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THE SPIRIT OF COMMON LAW AND THE REFORM OF CANON LAW†

LADISLAS M. ORSY, S.J.*

When St. Paul speaks about the various gifts of the Holy Spirit that he distributes in a Christian community, he does not make any mention of the charism of a canon lawyer. And no doubt, many persons would deny that such a charism exists or could exist. But at the same time we find that canon lawyers have a humble but indispensable role in the Church to help to develop and preserve order and peace in the Christian community and in this way prepare the ground for the work of the Holy Spirit. Order, however, does not mean inanimate structures but the ordered play of creative forces, the ordered release of energies. Order in a living body is the perfection of movement. Peace does not mean the absence of tension and of radical change. It means that the moving forces are rooted in love and carry the community toward a Person. Both order and peace include a creative element.

True, the canon lawyer's charism is not that of the theologian. He is not scrutinizing God's mysteries; he is concerned with simple norms of action. He is not interpreting the Word of God to an unbelieving world or to believing disciples; he is concerned with the practical happiness of God's people. The presence of God among his people is intimately connected with the life of a human community. The canon lawyer's mission is to build and to strengthen the life of this community. He has a social mission; his care (as that of canon law) should be for the community.

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Explained in this way, we doubt that Paul would have any objection to including the task of the canon lawyer in the list of charismatic gifts. And he would probably say that the gift that God wants to give them is that of discernment: to help in the incarnation of God's mystery in a human community.

But what has this introduction to do with the main theme of this article: the spirit of common law and the reform of canon law? Perhaps more than appears at first. If the task of the canonist is to help the harmonious development of the Christian community by human means, by ordered laws, surely the canonist can learn a great deal from the human wisdom and prudence that developed in secular communities. In fact, canon law owes a great deal to various legal systems. The impact of Roman law was so great on it that to this day our Code carries the substantial division of the manuals of Roman lawyers who liked to consider all under the three-fold headings: personae, res et actiones. In fact, most of our general principles or particular institutions come from Roman law.

The Church did not consider the Germanic laws as alien to her way of life when she conquered the peoples of Northern Europe. Many elements of it are still retained in our matrimonial and procedural law.

Today it is once again emphasized that the Church should be inserted into the life of various peoples. The mystery of God should take on flesh in different cultures and civilizations. Hence the question arises inevitably: should the Church open its doors to other legal influences than the ones received from Rome, Bezant and the Germanic nations? In particular should the Church admit the influence of English and American common law?

The answer should be in the affirmative. But we admit that the working out of the particulars may be difficult and slow. However, the more difficult it may appear, the more urgent is the task. Canon law and common law should come together and begin a fruitful dialogue.

This article is no more than one step towards this dialogue. It will not touch on particular problems; it will remain on the level of general principles. However, it is necessary from the beginning to define our terms of reference with reasonable clarity.

We take the term common law in a broad sense, meaning the whole legal system that developed in England and was eventually accepted by many English speaking countries and even by nations of another tongue. We include in the term the branch of law which is known as equity—although no doubt the lawyers of the old English chancery court would rise in protest. We include also the basic principles of constitutional law, a product of fairly modern times.

There is no need to define canon law. But if any doubt exists, we say willingly that by canon law we mean not only the Code but also the whole legal system of the Church including the principles of the so-called public law.

It is much more difficult to say what we mean by the spirit of a legal system. To some extent (but not exclusively) we mean the first juridical principles that help in the planning and formulation of
new laws and in the interpretation of the old ones. To a greater extent we mean fundamental human attitudes and virtues as they are expressed in the whole legal system more in an intangible way than by explicit rules or maxims.

The spirit of a legal system is present everywhere in the laws; at the same time its root and origin is not so much in the laws as in the history, in the religious, cultural and moral life of the community that makes the laws. The spirit of the laws does not originate in the laws; it is an inspiration that comes from outside and imprints its image on the legal norms. It is present in the acts of the legislator, in the statutes and orders, in the acts and decisions of the judges, and it is present in the executive and administrative powers—although somewhat less than in the other two branches of power.

By the reform of canon law we do not mean the immediate revision of the laws of the Church only. We mean something more; we mean the development of the legal system of the Church in the future. It is too early to foresee what course the reform of the Code and the development of the legal system will follow.

