GRANAT, Mirosław – GRANAT, Katarzyna: *The Constitution of Poland. A Contextual Analysis,* Hart Publishing 2019, pp. 262.

DOI: https://doi.org/10.24040/sap.2021.8.2-3.206-214

Introduction

The book under review, entitled *The Constitution of Poland. A Contextual Analysis*, was published by Hart Publishing as part of the Constitutional System of the World publishing series. In a brief foreword, the publishers of the series point out that that the texts of all constitutions can be found on the Internet. Thus, they are available to everyone anywhere in the world. The constitution is, after all, more than a text composed of a finite set of letters, words and punctuation marks. As a normative act, the constitution is a collection of legal norms, prohibitions and imperatives as to specific conduct. In turn, the constitution as an act constituting and ordering the state and society is multi-layered and dynamic. It arises and then exists and often perishes in a particular, ever-changing context. The authors, Mirosław Granat and Katarzyna Granat, have presented the Polish Constitution of 2 April 1997 (hereinafter: the Constitution) in a broader historical, economic and political context, epitomizing its spirit, colour and import.

I. Background

The Constitution of 1997 was laboured over a long time and it was a painful delivery, as it was only adopted eight years after the process of systemic transformation commenced, and merely 42.86% of eligible voters participated in the constitutional referendum and 53.45% voted in its favour. As a result, due to low turnout, only 22.6% of eligible voters expressed their approval for the Constitution. It should be added that in the Gdańsk Voivodeship, the cradle of the Solidarity (the City of Gdańsk is perceived as a defender of Polish democracy and the Constitution of 1997[1]), as much as 57.25% eligible voters voted against it. Opposition to the Constitution stemmed, as it seems, from the lack of confidence in the elites working on its wording, since the officers of the former communist regime were part of the group of the so-called "fathers of the constitution". Although that Constitution could be better and improved, it does not alter the fact that I respect and comply with it. Most, after all, will agree that there are no perfect basic laws. Indubitably, the Constitution of 2 April 1997 is important for my generation, which was born under the communist system and came of age during the period of political transition, and then matured along with the Constitution.

The book under review opens with the chapter "Polish Constitutional History and Tradition", on which I will focus more than on others. That chapter seems to be the background of the analysis of constitutional solutions applicable in Poland. It illustrates the path our Nation has taken: from the birth of the Polish state to the birth of populism at the end of the second decade of the 21st century. That path abounds in events that are a particular cause for pride. According to the Authors, the adoption of the Constitution of 3 May 1791 (the first in Europe and the second in the world) was such a pertinent point in the history of Poland. In the opinion of the Authors, "The Constitution of 3 May 1791 – labelled the testament for future

1 On 17 October 2016, thus on the 19th anniversary of the entry of the Constitution of the Republic of Poland of 2 April 1997 into force, the 30th anniversary of the Constitutional Court was celebrated in Gdańsk.

generations of Poles – replaced the elective, feudal monarchy with a constitutional one. This act introduced some of modern principles of political system, such as the sovereignty of nation and the separation of power." However, that constitution did not do away with the noble's democracy, discussed by the Authors in Chapter I. The essence of noble's democracy amounted to limiting the monarch's power in favour of the parliament representing the nobility enjoying numerous civil liberties, known as privileges. They were confirmed by the Constitution of 3 May, guaranteeing them full civil rights. Peasants, however, the largest and poorest social group, were covered only by "the protection by the law and by the national government". The Constitution of 3 May failed to improve their challenging and servile circumstances[2]. It is in this social context that the principle of sovereignty of the nation (which comprised the clergy, nobility, burghers and peasants) should be recognised, which principle, on the one hand, constituted a paramount achievement of the May law, deeming peasants a component of the "nation" yet, on the other, it failed to abolish their "slavery" or slave labour.

