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MODERATION IN THE EXERCISE OF RIGHTS PROPER
TO THE CHRISTIAN FAITHFUL (C. 223 §2)

INTRODUCTION

Book II, Part I, Title II of the Code of Canon Law¹ mentions the rights and obligations of all the Christian faithful in the Church. Their list is open-ended and not limited to the ones enumerated here as clearly indicated by the legislator in canon 224, which provides that there are “those which are established in other canons.”² 15 canons (cc. 208–222) enumerate 31 kinds of rights and obligations which E. Corecco divides into three basic categories: a) rights and obligations originating in the Divine Law, connected with the participation of the faithful in the threefold mission of Christ; b) rights and obligations which spring from the law of nature and which are regarded as the Divine Law since they regulate relations of a not natural but ecclesiological character; c) rights and obligations which exemplify natural law.³

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¹ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, January 25, 1983, AAS 75 (1983), pars II, 5–348; Polish translation in *Kodeks Prawa Kanonicznego*, Polish translation approved by the Polish Episcopal Conference (Poznań: Pallottinum, 1984) [hereafter CIC].

² Other circumstances to support this claim are indicated by the Author in his publication *Prawo-Obowiązek. Pierwszeństwo i współzależność w porządkach prawnych: kanonicznym i społeczności świeckiej* (Warsaw: Wydawnictwo UKSW, 2007), 339–40.

³ E. CORECCO, “Il catalogo dei doveri-diritti del fedele nel CIC,” in *Ius et Communio. Scritti di Diritto Canonico*, ed. G. Borgonovo and A. Cattaneo (Casale Monferrato: Edizioni Piemme, 1997), 501–3.

The final canon is devoted to the rights and duties of all the faithful. It contains general clauses which they should consider when exercising their rights, either as individuals or gathered in associations. The content of the clause is “the common good of the Church, the rights of others, and their own duties towards others,” which the Christian faithful must consider “when exercising their rights.” All of the circumstances described by the canon indicate duties existing when the rights are exercised. The provision of the canon implies that the exercise of one’s rights may not always correlate with the rights of other faithful or the demands of the common good. A lack of correlation may therefore cause a breach of the rights of other faithful or the order founded on the demands of the common good. At the same time, the canon does not reflect a conviction about the correlation of rights and obligations existing in one person, emphasised by the Magisterium of the Church.⁴ If we were to justify this state of affairs, we should see this legal text as a formulation of a certain requirement reflecting the reality which is not clear to everybody but needs to be explained due to the value it enshrines – a value that calls for acknowledgement and reflection. In this situation, the text of the canon and consequently its norm, which seeks to reflect the aim that the legislator was guided by, will not carry a negative connotation associated with the restricted exercise of one’s rights. The norm indicates the correct manner of their application in addition to speaking of motivation, which need not stem from the restriction of freedom in a venue and time where and when the freedom of another person appears, but will reflect the genuine freedom of exercise of rights at the point where the rights of another individual are encountered. In this sense, it is hard to speak of restriction of a right. However, the positive formulation of the norm which is based on this prescript implies that the norm has some limitations, which a believer should take into consideration whenever exercising his or her rights. The legislator not only prescribes but – given the communion of the faithful – makes reference to the sense of community transcending the social and legal bonds, the preservation of which is a cardinal obligation of every member of the Church (c. 209 §1). Therefore, this norm makes reference to something more than just internal limitations which the faithful should obey.

In §2 of canon 223, the legislator uses a rather vague and quite striking statement, at least so in the Polish translation: “ze względu na dobro wspólne, przysługuje władzy kościelnej prawo domagania się, by wierni korzystali z umiarem z przysługujących im praw.” Such an opinion does not follow the wording and translation of a legal provision but from the lost truth that single persons in a religious community are not protagonists in the creation of the fundamental rights and

⁴ GAŁKOWSKI, *Prawo-Obowiązek*, 377–401.

obligations because these are derived from the structure of the Church and they show relevance to the Divine Law, as demonstrated by E. Corecco. Rights that are proper to the Christian faithful do not result from a resentful approach to authority, neither do they stem from democratic equality.