This article, of course, cannot be comprehensive. We have to restrict our investigations to some aspects of the common law and see if the spirit which is present in them could have a salutary influence on the evolution of canon law. In a somewhat pragmatic way we have selected five aspects which appeared to us as having a greater importance for our purpose. The five aspects are: 1) the balance of powers: the harmony that common law creates between the various types of power in the state, in particular the harmony between the legislative and executive power and the harmony between the judicial and executive power; 2) the humanity of common law; 3) its sense of proportion in imposing legal obligations; 4) the law as a moving force; 5) the principle of good faith, an essential element of common law.

We willingly concede that this is not going to be a critical presentation of common law. Like any other system, common law has its own shortcomings and on a number of points is in sore need of reform. But our purpose is not the adequate presentation of common law. We are interested in those parts of it only that can serve as an inspiration for the reform of canon law; this is a restricted aim no doubt.

The Balance and Harmony of Powers

Since we are dealing with general principles, it would not be right to go into details. The constitutional law of English speaking countries may be markedly different. The power of the Queen of Great Britain is not the same as the power of the President of the United States. The British Parliament does not function in the same way as the United States Congress. Great Britain does not have a supreme court to adjudicate on the constitutionality of statutes enacted by the Parliament; the Parliament itself is the supreme court. In the United States the Supreme Court is one of the most important constitutional safeguards: it has a power of control over the legislature.

Yet there is a common element in the various system is; the different types of
power are so well balanced with each other that it is legitimate to speak about a harmony of powers. The legislative and executive powers are distinct and the judicial power is separated from both. Yet this separation is never complete; that is why modern lawyers prefer to speak about the balance or harmony of powers instead of their separation. The positive aspect is more important than the negative one. Also the term separation is a static concept. Perhaps the terms balance or harmonious play express better the necessary movement that has to be among these powers. The different branches are separated in order to make them into forces working on each other for the good of the whole. In this way the road is open for the dynamic development of the community.

Such a division or balancing of the powers is not so much the fruit of philosophical reflection as the result of centuries-old empirical wisdom. Experience proves that our human nature is limited: one man or one group of men can fulfill one task well; they can serve the cause of one interest well. But their drive and impetus will have to be balanced by another man or by another group of men with different interests in their hearts. If the two do not act in a spirit of enmity but in a spirit of harmony the life of the community will be enriched. They will mutually limit each other's power and they will create a creative play of social forces.

This system of balances can be applied to the life of the Church, too. At present, in the Church the legislative power in practice is not well distinguished from the executive branch of government. The main executive organs are the Roman Congregations and offices. In practice they are the legislators as well, even if officially they do not promulgate the laws. The internal dynamism of an executive organ is essentially conservative; its task and mission is to preserve the laws and to urge their observance. It is right that it should be so; the Church needs conservative forces. But, the Church needs progressive forces too; they should be present in the legislative organs. The legislators should be concerned with the building up of a new society, with providing laws for new situations that progress continually creates.

An example from the recent experience of the Church will help. Before Vatican II the practical planning of the legislation was the task of the Roman Congregations, and we all know that the general tendency was to preserve the legal structures in all, in great and small. The preparation for the Council itself, done mainly by commissions which worked under the guidance and in the spirit of the Roman Congregations, demonstrated the same tendencies. But when the Council convened a new legislative body appeared, independent and superior to the executive branch. The result was a breath of fresh air, a completely new spirit in our legislation. Surely, the Holy Spirit was there. But the whole process of change made perfect sense in terms of modern civil jurisprudence: an independent legislative organ brought in new ideas and broke new paths.

It would help the life of the Church if we had a legislative organ independent from the executive branch of the Government. A trend was the convocation of
the Episcopal Synod in the Fall of 1967. It was not more than a trend since the Synod did not have any legislative power. Let us suppose, however, that eventually under the presidency of the Pope the Synod becomes representative of the episcopal conferences and obtains the power to legislate. Every time the Synod meets, fresh air could be brought into the life of the Church. The Synod itself could set up commissions that would work parallel with the Roman Congregations. The task of the commissions would be to plan new laws; the task of the Congregations would be to watch over the observance of the laws, to give permissions and dispensations.

