



## CUESTIONARIO

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# Ley, doctrina y jurisprudencia

Responde **STEPHAN KUTTNER**

Stephan Kuttner, uno de los mejores conocedores de la canonística clásica, experto en el Derecho angloamericano y Consultor de la Comisión para la Reforma del Código de Derecho Canónico, nos ha parecido la personalidad indicada para responder a una serie de cuestiones que en los últimos tiempos han sido objeto de atención en escritos de muy distinta significación. Ofrecemos de este modo a los lectores interesantes problemas de la ciencia canónica, tal como pueden aparecer ante un científico del área cultural angloamericana.

**IUS CANONICUM :** Classical Canon Law had a vitality which the Law of the CIC has not had. Leaving aside, for the moment, now out-of-date norms and institutions of the classical period, which principles or which ways of conceiving the

juridical canonical order of the said period do you believe should be revitalised at the present moment?

**Classical Canon  
Law today**

**S K :** What ought to be recaptured is the creativity of the professional canon lawyer, both in the universities and in the courts. It is the conception of the canonical order as a living entity, developed by learned interpretation in academic exegesis and debate, hand in hand with authoritative interpretation in papal decisions and responses. In this conception, 'codification' has only the function of collecting the texts that should be used in this process of interpreting the law; it has not the function of establishing an abstract, closed system of concepts and rules as in the nineteenth-century civil codes or the Code of 1917.

**I C :** What function does power play in the creation of Law? What, principally, is Law for you, an expression of the will of the legislator — in which case Law would be an instrument and expression of the exercise of power (**quod est iussum**) — or a social order, expression of the **prudentia iuris** (**quod est iustum**), which the power ought **guarantee** and help to implant?

**Power and Law**

**S K :** The function of power in the creation of law is one of **auctoritas** rather than **potestas**. That is, it must be power based on reason, and on respect for the **ratio legis**. The voluntaristic conception of law has done much harm in the history of the Church. Your alternative is perhaps not exhaustive; I would say, law is **quod est iustum et aequum**.

**I C :** What rôle do you assign to jurisprudence and to doctrine in the evolution and progress of a juridical order?

**S K :** The answer is already contained in No. 1. The written law must be tested by judicial and scholarly interpretation, with judicial review by superior courts, up to the papal supreme tribunal.

**I C :** With the exception of the subject of matrimony, one of the characteristics of the juridical system after 1917 has been the absence of an authentic jurisprudence and the predominance of an administrative interpretation. Do you think it desirable that this situation continue?

**S K :** No, the predominance of administrative jurisprudence is undesirable. It goes, however, back far beyond the Code of 1917; it is a general result



**Authentic interpretation** of the uncontrolled growth of administrative bureaucracy after the sixteenth century, very much akin to the absolute monarchies of that period.

**I C :** Can a juridical system, based on authentic interpretation accompanied by an undervaluing of jurisprudential and doctrinal interpretation, can such a system insure a progressive interpretation of Canon Law? Do you see any relation between a rigid system of authentic interpretation and immobilism?

**S K :** 'Authentic interpretation' has a long and unhappy history, from Justinian to the Austrian Emperor Joseph II and canon 17 of the Code. It ought to disappear in the future canon law. Contrary to what has often been said, the medieval Decretals, at least before Boniface VIII, were not 'authentic' but were themselves subject to, and tested by, magisterial interpretation.

**I C :** Canon Law in the classical period owed a great part of its vitality, scientific rigor, and influence to its study and elaboration in the sphere of the University. Was this an isolated phenomenon or should one consider that there will not be a future revitalisation of Canon Law without a return to the university medium of certain important aspects of the dynamics of the formation and application of Law (doctrinal interpretation, jurisprudence, elaboration of legislative projects, etc.)? In other words, do you think it desirable that the present disparity between sources of normative production and University continue?

**Canon Law and the University** **S K :** The answer, again, is implied in what was said before. There ought to be greater weight given to the academic insight into law and legal doctrine; but it must be truly academic in two respects: not an unproductive, docile, and merely repetitive teaching as in the old-style Seminaries (from which many ecclesiastical Universities have been indistinguishable in the past!); and not a teaching wandering off into abstract theorizing, divorced from the reality of ecclesial life and canonical practice.

**I C :** What, in your opinion, are the most important general principles which, drawn from the teaching of the Second Vatican Council, ought preside over the reform of Canon Law legislation?

**S K :** Collegiality; conception of hierarchical office as service (stewardship, not lordship); pastoral purpose of the canonical order; protection of individual rights; subsidiarity; openness to selfrenewal.