Reservations in respect of thus formulated prescript occur for other reasons, too. The criterion of moderate use of rights that are proper to them is the common good (that is the Church, which is explicitly conveyed by §1), whose definition and limits are not precisely specified, which allows some latitude both in the activity and in the justification of the church authority. Further, no provisions exist to regulate the manner and measures [legislative (?), administrative (?)] the church authorities could use to elicit moderate exercise of rights.

The above doubts provide an incentive for a proposal of interpretation of canon 223 §2 with a view to the proper interpretation of the legislator's idea, reception of the norm, and a proper manner of its application.

1. MODERATION IN THE EXERCISE OF RIGHTS

The normative text of the provision of the Code is in Latin. However, a translation into a modern language does not constitute a point of departure for the formulation of a norm. Translations into other languages require, then, that the message which is not always possible to convey when translated, be complemented and elucidated. Therefore it is wrong to start with a translation of a provision or provisions from Latin when attempting to decipher the encoded legal norm. Here we encounter a difficulty common in canon studies. A proper interpretation of legal provisions in accordance with the rules of canon studies requires that preliminary conditions be met: a) knowledge of Latin, and b) a departure from existing interpretations which rely on a translation of the normative text and consideration of arguments for and against choosing a better normative construct. Here, we are not dealing with any choices made on the basis of extra, non-interpretative criteria, which would support an adopted approach, especially if exercise of real authority is at stake.

There are Latin expressions, even in the canon in question, the translation of which into other languages does not create understatement or misunderstanding. In a large measure, these are technical expressions which have long existed in the legalese or the language of legislation. Such an expression would be *bonum commune*, which is translated unambiguously as common good. However, the very translation is not sufficient to convey the legal norm properly. Not always is the referent of a commonly accepted notion unambiguous, which begs the question whether we

are dealing with a notion or rather with a mere functional description that is commonly acknowledged. The proper interpretation of a law text, even if it is based on a translation, will encounter further difficulties associated with the application of the norm, considering the referents of commonly accepted terms.

The situation described above occurs in the context of canon 223 §2, in which the scope of the norm is determined by means of a general clause, i.e. the common good of the Church. In the social teaching of the Church, the content of the notion of common good in respect of lay community, and despite systemic differences arising from the existence of different ontological schools within Christian philosophy, is commonly accepted. Much less often did the Magisterium refer the notion of common good to ecclesiastical communion and explain it. If any explanation was offered, it was provided in metaphorical and general terms. The lack of unequivocal determination of the content of the notion of common good in the community of the faithful caused that the notion was ignored in the definitions of a canonical law. An attempt to create such a definition on the basis of elements contained in CIC rules out any reference to the common good, as opposed to the definition of a canonical law developed by St Thomas.⁵

The problem indicated above plays a role mainly in the application of the norm. When interpreting the existing provision, first we need to ask what is demanded (particular behaviours), and then to ask about the circumstances under which a specific behaviour is required. If the circumstances expressed in the canon in question are not adequately specified, can a specific behaviour be demanded?

The questions mentioned above are illustrated by some translations of the canon into Polish. Also, its translation serves as a springboard to interpret the prescript and provide a legal norm on its basis.

In the Polish translation of CIC, approved by the Polish Episcopal Conference and published in 1984, we read: “ze względu na dobro wspólne, przysługuje władzy kościelnej prawo domagania się, by wierni korzystali z umiarem z przysługujących im praw.”⁶

E. Szafrowski translates that in the following way: “Ze względu na dobro wspólne, władzy kościelnej przysługuje kierowanie korzystaniem przez wiernych z przysługujących im uprawnień.”⁷ The Author of the translation leaves this canon in his course book without an explanation.

⁵ IDEM, „Dylematy wokół ustawy kanonicznej (II) – *bonum commune* czy *communio*,” *Prawo Kanoniczne* 58, no. 4 (2015), 46–7.

⁶ The Latin original goes: “Ecclesiasticae auctoritati competit, intuitu boni communis, exercitium iurium, quae christifidelibus sunt propria, moderari.”

⁷ E. SZAFROWSKI, *Podręcznik prawa kanonicznego*, vol. 1 (Warsaw: Akademia Teologii Katolickiej, 1985), 300.

