitive areas of adjudication, the Court was still present and must therefore always be taken into consideration by the political branches.

To illustrate these points, let us examine four important constitutional cases of the unification period which seem to follow this general pattern. Thereafter, we will look at one additional set of decisions which may not exactly fall into this pattern, but which -- at bottom -- may not be much different from the others.

II. The Case of the First All-German Election

The first of these cases concerned the all-German Bundestag election of December 2, 1990, the first election that involved the merged territories of East and West Germany.

The case considered whether the five percent cut-off rule, common in West German elections, could be constitutionally employed in this election. From the beginning of the Federal Republic, election statutes have required that, for a political party to be represented in the Bundestag, it must ordinarily receive at least five percent of the total popular vote. This rule is intended to discourage a proliferation of small splinter parties that could foster parliamentary instability -- with the type of dire consequences that occurred during the Weimar Republic. Accordingly, the statute establishing the first all-German Bundestag election of December 2, 1990 extended the five percent rule to all parties in the election, including the new parties of eastern Germany -- although it did make some attempt to provide a special regime for some of those parties.

The Constitutional Court found the election statute unconstitutional.[2] It noted that requiring the new parties of East Germany to obtain five percent of the total all-German popular vote would be to subject those parties to an almost impossible burden, in light of the fact that most of them had been in existence for less than a year. As a result, these small parties were being treated unequally in the view of the Constitutional Court.

Yet, the Court obviously did not want to stand in the way of this crucial election, and so its opinion carefully explained how the election could be conducted in a constitutional manner. The Court declared that, for the purposes of this election, it would be permissible for the Bundestag to impose separate five-percent rules in the East and in the West. Doubtless grateful for this guidance, the Bundestag immediately enacted a statute that followed the advice proffered by the Court. Thus the Court did not interfere with the

[2] 82 BVerfGE 322 (1990).

election overall, but adjusted aspects of the election in a manner that gave the small East German parties an equalizing advantage -- which remained in effect for one election cycle only -- so that they might have a better chance of establishing themselves in the total electoral landscape of unified Germany.

Indeed, the separate five-percent limit in the East allowed the reformed Communist party (PDS) as well as the eastern Greens (allied with certain reform parties) to enter the Bundestag, although they would not have satisfied a five percent limit for all of Germany. But thereafter, the East German parties have not fared particularly well in the period following unification. The PDS maintained some independent role in parliament over the years and, more recently, it has merged with left-wing sections of the SPD to form the Left Party (Die Linke), of which Gregor Gysi, former leader of the PDS, has been co-chair. In contrast, the small parties of the East German citizens' movement were basically swallowed up in the larger Greens Party (Bündnis

90/Die Grünen), and have shared the mixed fate of that party.

III. The East German Civil Service and the "Warteschleife" decision.

When the GDR joined the Federal Republic under Article 23 GG, a massive restructuring of governmental institutions was required in the East. First, as we have seen, eastern citizens became entitled to vote in elections for the all-German parliament. Moreover, the Unification Treaty divided the territory of the GDR into five new Länder, which in some cases reflected the borders of historic German states. In addition, East and West Berlin were merged to form a single state of the Federal Republic.

In measures that affected hundreds of thousands of eastern citizens, unification also required massive changes in the structure of the civil service in eastern Germany. These changes were of two basic types. First, as a result of the constitutional and political imperative of

full employment in East Germany, the civil service of the GDR was considerably larger than was necessary in order to perform required tasks. It was also considerably larger than could be compensated in accordance with Western salary scales. Accordingly, unification required the abolition of a very large proportion of the East German civil service, representing hundreds of thousands of employees. Second, the civil service also contained many employees who may have been politically compromised by their involvement with the East German Communist Party (SED) or their contacts or collaboration with the secret police (Stasi). Thus, an elaborate system of review was established for the purpose of excluding politically compromised individuals from the civil service. Similar elaborate structures were created in order to examine teachers and university professors, as well as judges and prosecutors, with respect to their past activities and political affiliations.