Today the judicial power in the Church is hardly functioning—if we abstract from its use in matrimonial cases. In reality we have matrimonial tribunals, scarcely anything else. This is the practice, not the theory. Canon law abundantly provides for the use of tribunals. But when 99.5% of the cases before the Sacred Roman Rota are matrimonial cases it is difficult to argue that by and large the judicial power in the Church is functioning.

The main task of the judicial power should be to interpret the law authentically. The high courts in a common law country have the power to make a judicial declaration; i.e., the independent judiciary is entitled to interpret the law—according to the mind of the legislator as it is expressed in the text of a statute. This power of the courts inspires a feeling of security in the citizens; they know the rule of law will be upheld by the judges and consequently they feel protected by the courts and by the law. The ordinary priest or layman in the Church does not feel that he is protected by canon law, even if he is. He knows that the law will be interpreted by those who have a right to correct, discipline or even punish him and he would have no appeal against the interpretation if he finds it unjust, unfair or debatable. It would help to develop this feeling of security in our faithful if our courts too would have the right to interpret the laws. The same right should not be given either to special commissions or to the executive offices of the ecclesiastical government.

Right now it appears less certain how the use of judicial power should be extended in disputes about rights and duties although it should be extended.

This extension will necessarily suppose a simplification of the procedural rules. Two years in the first instance and one in the second do not correspond to our needs anymore. There is no reason why the procedural laws of some countries, at least in minor cases, could not be canonized by the Church or by the local Churches.

In common law the judicial procedure is always marked by a strong personal element. Frequently, a case is decided on a subjective level: which of the two contending parties the jury or the judge is prepared to believe. Canon laws aim at a much more objective standard: the general rule of evidence is that two adult male persons’ independent testimony about the existence of a fact is required to establish judicial certainty. In canon law perhaps a more objective standard is needed since it is a law for use among many nations; yet could not some of that personal approach be ad-
mitted into our procedure, especially in cases of small importance? Sometimes a quick solution is a greater good in itself than a perfect solution given with delay. A speedy decision by honest judges in cases of small importance can benefit the parties and the community more than prolonged investigations and a decision delayed beyond any reasonable limit.

**Humanity Through Law**

Common law is marked by a deep humanity. Humanity means here a priority given to the human person over written rules. In the legislation and in the administration of justice the person is held in the forefront and not the written law. An exalted claim, no doubt, for common law. Yet we believe the claim can be substantiated.

To demonstrate this spirit of humanity, first of all we quote the existence of Equity. Side by side with the official tribunals of the King where the common law (now in a strict sense) was administered, the Court of Equity arose. There justice was given to all who could not get it according to the law. The rule for the administration of justice at the Court of Chancery was in the honest conscience of the Chancellor. At this court the deeply human rules of Equity developed: he who seeks equity must do equity; he who comes into equity must come with clean hands; equity will not leave a wrong without a remedy, etc.

The great achievement of the equitable jurisdiction was that it put a living person between the rigidity of common law on the one side and the needs of natural justice (Christian justice, in fact) and the needs of real life on the other side. Through the living person of the Chancellor the law became human.

The conflict between a rigid legal system and the everchanging realities of life is perhaps inevitable in any community. Common law somewhat forestalls it; a living person, the judge, stands with discretionary power between the letter of the law and the actual case.

This human role of the judge transcends the branch of Equity: the decision of the judge makes law at every court. The law that he makes may be good or bad, but he makes law. The current of legal life runs through a living man, and being a living man he reacts with humanity at the meeting point of abstract rules and concrete cases.

Further, the system of common law is built on some cardinal ideas that have not much juridical precision but much of broad humanity. They can be the despair of judges and scholars sometimes, especially of those who are hankering for definitions and are not content with reality. Some of these concepts are: 1) *reasonable man* (the law of torts is based on the care that a reasonable man should take in a given situation, or contracts are to be fulfilled according to the expectation of a reasonable man); 2) *common sense* (no one knows what it means exactly but judges go back to it frequently and decide issues by common sense); 3) *natural justice* (in recent times used especially at administrative courts); 4) *audiatur et altera pars* (a principle for administration of justice in all circumstances).

Now it is not a human person but a human concept that stands between the rigidity of the law and its application.
The concept is broad; it is a direction and it is a prohibition. It is a direction, vague perhaps, but meaningful for all citizens; it is a prohibition, since nothing against it should be done even if the act or judgment appears to fulfill the letter of the law.