T. Pawluk provides the following translation: “Właściwa władza kościelna ze względu na dobro wspólne może ograniczyć korzystanie z praw przysługujących wiernym.”⁸ The translator’s comment suggests that not authority but the common good of the Church “can restrict the exercise of rights which are proper to the faithful.” In the Author’s opinion, this good encompasses all that contributes to the building of the Church or is even identified with it. When individual good and the common good are at conflict (apparent or real), the faithful are obliged to submit to the community, which is their common good. This reasoning implies that individual good can stand in opposition to the common good in the Church, and consequently the rights of the faithful would not reflect the rights that really exist and stem from the transmission of the faith in the Church. The exercise of rights, T. Pawluk goes on, should be done in a way which is not detrimental to the community. What rights did he have on mind? Can the rights of the faithful in the Church be in opposition to the rights of the community which is of the faithful and for the faithful? Law would, then, safeguard individual goods, the exercise of which would go beyond the communal good. After all law promotes goods. Can the exercise of rights be restricted without depleting the good itself? Is the exercise of rights which is mitigated by the common good still exercise of rights or rather it gives rise to cases of lawlessness that require a response from authorities? Is there room in the Church for rights which would guarantee goods contrary to the good of community? These questions are but a few to ask when reading a commentary to one’s own translation of a provision of law. Neither does the commentary explain if it applies to the norm contained in the normative text or to its translation.

The commentary on the Code of Canon Law, a task undertaken by the Association of Polish Canonists, uses a translation that has been approved by the Episcopal Conference. In it, Józef Krukowski explains that the church authority is competent to regulate the exercise of rights proper to the faithful. This competence is underpinned by the authority’s concern to protect the ecclesiastical community from abuse, which may occur under the pretext of exercise of rights.⁹ Even a cursory glance makes it clear that the commentary is a radical departure from the text of the prescript existing in the Polish translation, where we deal with the right of ecclesiastical authority to demand that the faithful use their rights with moderation. When writing on the competence to regulate the exercise of rights, the author of the commentary leaves aside the quoted translation and interprets the proper normative text.

⁸ T. PAWLUK, *Prawo kanoniczne według Kodeksu Jana Pawła II. Lud Boży jego nauczanie i uświęcanie*, vol. 2 (Olsztyn: Warmińskie Wydawnictwo Diecezjalne, 1986), 44.

⁹ J. KRUKOWSKI, „Obowiązki i uprawnienia wszystkich wiernych chrześcijan,” in *II. Lud Boży. Część I. Wierni chrześcijanie. Część II. Ustrój hierarchiczny Kościoła*, vol. II/1 of *Komentarz do Kodeksu Prawa Kanonicznego*, ed. J. Krukowski (Poznań: Pallottinum, 2005), 42.

In the most recent Polish translation of the norm, featured in the Commentary on CIC (edited by P. Majer), the translation of the canon in question goes as follows: “Ze względu na dobro wspólne, władzy kościelnej przysługuje kierowanie korzystaniem przez wiernych z przysługujących im uprawnień.” The editorial board of the publication explains that the Polish translation of CIC was produced by E. Sztarfrowski, including corrections made by P. Majer and introduced by permission of the Legal Council of the Polish Episcopal Conference. In this case, the interpretation of the canon was carried out on the basis of the normative text rather than its translation, because the Polish text is a translation of the Spanish version. This may suggest that the translation of the canon was made to comply with its interpretation. However, the explanation of the canon, provided by J. Hervada, is so general that it cannot serve as the basis for any precise translation of the canon into Polish, which would in turn permit an adequate interpretation of the norm contained therein.¹⁰

Looking at the Polish translations of canon 223 §2, one notices that they follow two routes. In the most radical translation by T. Pawluk, we find the idea that church authority may **restrict** the exercise of rights proper to the faithful. The other translations contain the phrase saying that church authority **directs and regulates** the exercise of these rights. Restriction is a form of direction and regulation, but it proceeds only along one route. Regulation and direction have a broader scope. They are not limited merely to restriction, but they also indicate imperatives that inspire action which complies with those rights. Inactivity may restrict a person's rights and thereby stand in opposition to the common good (e.g. the right-obligation to celebrate the Eucharist for the community of the faithful), which should be promoted by the faithful who are joined in communion. In contrast, the translation which was approved by the Polish Episcopal Council includes a statement saying that authority is entitled to demand that the faithful use their rights with moderation. As a result, authority neither regulates nor restricts, but it has a right to elicit moderation, not demand, which may suggest a request, suggestion or encouragement rather than a specific activity and responsibility. Such conduct of the ecclesiastical authority would not unambiguously indicate that it bears the burden of care for the common good, whose character is not entirely normative.