It seems to me that the Authors overestimate the value of the Constitution of 3 May by stating that: "Later on, Poland again relied on the heritage of the Constitution of 3 May in a crucial moment of its history: the fall of Communism and the adoption of a new constitution for the democratic state" (p. 11). The constitution of 1791 quickly lost its legitimacy, as it collapsed along with Poland's loss of independence (1795-1918). Yet, it is a symbol of certain aspirations of the 18th century elites and should be seen as Poland's intellectual heritage. I tend to agree more with Marek Safjan than with the Authors. The former aptly notes that it "did not shape our tradition and constitutional culture[3]", but underpinned "our patriotism and attachment to a sovereign state[4]". Moreover, our constitutional tradition is not as strong as the Authors' account would suggest. Although as many as 10 constitutions were enacted on the territory of Poland, Poles had no opportunity to "become attached (thereto), because two of them were imposed (one by Napoleon in 1807, and one by Tzar Alexander I in 1915), and in 1918 - 1939 there were no realistic prospects to strengthen "the spirit of constitutionalism in citizens in the face of a major crisis, illiteracy, the Polish-Russian war, the world war".[5] In addition, the Constitution of 1921 was superseded by the Constitution of 1935 after 14 years of application, and it in turn

2 Jean-Jacques Rousseau (d. 1778) in his *Considerations sur le gouvernement de Pologne* (1772) expressed a significant opinion characterizing social relations in the 18th century Poland: "la nation polonaise est composee de trois ordres: les nobles, qui sont tout; les bourgeois, qui ne sont rien; et les paysans, qui sont moins que rien:. Thereby, this distinguished philosopher of the Enlightenment wished to emphasize that the legal position of the peasant population in Poland was similar to slavery in ancient times – as in W. Uruszczak, Zasady ustrojowe konstytucji 3 maja, in M. GRZYBOWSKI – B. NALEZIŃSKI (eds.) *Państwo demokratyczne, prawne i socjalne: księga jubileuszowa dedykowana profesorowi Zbigniewowi Antoniemu Maciągowi* (Kraków 2014) p. 14.

3 M. SAFJAN, Trybunał Konstytucyjny po trzydziestu latach – doświadczenia i przyszłość, 1 *Przegląd Konstytucyjny* (2017), p. 28.

4 Ibidem, s. 28.

5 D. LIS-STARANOWICZ – J. GALSTER, Konstytucja a suweren, 6 *Państwo i Prawo* (2019), pp. 6-7.

abolished the principle of separation of power and the sovereignty of the people. The Constitution of the People's Republic of Poland of 22 July 1952 was devoid of a normative nature, and the Nation did not approve of Soviet regime patterns. In the period between 1989 and 1997, citizens fought poverty and a part of the population experienced permanent pauperization, which, becoming a problem swept "under the carpet", fuelled Polish populism. Attachment to democratic procedures was problematic, as Poles were reluctant to exercise their right to vote, which resulted in low voter turnout[6].

II. Cornerstones of Polish constitutionalism

Chapter II, "*The Fundamental Principle of the Polish Constitution",* contains a general characterization of the state. The Authors focus their attention on principles such as common good, democracy, rule of law, sovereignty, separation of power, parliamentary government, civil society, European integration, source of law and constitutional amendment. They stipulate that this is not an exhaustive list, but merely key principles that forge the image of the state and society. They add that the Constitutional Court plays an important role, adding merit to the fundamental principles. "In its judgments, the Constitutional Court often deals with constitutional conflicts trying to reconcile conflicting principles[7]". It is impossible to challenge or disprove the findings of the Authors who presented, bearing in mind the limited form of the publication, the essence of the said principles. However, one may "reproach" them for overlooking the principle of direct application of the Constitution, which is vital for modern constitutionalism in Poland[8]. It was the reason why a bond was created between citizens and the Constitution, which was brought closer to people instead of being intellectually inaccessible.

That principle is enshrined in Chapter I of the Constitution, entitled "The Republic". None of the Polish constitutions contained provisions which required the application of the Basic Law directly. In theoretical terms, it was accurately described in the literature of constitutional law already during the period of the People's Republic of Poland, but in practice, it matured very slowly. The reason for this was, on the one hand, low awareness and expertise of judges, lawyers and citizens, and, on the other, their reluctance to apply the Constitution. There was a general agreement that it was the Constitutional Court that applied the Constitution, as it was its dominion. Today, however, the constitution has become more "expansive". It is present in ordinary courts and administrative courts that do not "fear" its provisions and are willing to apply a pro-constitutional interpretation. There is also no paucity of judgments based directly on the provisions of the Constitution, excluding regulation by law recognised by the court as unconstitutional (judicial review).