Finally, the discretionary remedies at the disposition of the courts, mostly of high courts, transcend the letter or even the whole text of the law and open up the possibilities for an informal procedure to give justice in a case that is beyond the reach of the law. The right to proceed against a person for contempt of court gives broad powers to a judge to redress injustices or to enforce actions that are not provided for by the law. Similarly, through an injunction the judge can use his power of discretion to promote peace and justice as he thinks it necessary in particular circumstances. These are remedies that enable the court to deal with personal situations in a unique way without being hampered by rules.

If we turn now to canon law and seek to find the same humanity we find it wanting.

A court of conscience does not exist in canon law. There is not any institution, short of personal appeal to the Pope that would install a living person between the letter of the law and its application. We think that such a court of conscience would have a scope in the Church today. It should be a court where the parties (perhaps on oath) are presumed to tell the truth, and judgment is rendered according to the conscience of the judge. Abuses may well follow, but the gain in humanity and equity would outweigh them.

In a more general way, could the Church give discretionary power to the judges? Certainly she could, but our whole doctrine on judicial precedent should be re-thought and reformed; this would be a radical transformation in the legal system. No doubt, it could not be done suddenly, only gradually. Perhaps it is already done in a subtle way. We all say that the decisions of the Rota are not binding on lower courts; yet all judges in every place are studying those decisions and by way of act recognize their authority.

Admittedly some discretionary remedies do exist in canon law, such as suspensio ex informata conscientia, but they belong more to the field of administrative discretion than to the power of the judges. The two powers are entirely different. The former should decrease; the latter should increase.

Sense of Proportion

The spirit of common law reflects a certain sense of proportion in imposing legal obligations. By sense of proportion I mean the respective and graded importance attached to various types of laws. Some laws are concerned with the laying of the foundation for the life of the community; they cannot be disturbed without the whole structure being somewhat shaken by it. Some laws are structures built on the foundation; they do not hold the building; therefore, they can be moved away and substituted in a relatively easy way.

Few, even among the citizens in common law countries, are aware of the fact that the stability of their laws is not uni-
form but that there are (to use the words of a modern commentator) two or three different layers of laws with varying stability. The most important layer is on the level of the Supreme Court; all decisions made by it are binding on all the courts of the land. But the decisions on the highest level are never too numerous. They constitute a loose framework, binding all, but leaving much freedom for action to tribunals at a lower level. One could easily publish a textbook on contract at common law entitled The Law of Contract at the Level of the Supreme Court. It would not be a great volume; there would be serious gaps in it since some of the issues never reached the Supreme Court.

Another volume could be The Law of Contract at Appeal Courts. It would be larger in size, and it would fill up many details, but it would still leave some freedom for local customs applied mostly at the first instance courts; let us call them county courts.

The whole legal machinery moves on two or three different levels. All decisions take their importance from their incorporation into one of those levels. It is easy to see how their permanency is effected by their appurtenance to a lower or higher grade. A sense of proportion pervades the whole system and brings flexibility into it.

In our code of canon law this sense of proportion does not exist. All laws have the same authority; they are promulgated by the Holy See. There are no laws evolved by judicial precedents. Be they fundamental or merely accidental they have the same stability and permanency. The laws concerning an ecumenical council are side by side with the laws concerning the chapter of religious sisters. They form one unit in the Code. The rather unfortunate but inevitable need of numeration increases the artificial unity so that to change one is to disturb the external structure of the whole.

It should be the subject of long and careful study how this uniformity could be broken up and a hierarchy of values introduced into the legal system of the Church. The strict application of the principle of subsidiarity would help. The reform of canon law should not begin so much on the top; it should begin rather at the diocesan level through local legislation and experimentation. The local efforts could be supplemented by legislation by Episcopal Conferences. Finally, the highest authority of the Church could make universal laws according to the universal needs of the Church. The inferior legislator should not be reduced to a mere executive officer as has happened frequently in the past; he should have the right to make laws and to change them according to his best judgment about local needs.

An example much to the point would be the rule that the change of religious constitutions on any point is reserved to the Holy See, or, at least, these constitutions cannot be changed without explicit permission. If a small change becomes such a great issue how can it be expected that the religious will be able to keep ahead of a changing world?