Another remark that springs to mind when the translation as well as the content of the canon is analysed concerns mutual relations between the two. It appears

¹⁰ J. HERVADA, „Obowiązki i prawa wszystkich wiernych,” in *Codex Iuris Canonici. Kodeks prawa kanonicznego. Komentarz. Powszechne i partykularne prawodawstwo Kościoła katolickiego. Podstawowe akty polskiego prawa wyznaniowego*, ed. P. Majer, the Polish edition based on the Spanish edition (Kraków: Wolters Kluwer Polska, 2011), 214.

that there is a difference between authors who write commentaries on the basis of a translated text and those who do so by making reference to the original text, although this is not always clear from the content of the commentary.

2. THE VERB *MODERARI*

The variety of ways to translate the canon into Polish stems from the semantic abundance of Latin words. According to interpretation rules provided in canon 17, ecclesiastical laws are to be interpreted according to “the proper meaning of the words considered in their text and context. The word that causes translation and semantic ambiguity is the Latin verb *moderor, moderari (verbum semideponens)*. J. Sondel’s Latin-Polish dictionary attributes the following meanings to the verb *moderari*: 1) restrain, restrict, contain; 2) decrease; 3) mitigate; 4) resolve a dispute (*moderari controversiam*); 5) direct, govern; 6) set, establish, arrange, determine; 7) devise; 8) fix, improve; 9) comply with.¹¹ The Polish meanings provided by the author of the dictionary were used in the translation of the canon, i.e. *ograniczać, kierować* [Eng. *constrain, direct*]. However, they do not form the basis for translation if used in the sense “demand that something be used with moderation.” The Latin-Polish dictionary, edited by M. Plezi, features meanings that reflect the way the word is used in Latin texts and indicate the semantic context of its use and translation. The verb *moderari* appears in two basic semantic groups. The first group (I) covers the following meanings: a) put on a brake, curb, contain; b) arrange suitably (equitably), maintain moderation; c) consider; while the second group (II) includes these: a) direct properly; b) rule (metaphorically). The authors point out the connection of this word in meaning Ib with the area of law. The meaning attributed to this word expresses just governance, observance of certain measures, which is reflected by a Latin sentence taken from Suetonius’ *Divus Claudius* (14,3): “*duritiā lenitatemve multarum legum ex bono et aequo [...] moderatus est*”.¹² *Moderari* stands for compliance with a specific form, avoidance (omission) of certain extremes, temperance.

The semantic content in respect of law attributed to the Latin word has a twofold significance for our considerations. Firstly, it is one of several interpretative clues

¹¹ Translated into English on the basis of the Polish meanings as they appear in J. SONDEL, *Słownik łacińsko-polski dla prawników i historyków* (Kraków: Towarzystwo Autorów i Wydawców Prac Naukowych Universitas, 1997), 631.

¹² *Słownik łacińsko-polski*, ed. M. Plezia, vol. 3 (Warsaw: Wydawnictwo Naukowe PWN, 2007), 515–16.

allowing to work out the idea of the legislator, who wishes to convey the content of the norm in a clear and comprehensible manner. The use of the verb *moderari* implies that the intention of the legislator was not only to restrict the exercise of rights but also to efficiently control their use so that they may comply with the demands of justice which reflect the communal nature of Christian vocation and life in a community, and which realise such a lifestyle. Restrictions are not ruled out. However, it is not the only kind of conduct which can be inferred from the norm. It is part of regulation and direction, in accordance with the demands of justice – Christian justice. Secondly, it provides a foundation for correct translation of the prescript into other languages, which does not imply, however, the correct understanding. A question that still remains is one which concerns the meaning of this fair regulation and the means to achieve this.