6 D. LIS-STARANOWICZ – J. GALSTER, Op. cit., p. 7.

7 For many years voter turnout for parliamentary elections failed to exceed 50% of eligible voters, for example: 1991 - 43,/20%; 1997 - 47.93%, the lowest turnout was recorded in 2004 and it reached 40.57%.

8 Art. 8.1 of the Constitution: "The Constitution shall be the supreme law of the Republic of Poland"; art. 8.2 of the Constitution: "The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise" [online]. The CONSTITUTION OF THE REPUBLIC OF POLAND OF 2nd APRIL, 1997 As published in Journal of Laws/Dz. U. No. 78, item 83 https://www.sejm.gov.pl/prawo/konst/angielski/kon1.**htm.**

The principle of direct application of the Constitution is related to Chapter VIII ("*Constitutional Freedoms and Rights*") of the book under review, since the constitutional guarantees of rights and freedoms make sense not only when they impact the position of an individual in vertical relations, but also in horizontal ones. The constitutional right to privacy, the secrecy of correspondence (electronic mail today) or the right to equal treatment is more often infringed by private entities than by public authorities. Thus, in the 21st century, Poland has radically accelerated the direct exercise of constitutional rights and freedoms in horizontal relations. The Authors seem to omit this important achievement for Polish constitutionalism.

It is difficult to argue with the findings of the Authors made in part VIII of the book. They zoom in on issues such as, for example, the impact of international standards on the protection of rights and freedoms in Poland, the principle of human dignity, the principle of equality, the principle of responsibility of the state and the Ombudsman. In the analysis of human dignity, the Authors invoke two cases. The first one concerns ritual slaughter and the other refers to the shooting down a passenger plane for fear of a terrorist attack. Both judgments are important and may be viewed as cornerstones, yet they do not particularly improve the situation of an average citizen. I believe that the impact of the Constitutional Court's rulings regarding incapacitated persons with no legal capacity, deprived of any "decision-making autonomy", is wider. Through the Constitutional Court, those persons have obtained the right to instigate proceedings before courts to have legal incapacitation revoked and the right to express their opinion as regards being forcefully placed in nursing homes. The third judgment, on the other hand, is of particular importance in the era of economic crisis caused by Covid-19, since it concerns the protection of an individual from eviction onto the streets, declared unconstitutional by the Constitutional Court[9]. Each of those rulings eliminated the laws that objectified a person afflicted by illness or poverty. Such factors are more frequent "in nature" than an airplane terrorist attack, while the problem of ritual slaughter is marginal in Catholic Poland.

All of the aforementioned cases were initiated by the Ombudsman. It is an authority that has enjoyed public confidence since its first appointment (1987). "The Ombudsman acts as human rights watchdog through non-imperative tools and does not issue judgments or decisions. In his and her activities, the Ombudsman fulfils the role of both the "firewatcher and firefighter […]. As a firewatcher – acting preventively – the Ombudsman is the crucial organ bringing cases on fundamental rights violations before the Constitutional Court." In turn, the Ombudsman's function as a firefighter involves acting "on his and her own initiative or on the initiative of the citizens, their organizations, organs of local self-government or the Commissioner for the Children's rights" (p. 222). The Authors point out that the organ "acts as an independent authority charged with supporting and protecting people with disabilities under UN Convention on the Rights of Persons with Disabilities, which was ratified in 2012." This function is conscientiously performed by Adam Bodar, who devotes a lot of attention to the disabled, and in particular promotes knowledge on Po-

9 Judgements of the Constitutional Court dated: 4 April 2001, file ref. no. K 11/00 and **18 October 2017, file ref. no. K 27/15.**

lish Sign Language and acts for the deaf. Among other things, he was the first constitutional body to post information in Polish Sign Language on his website. The Ombudsman is also committed to reinforcing the principles of equality and the prohibition of discrimination.