In one of its most important decisions on German unification, the Constitutional Court

upheld the abolition of hundreds of thousands of jobs in the East German civil service.[3] At the outset, the Court rejected the government's sweeping argument that -- because the GDR state had come to an end -- the government of the Federal Republic bore no continuing responsibility to the former East German civil servants. Rather, the Court declared that the plan to dismantle much of the eastern German bureaucracy must be tested against the provisions of Article 12 GG, which provides a right of individuals to choose their employment -- and, by extension, a right to retain employment that they already possess. Yet, the Court indicated that the right of Article 12 is not absolute, and it found that, in this instance, the right was outweighed by the subordinating interest of the German state in creating a viable governmental and economic system after unification. Under this argument, therefore, the basic program abolishing a large part of the East German civil service was upheld.

[3] 84 BVerfGE 133 (1991).

And yet, in accordance with the pattern of adjudication outlined above, the Constitutional Court was not willing to grant the government carte blanche in this connection. The Court suggested that certain measures of governmental assistance, provided by the Unification Treaty to those who lost their jobs, were constitutionally required, and it went on to mandate further assistance for particularly disadvantaged persons whose jobs were imperiled, as well as assistance for mothers and pregnant women pursuant to a special provision of the Basic Law.[4] In this way, as noted, the Court did not impair the basic actions of the government in this essential aspect of unification, but it did seek to intervene to grant certain compensating advantages to some of the losers in this process.

The Court did not have occasion to hand down a major decision with respect to exclusions of members of the civil service (including teachers and professors) on the ground that they may have been compromised by their past political

[4] Art. 6 (4) GG.

affiliations. Historically, the most important decision in this area was the "Radicals Case" -- a dubious decision of the Cold War period, which imposed a very strict standard of loyalty on civil servants.[5] But in certain post-unification cases on this subject, the Constitutional Court seemed to relax the stringency of the earlier Radicals Case, thus perhaps offering a measure of protection to some of those who otherwise would have been the losers in the unification process.[6] These cases suggest that with the Cold War over, and the perceived threat from the Soviet Union a thing of the past, the Court was willing to take a somewhat more relaxed position on the political attitudes and affiliations of civil servants in the East.

IV. The Property Settlement upon Unification.

The government of the Soviet occupation zone, as well as the subsequent government of the GDR, were perceived in the West as "injustice

[5] 39 BVerfGE 334 (1975).

[6] 92 BVerfGE 140 (1995); 96 BVerfGE 152 (1997).

regimes”, governments which deprived their citizens of human rights on a broad scale. One of the principal goals of the federal government upon German unification, therefore, was to provide some sort of redress for widespread violations of human rights that had occurred in the East. Accordingly, the Parliament of unified Germany instituted a plan of “rehabilitation” and compensation for individuals who had been imprisoned in the GDR, or had been deprived of education or employment, for political reasons or in violation of general principles of the rule of law. A quite different mode of redress was provided in the prosecutions of East German border guards and other officials, for violent and other oppressive actions against GDR citizens (a subject that will be discussed more fully below).

Finally, the federal government sought to provide a measure of redress for people whose property in eastern Germany had been confiscated in violation of western concepts of property rights. In accordance with this program, which was set forth in a Joint Declaration (and

accompanying statutes) incorporated in the Unification Treaty, eastern citizens whose houses had been confiscated by the GDR government when they fled to the West were generally entitled to restitution of that property after unification. But if the house had been sold by the GDR state to a good faith purchaser, the former owner generally received other property or compensation instead.[7]

In contrast, however, persons whose property had been confiscated under the Soviet occupation regime during the period 1945-1949 were to be totally excluded from the program of restitution. According to the Unification Treaty, these persons might possibly receive a measure of compensation, but that decision was left to the discretion of the Parliament. The treaty negotiators thought that the denial of restitution for Soviet era

[7] Similarly, in instances in which return of property was impossible, compensation would be awarded. Moreover, provisions for the restitution of property were subject to complex (and sometimes shifting) exceptions favoring persons who presented practical plans for economic development. Individuals whose property in the East had been expropriated by the Nazis between 1933 and 1945 were also generally entitled to restitution.

expropriations was so important that the Unification Treaty contained an amendment of the Basic Law for the purpose of according constitutional reinforcement to this rule.[8]