The above considerations are confirmed by the reading of the word *moderari* in a broader context, i.e. its application in CIC. This word is translated into Polish as: a) *zarządzać* [English translation: *direct*] (c. 115 §3; 321); b) *kierować* [English translation: *direct*] (cc. 215; 254 §1; 318 §1; 517 §2; 528 §2; 567 §2; 790 §1; 803 §1; 1374; 1649 §1); c) *regulować* [English translation: *direct*] (c. 576); d) *określić sposób zarządzania* [English translation: *direct the governance*] (c. 1272); e) *łagodzić* [English translation: *moderate*] (c. 1346). Used with reference to proper rights, the word appears in canon 576, where it denotes a legal regulation (*legibus moderari*) of the practice of the evangelical counsels, that is the manner of exercise of rights and duties resulting therefrom. Therefore, the role of a competent authority is to determine the range of rights and duties, and consequently the resulting methods of their exercise depending on the form of consecrated life.¹³

Whenever the word *moderari* appears in CIC, the legislator uses it largely with reference to direction, governance and regulation of the life of a community by means of general norms. Only in one case (c. 576) this regulation is done by means of statutes (*legibus moderari*). In many other situations where no direct reference to laws is made, the meaning of the word is similar and it denotes direction, regulated by means of normative measures (compare especially canons 215; 254 §1; 1272).

¹³ J. BEYER, *Il diritto della vita consacrata* (Milano: Ancora, 1989), 25–32.

3. THE TASKS OF CHURCH AUTHORITY VERSUS THE EXERCISE OF RIGHTS PROPER TO THE FAITHFUL

Canon 223 §2 had no counterpart in the previous code. In the 1983 edition of the Code, which features a list of sources, the canon under our scrutiny does not have any associated sources.¹⁴ In contrast, the explanatory note of the Pontifical Council for Legislative Texts contains a statement that the source of the canon lies in the Declaration on Religious Freedom *Dignitatis Humanae* 7.¹⁵ The first redaction of the canon took place as part of the draft of fundamental law of the Church *Lex Ecclesiae Fundamentalis* [hereafter LEF]. Its redaction demonstrates many similarities to various declarations of laws which also contain some restrictions of the exercise of rights proper to individuals or social groups. The lack of approval for human rights as well as the ecclesiological premises that underlay the previous code all resulted in absence of basic rights which would be available to all the faithful. The situation was changed radically by the teaching of Pope John XXIII concerning rights and duties of man, later articulated by the Second Vatican Council.

The conciliar declaration as well as the conceptual and redaction process which belong to the LEF projects demonstrate the legislator's intention regarding the direction of the exercise of rights proper to the faithful. The declaration mentions three principles regulating the way the rights proper to the lay community are exercised, and which should be adhered to when exercising "all kinds of freedom."¹⁶ These are: a) the principle of personal and social responsibility, whereby one needs to respect the rights of others when exercising one's own rights, and fulfil one's duties towards others and the common good; b) the principle whereby the civil authority uses protective measures against all kinds of abuse "which may emerge under the pretext of exercising religious freedom" and, more broadly, other freedoms; and c) a principle which is not referred to in canon 223 but granting man the greatest possible freedom and restricting it "only when and insofar as it is necessary." The absence of such a reference can be justified by referring to the Christian perception

¹⁴ PONTIFICIA COMMISSIO CODICI IURIS CANONICI AUTHENTICA INTERPRETANDO, *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus. Fontium annotatione et indice analytico-alphabetico auctus* (Città del Vaticano: Libreria Editrice Vaticana, 1989), 59.

¹⁵ PONTIFICIO CONSIGLIO PER I TESTI LEGISLATIVI, *Chiarimenti circa l'applicazione del can. 223 § 2 CIC* (December 8, 2010), accessed July 14, 2014, <http://www.delegumtextibus.va/content/testilegislativi/it/attivita/note/applicazione-can-223-par-2-cic.html>.

¹⁶ SACROSANCTUM CONCILIUM OECUMENICUM VATICANUM II, *Declaratio de libertate religiosa Dignitatis humanae* (December 7, 1965), *AAS* 58 (1966), 929–946; Polish text in SOBÓR WATYKAŃSKI II, *Konstytucje, dekryty, deklaracje* (Poznań: Pallottinum, 1986), 414–426 (no. 7).

of freedom for which Jesus Christ set us free (Galatians 5:1). Freedom need not be mentioned in the canon, then.