The principle of equality, as the Authors indicate, "is the second most common benchmark of constitutional review before the Constitutional Court, after the democratic state ruled by law principle" and continue to note that "The case law seems to confirm that equality is a particular controversial principle of law." The Authors take notice of the theoretical assumptions of equality and its recognition in the case law of the CC. They present it in the context of lawmaking, and only marginally refer to equality from the point of view of application. The latter problem is related to the case of the so-called Printer from Łódź who refused to provide services to the LGBT in the name of religious beliefs. It should be added, however, that the Printer was punished with a fine of PLN 200, and as a result of appeals, the courts found him guilty, but waived the penalty. The case was finalised before the CC, which ruled that the provision penalising the Printer's conduct was in conflict with Article 2 of the Constitution. As stated by the CC, "In the market economy system, the definition of a relationship in terms of provision of services is primarily based on the principle of freedom of contract and therefore presupposes the freedom to contract and select a counterparty […] For that reason, legal solutions which implicitly restrict the freedom of private entities to enter into contracts and further penalise failure to provide particular services, where the obligation to provide such services does not expressly arise under the provisions of law, undermines confidence in the state and the law it lays down, since they are inadequate for the purpose of the regulation and constitute excessive interference by the legislator with the freedom of individuals." Under this provision, it will not be possible to punish a Baker, for example, who refuses to sell bread to a doctor or a nurse during the Covid-19 epidemic[10]. The CC did not anticipate it when delivering the judgment in the Printer's case. Yet, the Constitutional Court noted that a customer of the Printer, as well as a potential customer of a Baker, has other remedies at his or her disposal to pursue a breach of the principle of equal treatment, e.g. an action against discrimination[11]. However, it is quite poorly recognised in Poland and rarely exercised to seek compensation by those affected by discrimination. The situation is different when it comes to unequal treatment of employees, who are also entitled to an action against discrimination, as provided for by the Labour Code. Employees are willing to exercise that remedy. This ren-

10 "There was a notice on the door of a bakery in Poznań, reading: „*For obvious reasons, enter individually to do your shopping. Persons travelling abroad in the last three months, medical staff and infected people are requested to refrain from shopping. Please wear disposable masks and gloves. Do not talk.* The information outraged the medical circles, among others" – see: M. ZABOROWSKA, *Poznań: Piekarnia nie chciała obsługiwać personelu medycznego. Teraz przeprasza..* [online] https://www.rmf24.pl/raporty/raport-koronawirus-z-chin/polska/news-poznan-piekarnia-nie-chciala-obslugiwac-personelu-medycznego,nId,4439290.

11 The Act of 3 December 2010 on the implementation of certain European Union provisions on equal treatment (Journal of Laws/ Dz. U. of 2016, item 1219; hereinafter: the Anti-Discrimination Act).

ders a discussion on an extensive judicial case-law in such cases possible.

III. Parliament - Government – President relations

The remaining chapters are dedicated to the structure of the state and its authorities, i.e. the Parliament (Chapter III), the President (Chapter IV) and the Council of Ministers (Chapter V). A study of those chapters leads to several conclusions. First, these bodies are inscribed in the parliamentary cabinet system, which is rationalized by a number of mechanisms strengthening the position of the prime minister and the government. The assumption is that the parliament exercises control over the government. This function was assigned – under Article 95 of the Constitution – exclusively to the Chamber of Deputies (a house of parliament). The Authors correctly assert that: "When a strong parliamentary majority forms a cabinet, control over the government may weaken. The opposition may become discouraged by the lack of any realistic possibility of succeeding in eliminating the government by a vote of no confidence. In this sense, there appears to be a divergence between constitutional theory and the practice of governing" (p. 47). At this juncture, I do agree with the Authors that "weak" opposition has a "slight chance" of conducting a constructive vote of no confidence and dismissing the Council of Ministers. On the other hand, the structure of a constructive vote of no confidence in Poland guarantees stabilisation of the government that can "endure" even after the parliamentary coalition collapses. It is a value in itself and that is what the rationalisation of the parliamentary system involves. The Authors fail to notice that the opposition is willing to submit motions for a vote of no confidence for the government. Such motions are the subject of a "theatrical" debate in the Chamber of Deputies, creating an opportunity for "scathing" criticism of the Prime Minister.