**Law as a Moving Force**

Common law has a certain dynamic element in its structure. Without it, it could not have become the law of so
many countries. It adapted itself to differing cultural, social and political circumstances through an internal strength, not through imposition by an external authority, even if initially such an imposition had taken place.

By dynamic quality we mean an internal strength in the legal system by which it is able to renew itself in changing circumstances. This quality is the result of a fine play of balancing forces, either within the legal structure or from outside.

Inside the legal structure there are five balancing forces:

a) The spirit of common law is against codification. A neatly designed legal structure as it is represented by a code immobilizes the whole system and takes away its flexibility. Even when for pragmatic reasons the laws have to be collected into a systematic order and promulgated as a statute, the decisions of the courts will be the most important source for the new collection. The abstract statute has to retain its connection with the concrete life of the country. Then all statutes are handed over to the courts for interpretation. If the courts would find that laws on the books do not cover real life situations, they can make the necessary adjustments, usually in the form of subtle distinctions.

b) Common law has great respect for customs and usages and some distrust for statutory legislation. The common law conception is not that the legislators conferred legal validity on customs but that the legislator has to respect the customs that have their validity out of real existence. The best part of common law, such as contract, torts, much of the real property and constitutional law, developed through customs.

c) Common law can be very precise when it is needed and very vague when it is useful. Much of the real property law is worked out with mathematical precision; many of the fundamental concepts in contract are so vague that they can be easily adjusted to new developments in the field of commerce and industry.

d) Common law abhors secrecy. The general trend is always for the openness of a legal act; secrecy needs justification. The legislative power works in the open. Laws are prepared and enacted through open debate. All groups that have an interest in new laws have to be consulted previously. The court deals with their cases in the open. And the judges have to give an account of their decisions.

e) Common law has an empirical foundation and it continuously refers to and is corrected by empirical facts. Therefore, it is very difficult for common law to get out of touch with life.

There is a continual impact from extra-legal sources to which the legal system is open.

Public opinion is a most important factor in checking, controlling and correcting the activities of the three branches of government. Channels to government exist in the form of various agencies, corporations and associations that have their own offices and are consulted whenever their interest requires. Constructive criticism flows from university departments, especially from law schools.
The open debates that are typical of political life in a democracy cause social development to soon enter the field of legislation.

The legal life of the Church needs certainly new balancing forces built into the system. Some conceivable developments in this direction are these:

a) The conception of full codification should be abandoned. Partial codification may be useful, even necessary, in the Church. But it should not be carried out by a commission working in secret and without broad consultation. It should be somehow the work of the whole Church. Especially the cooperation and creative contributions of all the episcopal conferences, universities and various professional groups is required.

b) Freedom should be given for developing new customs and usages. There is no community that has such resources, supernatural and natural, for the development of customs as the Church; but to give freedom for such development would require great trust in the Holy Spirit and in the people of God. It would not be a misplaced trust.

c) Openness in the administration of the Church would do much to awaken latent forces in the community that would help the development of the Church. Secrecy breeds distrust and inspires indifference in those who are not initiated into the secret; openness invites free contribution and generates trust.

d) Canon law should be based much more on empirical research. Religious sociology has not made the contribution that it should to our legislation.

Full scope should be given also to extra-legal forces in the Church:

a) Responsible Christian and even non-Christian public opinion should be taken account of in the process of legislation. This is not to reduce the laws to the lowest common denominator but to trust human nature and in particular human intelligence inside and outside the Church.

b) There should be much more consultation and participation. Universities and professional groups should be allowed to represent their problems and also to ask for special consideration.

c) Much of the human wisdom of other organizations could be taken into account, e.g., the international character of many world-wide political organizations could be taken as a model and inspiration for a universal Church. The United Nations and all its agencies are far more international than the Catholic Church.

Bona Fides: Good Faith

A quality that exists strongly in common law but is not expressed by the words that we are using is bona fides, good faith. This expression is taken from classical Roman law.

Schulz has remarked that somehow the whole legal system of Rome was built on trust and confidence that the leaders of the community had in the citizens or even in the peregrines who resided habitually in Rome. It was the fides Romanorum that held the Empire together and cemented the structure of the laws.