**Canon Law and  
Common Law**

- I C :** You have shown yourself to be in favor of the view that future Canon Law ought absorb elements from the Anglo-Saxon juridical system. Could you pinpoint which principles and institutions of the said system ought be adopted in your view?
- S K :** The principles of the Anglo-American Common Law (preferable to the narrow expression 'Anglo-Saxon': most Americans or Canadians are not of Anglo-Saxon stock) worthy of imitation are: the method of law-finding and law-making, which emphasizes the independence and great authority of judiciary powers, over against rigid codification; the review of administrative acts in the courts; the emphasis on «due process»; the juridical reasoning which (like that of the classical Roman jurists) construes law with a view to its purpose in society and seeks to find equitable remedies, rather than solving cases by a merely analytical approach. It has been a great mistake of continental civil and canonical doctrine to label these principles merely as **consuetudo**, customary law, and try to press it in the rigidly restrictive categories of Justinian's distrust of custom.
- I C :** Dwelling on the previous question, it could be observed that the problem could equally be posed with respect to the juridical systems of other cultural areas. Thus, does this desire mean that we ought to go towards a Canon Law which would integrate other juridical systems, or would the case in point be to arrive at a totality of particular Laws by zones of juridical culture?
- S K :** This question remains too theoretical as long as we have no deeper insights into the methods and merits of other legal cultures (Hindu, Chinese, African and Polynesian tribal laws). It should, however, be emphasized that historically there exists a strong kinship of medieval Canon Law with the non-Roman elements of the Anglo-American law — hence it would make good sense to revive these traditions first.
- I C :** In a Canon Law system of particular Laws, do you consider feasible a diversification of processal systems, without this originating a problem in what refers to causes which admit of appeal to Rome? Do you consider feasible a central unitary jurisprudence — Apostolic Signature, Roman Rota — and plurality of processal normatives?
- S K :** It will be possible to have a «common» law of canonical procedure, supplemented by diversified particular rules to be observed in different areas,

**The diversification  
of processal systems**

as determined by episcopal conferences. This does not exclude judicial review in appeals to the Rota or the Signatura: there exists an analogous situation in the United States where the Federal Supreme Court may on occasion have to examine particular laws of procedure observed in individual States.

**I C :** One of the subjects which has recently come to the foreground is the relation between Sacraments and Canon Law. What is your opinion on this subject? Do you believe it possible that it be reflected in the systematization of the new Code?

**Sacraments and  
Canon Law**

**S K :** I feel very strongly on this. The relation between the Sacraments and the canonical order of the Church should be reflected in the systematic arrangement of the parts of the new Code. But whatever systematic order will be chosen, let us hope that we can free ourselves from the blind belief in the order of Justinian's Institutes or, for that matter, any secular Code. Canon Law is a judicial order **sui generis**.

**I C :** In certain European sectors the subject of the laity is frequently touched on, elevating to the level of general criteria the experience of Catholic Action. This experience is, however, practically unknown over wide areas, in particular in the United States of America. Do you, well conversant as you are with the Anglo-American situation, do you believe that the position of the aforementioned European sectors is valid? What ought to be, in your view, the starting-point?

**Catholic Action**

**S K :** Catholic Action as a principle of lay activity is definitely so European in character that it cannot serve elsewhere. Any sharing of lay people in the action of the Church must start from a practical application of certain principles spelled out for the People of God in the II Vatican Council. This will require a theological study of subsidiarity and collegiality at the national, diocesan, and parish levels.

**I C :** Are you in favor —within the Church— of a safeguard of the freedom of association, as spontaneous as possible, or rather that the official organisations of the laity, born to collaborate with the Hierarchy, predominate?

**Freedom of  
Association**

**S K :** Freedom of association (for the laity and the clergy, to be sure) must be the governing principle, with the proviso that an association can have **canonical** standing only according to rules that determine the relation to the hierarchy.



- I C :** The development of the science that studies the History of Canon Law, at the moment requires a very specialised preparation in historians, as also the following of a method quite distinct from that which is proper to juridical science in the strict sense. Nevertheless, the canon lawyer needs a preparation in history. What could be the way to give a sufficient historical formation to those who study present-day Canon Law, without their aspiring to be historians?
- S K :** There should be courses in the History of Canon Law, at different levels, beginning with general Church History, including the history of Ecclesiology, history of the institutions of the church in the context of general society —ancient, medieval, post— Reformation, modern. At a second level a study of the sources and the science of canon law; an advanced level in which a great amount of reading of sources, especially the **Corpus iuris canonici** and its medieval commentators ought to be done. Where specially trained professors are not available, all students should have to take courses from a professor of general Church history.