The second note concerns the Senate (a house of parliament), the range of powers of which vis-à-vis the Chamber of Deputies is much smaller. The Senate was removed under the communist regime. Then it was reborn in 1989, acting as a symbol of free Poland. This notwithstanding, the Authors are critical of the bicameralism in Poland: "However, in its experience with the Constitution of 1997, Poland has been unable to take advantage of these benefits and its system qualifies as relatively weak bicameralism with asymmetrical and congruent chambers. There are two main reasons for this. First, both chambers of the Polish parliament tend to have a very similar composition [political, not personal – author's note], which may be a consequence of the electoral system." (p.48) They continue to add, "[...] the Senate does not appear to offer a more independent view than the Chamber of Deputies, arguably undermining one of the rationales of bicameral structure." Finally, they state that "It seems that a major reform of the Senate would not be possible without a profound change of the Constitution as such" (p. 73). This depiction is partly uncorrelated with the image of the Senate of the 11th term, which was elected on 13 October 2019, i.e. after the book under review was submitted for publication. The Chamber of Deputies and Senate elections are universal and held on the same day, which is why – as the Authors rightly note – the party that won the Chamber of Deputies elections always wins the Senate elections with a surplus. This rule did not operate well in the 2019 elections when the

ruling Law and Justice party won 48 out of 100 seats. This state of affairs allowed the opposition to dominate the Senate and elect the Marshal (Speaker) of the Chamber of Deputies, who appointed the "Team for the Constitutionality of Laws". The Team's task is to assess the constitutionality of the laws adopted by the Chamber of Deputies. In constitutional terms, it does not alter the position of the Senate, whose amendments the Chamber of Deputies may reject by an absolute majority of votes. In political terms, the Senate ceased to act as an "obedient rubber eraser", removing inkblots of the Chamber of Deputies[12].

A few words should also be said on the position of the President and Prime Minister in Poland. The Constitution classifies both authorities as executive power, save that it is the Council of Ministers, headed by the Prime Minister, that pursues internal and foreign policies of the state. The President is primarily the head of state and moreover, "the President exercises the function of political referee". The position of the President has been shaped over time by political practice and by jurisprudence of the superior courts. The responsibilities of the President indicated in the Constitution reflect his and her general role as the head of state. Specifically, the Constitution identifies the President as the supreme representative of the Republic of Poland, and the guarantor of the continuity of state authority. Moreover, the President ensures observance of the Constitution, [and] safeguards the sovereignty and security of the state as well as the inviolability and integrity of its territory […]. The fundamental function of the head of state implies that the President is the guardian of all constitutional process in the state" (p. 84).). The Authors add that: "The functions enshrined in Article 126 of the Constitution enable the President to act as a political referee". The head of state is not politically liable to the Parliament and participates in political conflicts as if from the sidelines of mainstream political affairs. "This independence from Parliament with the exception of those connected to the office of the President, allows the President to maintain some distance from day-to-day politics while nonetheless wielding a certain degree of influence" (p. 84). Once again, I must agree with the Authors that the Constitution makes the President an arbitrator and the head of state. This is what the law stipulates, yet constitutional practice is slightly different. Each Polish President distanced himself from his political party, claiming that he was the president of all Poles. In reality, he guarded its interests, directly or indirectly. Thus, the function of political arbitration in this context is in fact quite illusory. In the era of the Covid-19 epidemic, the President does not emerge either as the head of state or as a political arbitrator. Currently, it is the Prime Minister that is the head of state, acting jointly with the Minister of Health, who protects our lives and health by making unpopular decisions, and with the Minister of Development, who guards us against the economic consequences of the epidemic, saving the Polish economy and jobs (a triumvirate). Therefore, when discussing the head of state and the Council of Ministers, it should be noted that the Constitution enables the President to act as the head of state, but exercising his constitutional competence and being a

12 In 2011, the Senior Marshal Kazimierz Kutz opening the first Senate meeting, stated that the Chamber is a "mechanical toy in the hands of the Civic Platform" and acts as a "rubber eraser" in the legislative process.

statesman is contingent on his personality. Yet again, this example confirms that the Constitution of 1997 is a living and evolving act, as it changes under the effect of numerous factors, including even viruses.