Why was the property confiscated by the Soviet occupation regime treated differently from the property confiscated by the GDR state? The property confiscated by the Soviet occupation regime comprised the major industrial plants in the East, as well as farms of more than 250 acres (100 hectares) -- which included (among other holdings) the vast aristocratic estates of the so-called East Elbian Junkers. Some argued, perhaps cynically, that the unified German state wished to retain ownership of much of this property in order to help finance the costs of unification. The government maintained that the Soviet Union (which possessed a legal veto over unification) had insisted that this property be excluded from restitution -- although whether the Soviet Union had actually imposed such a condition has been subject to vigorous debate, with disputes on this

[8] See Art. 143 (3) GG.

point arising even among former high Soviet officials of the period. East German negotiators may have feared that the return of this property could jeopardize the ownership claims of thousands of GDR citizens with respect to small pieces of agricultural property received by them (or their parents or grandparents) in the land reform (Bodenreform) of the Soviet era. But, at bottom, the decision most likely rested on the view of officials, in the East and perhaps in the West as well, that it would be unthinkable to recreate even a shadow of the quasi-feudal economic and social structures of rural eastern Germany in the 19th and early 20th Centuries -- which, many thought, provided important support for the rise of Nazism.

A deeper look into the historical circumstances, moreover, may suggest significant moral differences between the claims of the two groups. The individual houses of persons fleeing to the West -- which constituted much of the property seized by the GDR regime -- had probably been acquired by these individual

owners through ordinary purchase in accordance with the general requirements of the rule of law. This type of property, seized by the GDR, was generally subject to the regime of restitution. In contrast, the huge quasi-feudal estates of the eastern German aristocrats, originally acquired in past centuries, may well not have been acquired or maintained in a manner that satisfies contemporary concepts of the rule of law; moreover, the large industrial plants were, most likely in every case, deeply involved in the Nazi war machine. These forms of property -- expropriated by the Soviet occupation government -- were not subject to the regime of restitution.

The exclusion of the Soviet expropriations was challenged in the Constitutional Court as a violation of rights of equality, as well as certain affirmative constitutional obligations of the government under the Basic Law. But the property settlement was certainly one of the most fundamental decisions of German unification, and the Court was obviously unwilling to interfere with it in any significant way. Thus, the Court

upheld the exclusion of the Soviet expropriations from the regime of restitution.[9]

Yet the Court did not stop there. Rather, following the general pattern suggested above, the Court made one significant adjustment in favor of the former owners of property seized during the Soviet occupation. The Court concluded that the regime of compensation, which had been left to the discretion of Parliament in the Unification Treaty, must be made mandatory. On the other hand, the Court also indicated that the Parliament would have substantial discretion in determining the level of compensation, and ultimately that level was set at a rather low amount. Thus, the Court required that the "losers" in this aspect of unification (the former large land-owners) be given more than they received under the Unification Treaty, but this redress was not enough gravely to impair the government's ability

[9] 84 BVerfGE 90 (1991).

to put into effect the core decisions of unification.[10]

One interesting issue that could now be examined -- almost twenty years after unification -- is the extent to which the agricultural map of eastern German landholdings has actually been changed by the provisions of the settlement upon unification. This question is now the subject of various geographical studies in local areas. Although the large landowners did not receive restitution of their property, they were accorded certain favorable treatment in the purchase of land in the east. Although some of these families have apparently been purchasing eastern property, there is no likelihood of a return to anything like the extensive land holdings of the pre-War era. In contrast, in several areas, the former collective farms of the GDR remain generally intact -- not in the form of "people's property"

[10] Further challenges to the property settlement by the former large landowners (or their heirs) were rejected by the German Constitutional Court and by the European Court of Human Rights. See generally Von Maltzan and Others v. Germany, 2005-V E.C.H.R.R. 397.

(Volkseigentum) or “collective property” of the former East German legal system, but rather in the form of farm cooperatives owned in common by numerous holders of small pieces of property originally received in the Soviet Land Reform (Bodenreform) of 1945-1949. In some cases, these capitalistic farm enterprises may be operated by the same individuals who operated the collective farms of the GDR period.

V. The Revised Law of Abortion.

The exclusion of the Soviet expropriations from the principle of restitution was one of the few important areas of the Unification Treaty in which the GDR negotiators held firm on their position and ultimately prevailed. A similar result was achieved with respect to the GDR’s liberal rule on abortion. Because this liberalized rule had become the basis of a social institution in the GDR, the eastern negotiators were reluctant to give way on this point. After a number of complex developments, therefore, the GDR’s rule on abortion -- or something very much

like it -- ultimately made its way into the law of unified Germany.