The formation of the canon began the moment the LEF project started in 1965. Initially, the canon was received very favourably because in its original form it emphasised the duty of authority (*sacra hierarchia*) to govern the life of the faithful rather than rights and obligations of the faithful, which the authority would regulate *ratione aetatis*, as it had been proposed. The subsequent proposals manifested with increasing conviction and clarity the conciliar sources for the canon, both in terms of the wording and the spirit.¹⁷ In the initial six concepts (schemas) of LEF, it existed in the form of only one paragraph, its numbering changed from time to time. From the seventh schema, the content of the canon was split into two paragraphs. After a decision was made to abandon the LEF project, the canon ended up as no. 223 in *Schema novissimum* of 1982; finally, after minor modifications made by John Paul II himself, it acquired its present form. The Pope deleted the final fragment of §2: “vel legibus irritantibus et inhabilitantibus restringere.”¹⁸ Interestingly, the juxtaposition of *moderari* and *restringere* suggests that the meanings of the two terms and their denoted behaviours are at the same normative level. The church authority would be entitled, in the same degree and under the same circumstances, to direct and restrict the exercise of rights proper to the faithful. Restriction would be additional to direction and also contrary to the latter. The Pope’s decision confirmed the negative opinions which had appeared during the preparation of LEF, suggesting that the exercise of rights by the faithful cannot be moderated by means of invalidating or disqualifying laws, and measures undertaken by the authority must be applied in accordance with the law and via laws which must not violate the essence of rights that belong to the faithful.¹⁹ Other than that, as pointed out by the Pontifical Council for Legislative Texts in its explanatory note, the fragment removed by the Pope demonstrates its uselessness in this location within the Code, given the presence of the existing canon 10, which deals with invalidating and disqualifying laws. This is because such laws, as clearly determining the invalidity of an act or disqualifying a person as being unable to perform an act, cannot refer to a norm of a general nature, as provided in canon 223 §2.

The canon’s development on the basis of the conciliar source demonstrates that the intent of the legislator in respect of rights that are proper to the Christian faithful

¹⁷ J.B. DÍAZ, “El favor libertatis como clave hermenéutica del canon 223,” *Ius Canonicum* 53 (2013), 526–9.

¹⁸ *Ibid.*, 529–30.

¹⁹ *Ibid.*, 533.

was to moderate them. Therefore, *moderari* does not mean a restriction but it refers to proper promotion, orientation, and location within certain limits imposed by the requirements of social life, including those necessitated by the common good. This results from the reality of law, its enforcement and its protective role regarding goods and social values, in respect of which law sets tasks for the legislator. The tasks include the formation and safeguarding of a just and equitable social order which will correspond with human dignity and, in the case of Christian community, respect dignity arising from vocation.²⁰ A restricted exercise of respective rights, if any, should not be treated as an exception to the general principle but as a response to cases of abuse which destroy law and lead to lawlessness.²¹ The authority's response should foster proper exercise of one's rights.

Not only differences as to interpretation of canon 223 §2 contributed to the ambiguity of the norm. The unclear and therefore uncertain norm causes problems with its application. The Pontifical Council for Legislative Texts was requested to provide a clarification. The question was whether canon 223 §2 could be invoked if protective or disciplinary measures were used towards a clerical person. The Council stressed that this question should be examined in a more general context, and it should be determined whether the norm can be directly applied to specific cases or rather it grants the authority necessary prerogatives to take measures of a more general nature. Simultaneously, the Council concluded that the issue does not require an authentic interpretation because it concerns only a proper application of the norm in this regard.

On the basis of the analysis of the redaction process of the canon and the interpretation criteria provided by CIC, the Council concluded that they are relevant with respect to interpretation and application of the norm. The Council explained that the duty of the authority, on account of its role, i.e. concern about the common good, is to moderate (*moderari*) the exercise of rights in the sense of regulating²² using means of general nature. It also explained that one must not make reference to the norm of canon 223 §2 in order to restrict the exercise of rights in specific case. For this purpose the law envisages other procedures, which take into consideration specific requirements when securing relevant guarantees.²³ Although the Council

²⁰ R. SOBAŃSKI, *Nauki podstawowe prawa kanonicznego*, vol. 1 of *Teoria prawa kanonicznego* (Warsaw: UKSW, 2001), 107–8.