III. Constitutional identity

A change of the constitution is related to the issue of constitutional identity. This is an interesting research issue for constitutional law theorists and could not have been omitted in the work under review. In the final chapter, entitled "Facing the Future," the Authors analyse the problem of "the role of constitutional identity in the battle for the Constitution." The question of constitutional identity is primarily associated with the permissible limits of its change. A change may be formal (an amendment adopted under a relevant procedure) and informal (substantive). The Constitution of 1997 is rigid and difficult to amend. There have already been numerous bills on amending the Constitution. They ceased to exist at the end of the Chamber of Deputies' terms of office. The Authors present substantive changes of the Constitution of 1997 initiated in 2015. They see it as an erosion of the spirit of the Constitution. They assert that: "Constitutional identity presents an extremely important concept, acting as a barrier that protects the Constitution from the careless changes. For this reason, in the light of the constitutional crisis in Poland, the role of the constitutional identity is particularly important. A constitution that does not maintain its constitutional identity cannot fulfil the function of a basic law" (p.24).

I must briefly refer to the idea of constitutional identity, of which I once used to be an advocate. Constitutional identity may be construed in a number of ways. In a narrow sense – as the identity of constitution, and in a broad sense – as the identity of constitutionalism (common values or continuity of the constitutional tradition). Within the first meaning, the theory of constitutional identity is irrelevant. If it is to be the limit of acceptable changes, the change must be formal (an amendment) in order to be subject to the jurisdiction of the constitutional court. On the other hand, there are no amendments in the world of rigid constitutions. Hence, the identity of constitution is not threatened by an amendment. In the world of rigid constitutions, only a substantive change is possible, and such change is more complex than an amendment. If a substantive change is gradual and progressive, moving slowly from decade to decade, it is imperceptible because it progresses or creeps like a turtle. Supposing the Constitution of 3 May had survived until 2020, it should be assumed that the nobles would have lost (in the 1920s, and no later than the 1950s) their special position guaranteed by the Basic Law. This change could have taken place at the level of ordinary legislation by granting all Polish residents electoral rights (the right to vote and to be elected). If peasants had been given the right to elect their representatives of the parliament in 1792 (a year after the May Constitution was adopted) by ordinary legislation, that provision should be considered, in accordance with the theory of constitutional identity, to have been in breach of the spirit of the constitution. Even more complex is the problem of constitutional identity construed as the identity of values or continuity of the constitutional tradition. If it is assumed that the constitutional tradition in Poland is of a superficial nature, since none of the constitutions became permanently rooted in the public consciousness,

then only the identity of values remains. Where to seek those values? The answer to this question seems to be seemingly straightforward. In Catholic Poland, society should be strongly committed to Catholic values and the teachings of the Church. Statistics show that the number of divorces is exponentially increasing and that young people do not want to enter into sacramental marriages while cohabiting. And every second believer is in favour of maintaining the abortion compromise. With no opinion polls, I am able to assert that the vast majority of Poles strive for truth, justice, goodness, beauty. These timeless values, which are stated in the preamble to the Constitution under analysis, convey the aspirations of every person.

III. Epilogue

The Authors outline a dispute around the Supreme Court and the Constitutional Court, the rule of law. Today, that dispute has taken a back seat. Covid-19 has given rise to global anxiety and posed new questions that we do not have answers to. It seems that the third decade of the 21st century will open a new era in the study of the constitution and constitutionalism, and the constitutionalist milieu will focus all its attention on "ecological" democracy, putting aside liberal and illiberal democracy that has melted like glaciers, depleted like deposits of pure waters, shrunk like the forests of the Amazon. My children, who are slowly coming of age, have no interested in the "rule of law" in Poland, although I constantly try to engage them in the discussion. Instead, they harass me with reproaches: "why has your generation destroyed our environment!?" and ask: "where and how should we live?" From the the other side, young people took part in demonstrations against the constitutional court's sentence issued in the abortion case on 22 October 2020. These and other problems that arise before our eyes emphasize the importance of contextual analysis for understanding the text of the constitution.

In conclusion, the book by Mirosław Granat and Katarzyna Granat is a very good publication on Polish constitutionalism. Their comprehensive and clear study introduces the reader into the world of the Constitution of 1997 with all its shortcomings and failings. The Authors characterize populism in Poland,[13] while refraining from evaluating it and leaving it up to the reader. They navigate the reader through the maze and entanglements of Polish constitutionalism. *The Constitution of Poland. A Contextual Analysis* is a book that is definitely worth having in a reference library.

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13 S. Suteu, The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy Part of the Solution, 15 *European Constitutional Law Review* (2019) pp. 488-519; W. SADURSKI, *Poland's Constitutional Breakdown* (Oxford University Press 2019) p. 304.