To understand this point fully, we need a bit of history. In its first abortion decision in 1975,[11] the West German Constitutional Court held that, as a general matter of constitutional principle, the state was obligated to criminalize abortions, in order to protect the life of the fetus. In reaching this conclusion, the Court found that a fetus was entitled to the right to life contained in Article 2(2) of the Basic Law, and that the state was obligated to protect this right pursuant to the guarantee of human dignity in Article 1. The Court also advanced the argument that because the Nazi regime had disregarded human life on a vast scale, the Basic Law recognized a special obligation to protect human life, including, specifically, fetal life. Although many commentators applauded this argument, to other observers it could seem like the cynical instrumentalization of the fate of the

[11] 39 BVerfGE 1 (1975).

Nazis' victims, in order to achieve a present political or judicial goal.

Although the Constitutional Court thus emphasized the right of the fetus in its 1975 decision, the Court also recognized that this right was not absolute. The Court acknowledged that the pregnant woman had countervailing rights of the free development of her personality under Article 2(1) of the Basic Law. As a result, the Court concluded that abortion would be permissible -- as an exception to the state's general obligation of criminalization -- in four sets of circumstances:

(1) when pregnancy would threaten the life or health of the pregnant woman;
(2) when the abortion was the result of rape or incest;
(3) when the fetus was threatened with a serious birth defect; or
(4) when the birth of a child would lead to undue social distress for the woman.

The last of these criteria was obviously quite elastic, and was interpreted broadly in some liberal German states, but it was viewed much more narrowly in states with conservative governments. Even with these exceptions, however, the Court's decision drew an extended dissent from Justices Wiltraut Rupp-von Brünneck and Helmut Simon, who had become the "great dissenters" of this period of the Court's history. In any event, this decision of 1975 represented the state of West German constitutional law on abortion at the time of German unification.

In contrast with the more restrictive West German abortion regime, an East German abortion statute of 1972 basically allowed the free choice of abortion by a pregnant woman during the first twelve weeks of pregnancy, and this freedom of abortion had become embedded in the social institutions of the GDR. Accordingly, the GDR representatives were intent upon preserving this abortion regime in the negotiation of the Unification Treaty. Ultimately, the Treaty itself contained only a temporizing compromise, but after

a long imbroglio, the unified Bundestag eventually enacted a new abortion statute which, in fact, closely resembled the GDR abortion provisions.

In its consideration of this new statute, the Constitutional Court retreated from its earlier view (set forth in the 1975 case) which required that, in order to protect the right to life of the fetus, an abortion must remain subject to criminal penalties (with certain exceptions noted above). Rather, the Court accepted the view of the new statute’s proponents -- and of the dissenters in the 1975 case -- that the life of the fetus may be equally well protected through a regime of counseling rather than criminal penalization.[12] The Court did, however, insist on a regime of very tendentious counseling, which would be directed toward dissuading the pregnant woman from having an abortion. The Court also found that in many instances, an abortion freely chosen in the first twelve weeks of pregnancy could not be subsidized through the ordinary health insurance system. Yet, overall, this was

[12] 88 BVerfGE 203 (1993).

one of the few instances in which the ultimate resolution upon unification moved rather decisively in the direction of former GDR law. Thus one might say that, here again, the Court (as well as the all-German legislature) conceded something to the overall "losers" in the unification process -- especially under circumstances in which a different result might have evoked unrest in the former GDR and thus have impaired the process of "inner unification."

VI. Criminalizing the GDR Regime.

The final cases that we will consider -- dealing with the criminal responsibility of GDR border guards and other officials -- do not fall neatly into the structures outlined above. In any event they do not seem to have arisen from an essential aspect of the political settlement upon German unification -- in contrast, for example, with the fate of east German property or the dismantling of the GDR civil service. Indeed, the principles ultimately governing these cases seem to have been developed almost completely by the judiciary -- rather than by Parliament -- and they

were apparently not the subject of significant negotiation in the debates on the Unification Treaty.