²¹ For example, a situation in which the right to celebrate Mass is restricted by means of limitations concerning bination and trination.

²² Both verbs exist in Italian: *moderari* and *regolare*, which the Council regards as equal, using one to explain the other – “*moderari* [...] nel senso di *regolarli*.”

²³ PONTIFICIO CONSIGLIO PER I TESTI LEGISLATIVI, *Chiarimenti circa l'applicazione del can. 223 § 2 CIC*, no. 4.

does not mention such procedures or measures in the note, individual precepts of CIC can be regarded as such (c. 49), including the penal precept in canon 1319 or the prohibition to marry (c. 1077; 1682 §1).²⁴

Moderation of rights that belong to the faithful by the ecclesiastical authority when using measures of a general character takes place, as we read in the explanatory note, within the limits determined by internal and external requirements. The latter group includes those concerning the legislative hierarchy, whereby “a lower legislator cannot validly issue a law contrary to higher law” (c. 135 §2), and procedural questions that guarantee security of law through legislative activity (c. 8 §2). The limits of the activity consisting in moderation of the exercise of rights proper to the faithful are delineated by the internal requirements of canon law itself, which has its source as well as the limits in the Divine Law. Importantly, as the Council underscores, the fundamental rights of man and the faithful must not be negated.

4. OBSERVATIONS AND REMARKS

The examination of canon 223 §2 gives rise to several remarks and observations of, say, a doctrinal and legal character. The former concern the principle of common good, which is clearly addressed by the canon, and the principle of granting maximum freedom and restricting it only inasmuch as it is necessary, but this is not mentioned by the legislator. The latter concern, in the Author’s opinion, the narrow interpretation made by the Council.

The Pontifical Council for Legislative Texts is a body entitled primarily to interpret church laws, as well as to provide an authentic interpretation.²⁵ The document which the Council issued in the form of an explanatory note confirms that the explanation therein is not to be treated as an authentic interpretation. This concerns only the proper application of canon 223 §2. Our doubts do not relate to the manner of application of the canon presented by the Council but to explanation of its meaning. Our uncertainty concerns the meaning of the verb *moderari*, which is crucial for understanding the prerogatives of church authority. The Council explains that church authority has a right to *moderari* the exercise the rights proper to the faithful, i.e. to regulate them using means of a general character. In its further explanation

²⁴ In accordance with the numbering of canons after the apostolic letter *Mitis Iudex Dominus Iesus*.

²⁵ IOANNES PAULUS PP. II, *Constitutio Apostolica de Romana Curia Pastor bonus*, June 28, 1988, *AAS* 80 (1988), 841–912; Polish text in *L'Osservatore Romano*, Polish edition 9 (1988), no. 6, 4–17; no. 154–155.

regarding the limits within which authority can act, the council points out that statutory measures are means of a general nature. *Moderari*, then, denotes regulation through laws. It seems though that even the meaning of the word *moderari* in the text and context alluded to by the Council does not fully reflect its semantic content. If the Council refers to this meaning and claims that we are dealing not with an authentic interpretation but a mere explanation, this interpretation is done on the basis of the legislative conception rather than proper meaning of words. *Moderari*, which occurs in the Code, does not imply only regulation through laws (*moderari legibus*), as mentioned above. From its broader context it transpires that the word also refers to pastoral activity conducted using the means available to the authority in this respect. This would imply that the explanation of the word *moderari* by means of legal regulation suggests that the meaning of this law is narrowed down. The explanatory note, however, is not ultimate in its nature, yet it remains a valid clue for undertaken actions.