This fides survives, we believe, in common law in many forms and gives it great internal strength.
The ordinary citizen has a respect for the law; he trusts his own legal system and he believes that he is protected and served by it in an efficient way. Therefore, on the whole, the community is law-abiding. Also, the legal system too is structured in such a way that a quiet trust towards the ordinary citizen transpires through the rules.

In the field of so-called public law to give importance to custom is to trust the good sense of the subjects. To give discretionary power to the judges is to have confidence in the wisdom and integrity of the judges. To let the jury decide if a person is guilty or not is to believe that there is a sense of justice in the jurymen. In the field of so-called private law the best example is the most obvious one: the very institution of trust. It came into being because the citizens trusted each other, and this mutual trust is still the foundation and practical condition for a legal trust.

When trust is alive and penetrates into the whole community then the number of laws need not be great. If difficulties arise a solution can be found either by the legislator or by the judges or by the citizens without recurring to formal legislation.

If there is no trust in the community there will be an inflation of laws. The legislator who does not trust the community will make norms against every conceivable evasion and by doing so he will overburden the community. Next, the community, overburdened, will really try to escape from the weight of laws, finding loopholes and fine distinctions. Then the legislator will react by making even more laws and imposing even more restrictions on the subjects. As in any case of inflation, the vicious spiral will speed up and will eventually lead to a grave disease in the community.

It should be possible to build *bona fides*, good faith, into the legal system of the Church to a much greater extent than it is there now. To do this a certain vision and the acceptance of certain principles would be necessary.

The vision should be that of God's people: imperfect and sinful people, no doubt, but also blessed by God's grace, moved by the Spirit to the final revelation of the Kingdom of God. A vision of God's pilgrim Church would be necessary.

For this community no perfect legal order is possible or even desirable because law is not the primary factor in keeping the members together. Therefore, the aim in building up the legal system should not be an abstract perfection but the best suitable organization in the circumstances; this can be an imperfect one. The realization is necessary that it is really not law that holds the community together but a Person, the Holy Spirit. Consequently, a lack of perfection in the legal system will not be able to destroy the cohesion of the community at the deepest level. This is not to advocate lawlessness but to put the value of Christ's promise in strong terms and to situate law in its own place.

The legislator should trust, above all, the Holy Spirit, the source of the unity of the community. He should believe in the effectiveness of the promise of Christ that the Spirit will never abandon God's own people. The scope of the law is not
to make the community but to better its life through external organization.

The legislator should trust also God's children in their basic thrust towards God. He should believe that they do not want to escape God's laws; rather, they want to submit themselves to them. And finally, the legislator should trust human nature that produced so many good legal principles outside the Church. It is likely to produce even better ones in the Church.

The laws themselves should demonstrate this overall trust. And trust should not be withdrawn when some are abusing it.

To build up this trust some of our laws should be relaxed or plainly abolished. We have suffered and we are still suffering from an inflation of laws.

Fundamental structural laws must be clearly known and firmly applied. But unnecessary burdens should not, in the form of discipline, be placed on individual consciences. Fewer laws would give immediately greater scope to the creative action of the Spirit of God, of the children of God and of human nature. New customs would begin to develop and enrich the life of the Church. New technical, legal knowledge would be brought into the life of the community. On the surface the relaxation of laws would bring a certain looseness into the texture of the community but at a deeper level it would bring a deeper cohesion.

Even more, the exercise of authority could become more humane and more Christian. Instead of introducing a hierarchical order and precedence of honor into the life of the community there could be more of free associations of free persons, all working for the same goal. A parish need not be necessarily taken care of by a pastor to whom several assistants owe obedience. It could be well helped by a team of priests working together with one mind and one heart. The administration of the diocese need not be done by orders coming from the bishop or from the chancery but it could be taken care of by a body of presbyters under the effective presidency of the bishop. The Holy Father himself will not need to suffer agonies in making a decision but he could trustingly resort to the bishops, knowing that through them the Holy Spirit will give the light much more than through the study of documents.

And in all this process the layfolk would not be looked on with suspicion but as brothers and sisters, cooperators in Christ.

There is no doubt that the task of canon lawyers in the life of the Church could be considered a charismatic gift. It is to help principally the humanity of the Church. This task has its roots in faith and in theological knowledge, but it requires a worldly skill and a greater deal of practical wisdom as well.