In one of these cases, for example, the Constitutional Court held -- in an elaborate argument apparently made out of whole cloth -- that East German espionage agents who had operated entirely in East Germany (for example, higher espionage officials who directed agents in the West but did not travel to the West themselves) could not be prosecuted for espionage after German unification.[13] According to the Court, espionage was a morally neutral activity employed by all governments; therefore, to impose liability on East German agents who could reasonably have relied on non-prosecution because they remained in the East, would be an unconstitutional example of disproportionate treatment in violation of the Basic Law. One might view this result as an added "benefit" extended to certain "losers" in the unification process -- although the East German espionage agents might not seem to be the most

[13] 92 BVerfGE 277 (1995).

eligible candidates for this form of mediating adjustment.

In a separate set of cases, however, the Constitutional Court upheld the criminal convictions of East German border guards who had used deadly force at the Berlin Wall (and elsewhere along the East German border), against persons seeking to escape from the GDR. In these cases, the courts seemed to disregard the provision of the Unification Treaty which stated that, after unification, the law applicable to criminal prosecutions for acts that had been committed in the East should be either West German or East German law, depending upon which law was "milder". Since the official use of firearms at the border was, in most instances, legal under East German statutes -- a regime that, accordingly, constituted the "milder" law -- a straight application of the Unification Treaty should have resulted in acquittals of the East German border guards in most cases. Rejecting this result, however, the post-unification courts invoked natural law concepts and reinterpreted

East German law in a manner that never would have been employed by the East German courts of the old regime. Moreover, the Constitutional Court argued that the principle of non-retroactivity should be accorded diminished respect in the case of criminal statutes enacted by a non-democratic state. The result was that hundreds of East German border guards were convicted of manslaughter, and a number of high East German officials (in several instances, former members of the Politbüro) were convicted of complicity in manslaughter.[14]

But even here the courts seem to have built an implicit adjustment into the results, because

[14] For important decisions of the German courts in these cases, see, e.g., 95 BVerfGE 96 (1996); 39 BGHSt 1 (1992). The European Court of Human Rights also found that convictions based on these arguments did not violate Article 7(1) of the European Convention of Human Rights, prohibiting retroactive criminal conviction. See Streletz, Kessler & Krenz v. Germany (2001) 33 E.H.R.R. 31. For the author's views on the German cases, see Quint, "The Border Guard Trials and the East German Past -- Seven Arguments," 48 American Journal of Comparative Law 541 (2000); Quint, "Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command," 61 Review of Politics 303 (1999).

in almost all cases, the border guards received suspended sentences and so were not penalized in a very concrete manner. A number of the higher officials, in contrast, did serve modest jail sentences. Overall, however, these prosecutions and convictions did not really seem to serve any of the traditional goals of the criminal law. Rather, the principal result of these cases seems to have been little more than a rhetorical result, i.e., placing the stamp of criminality and illegitimacy on the actions of the prior GDR regime and thus retrospectively calling into question the legitimacy of the GDR state itself.

VII. Conclusion

The Constitutional Court of the Federal Republic of Germany has had numerous dramatic and important moments in its almost sixty year history. Many of these instances were dramatic and important because the Court invalidated statutes of Parliament or judgments of the "ordinary" civil or criminal courts. In the famous Lüth case in 1958, for example, the Court, striking down judgments of the ordinary civil

courts, extended the Constitution into the domain of private law and opened up broad prospects of rights of free expression. In a dramatic series of cases in the 1970s, the Constitutional Court engendered considerable controversy by invalidating various reforms enacted by Social Democratic governments of the time. In contrast, in the mid-1990s, the Court seemed to open new paths in the development of constitutional rights of religious freedom and freedom of expression, in cases that were bitterly criticized by conservatives in Germany. More recently, in noted decisions, the Court has struck down statutory measures of electronic surveillance and invalidated a law authorizing the shooting down of civilian aircraft being used for terrorist purposes.

In the aftermath of German Unification, in the early and mid 1990s, the Constitutional Court also handed down a number of dramatic and important decisions. But these decisions were important in a somewhat different manner. Instead of permanently striking down significant

legislation, the Court upheld the basic political decisions on unification. Yet, at the same time, the Court also sought a degree of social integration through attempts to mitigate the burdens imposed upon some of the inevitable losers in the unification process.