The moderating activity of the church authority in respect of the exercise of rights proper to the faithful is not voluntary. The point of reference is the common good of the Church. It constitutes, on the one hand, motivation for action and an opportunity to assess to validity of the authority's conduct whenever the common good is at risk because of abuse of rights. On the other hand, it is the line which the authority cannot overstep in its operation. The common good appears as both motivation and limits of the authority, which therefore cannot act in an arbitrary manner. This is also another motive which indicates that the verb *moderari* was rightly used in the canon. There is a large lexical discrepancy between *moderari* and *non modo arbitrario*. *Moderari* denotes *modus* (mode) of conduct within reasonable limits.²⁶

Construing the common good in terms of a motive and limits to one's action calls into question its status as a general clause. Actually, the term 'clause' is an imprecise notion, left to the discretion of courts or law enforcement agencies. Its role is to make law more flexible, realisation of higher justice, emphasising and realisation of values enshrined in law. The canon in question addresses the common good differently. It is a concrete incentive for the ecclesiastical authority to take necessary measures, but at the same time it marks the boundaries for such activity. This refers to requirements imposed on authority, not on those targeted by authority. The authority's acceptance of the common good as a motive for action also emphasises the fact that its vital aspect is not the possibility to regulate the exercise of rights proper to the faithful but to underscore their importance and meaning for community growth. In his address to the Roman Rota, John Paul II described the

²⁶ <http://www.garzantilinguistica.it/ricerca/?q=moderari>, accessed July 15, 2016.

common good as realisation of the community insofar as the dignity of the human person is acknowledged in her freedom.²⁷

The Pontifical Council indicated *Dignitatis humanae* 7 as the source for canon 223. The conciliar declaration mentioned the principles which should be observed when exercising all kinds of freedom. The first two, which were mentioned above, find their expression in canon 223. However, it is difficult to find in it a principle of granting maximum freedom to the faithful subject to restriction only when and to the extent that it is necessary. Arguments for removing a direct reference by stressing the Christian character of vocation and endowment with the fullness of freedom by Christ do not appear to be sufficient. Also, regarding it as being derived from natural law constitutes its full acceptance and need not be reminded. Using this argumentation, references to the sources in the doctrine should not be used in other canons. Is *Dignitatis humanae* 7 fully the source of canon 223, then? If so, this canon should be complemented, as proposed by J. Viladrich as early as in 1971, with the last sentence of the *Declaration* 7,²⁸ which would largely contribute to its more profound interpretation and delineation of reasonable boundaries for the operation of the ecclesiastical authority in addition to solving dubious situations when norms are at conflict by invoking *favor libertatis*.²⁹

CONCLUSION

The translations of canon 223 §2 into Polish are not identical. The differences between them do not concern the elements of secondary importance, as those do not affect the interpretation of the canon. They concern the content of the norm and clearly manifest the existing differences in interpretation. This may be caused by the lack of a straightforward counterpart of the verb *moderari* in Polish. This Latin verb will be most closely rendered in Polish by the expression “czuwać nad właściwym przebiegiem [Eng. *oversee the proper course*]” (just like moderating a discussion). The situation may be caused by a lack of thorough analysis of the

²⁷ “If, then, the believers accept the inspiration of the Spirit and acknowledge the need of a profound conversion to the Church, the affirmation and exercise of their rights will be transformed into acceptance of duties with regard to unity and solidarity so that the hither values of the common good may be achieved.” The Polish text can be found in “Przemówienie do Trybunału Roty Rzymskiej,” February 26, 1983, in *Orędzia, przesłania, przemówienia okolicznościowe*, vol. 5 of *Dziela zebrane* (Kraków: Wydawnictwo M, 2007), 651–4.

²⁸ DÍAZ, “El favor libertatis como clave hermenéutica del canon 223,” 540.

²⁹ *Ibid.*, 539–41.

norm, as exemplified by divergent interpretations among canonists, who use their language counterparts of the Latin word *moderari* on a daily basis.

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MODERATION IN THE EXERCISE OF RIGHTS
PROPER TO THE CHRISTIAN FAITHFUL (C. 223 §2)

Summary

On account of differences in translation of canon 223 §2 into Polish and associated interpretation controversies, the article presents an interpretation of the canon based on its sources and an explanatory note issued by the Pontifical Council for Legislative Texts. The Author demonstrates ambiguities which, in his opinion, are related to the narrowing of the meaning of the Latin word *moderari* and presentation of *bonum commune* as a general clause. Moreover, the postulate expressed in canon studies to include the last sentence of *Dignitatis humanae* 7 into the canon is upheld.

Key words: *moderari*; common good; favour of freedom.

Translated by Tomasz Pałkowski



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