

## FEATURED EXPRESSIONS OF THE RELATIONSHIP BETWEEN LAW AND LITERATURE IN ARGENTINA (\*)

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**Abstract:** Literature and art in general constitute a horizon of Law, which is especially present when the juridical object is constructed with the breadth of the tridimensionalist integrativism of the Trialist Theory of the Juridical World. According to the tridimensionalist integrativism, supported by jurists such as Miguel Reale, Werner Goldschmidt, Luis Recasens Siches, etc., Law must address social reality, norms and values. In accordance with the Trialist Theory of the Juridical World, founded by Goldschmidt, tridimensionalism raises itself on partitions of life, captured by norms and valued by a complex of values that culminates in justice. Literature and art in general are expressions of the Culture's deep meanings, as a whole, and of the Law in particular, that have to be integrated socio-normo-axiologically.

Our subject has been discussed also in Argentina. Personally we have engaged ourselves in the study of, for example, *“Edipus”*, *“Antigone”*, *“The Divine Comedy”*, *“Fuenteovejuna”*, *“Don Quixote”*, *“The Merchant of Venice”*, *“The Mayor of Zalamea”*, *“Facundo”*, *“Martín Fierro”* and lyrics from several tangos. *“Facundo”* and *“Martín Fierro”* constitute a skyline of significance very special to understand the Argentinean legal culture manifested in the Civil Code of 1869, which -with modifications- still rules.

The Argentinean culture, like a large part of the Iberoamerican culture, is marked by the conflict between traditional Iberian and Anglo-French sectors. The first of them, reinforced by the south European immigration and the assimilation of indigenous groups, is more organicist and communitarist, paternalistic, traditional Catholic and romantic. Its exponents are, for example: Felipe II, Rosas and Perón. The second one, reinforced by American influences, is *contractualist*, in a liberal sense, kindred to the Reformation and illustrated. Its exponents are, for instance:

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Carlos III, Moreno, Rivadavia, Mitre and Aramburu. Since the mid-twentieth century, the first of these sectors, usually rely on Rousseauian democracy, while the second is more liberal and republican, affined with Locke and Montesquieu. The style of the current peronist government is, in many ways, traditional Iberian. The opposition is usually more Anglo-French.

The key to the Civil Code of 1869 –liberal, in the economic sense-, enacted under the presidency of Sarmiento, lies in the Anglo-French interpretation of the Argentinean culture that he had done in “Facundo”, subtitled “Civilization and Barbarism”. “Civilization” was Anglo-French and “barbarism”, the Iberian traditional *gaucho*. Related to the juridicity implemented by the Anglo-French group, in 1871 the *gaucho* cried his sadness in the poem “*Martín Fierro*” by José Hernández.

**Resumen:** La Literatura y el Arte en general forman un *horizonte* del Derecho que se hace especialmente presente cuando se construye el objeto jurídico con la amplitud del integrativismo *tridimensionalista* de la *teoría trialista del mundo jurídico*. Según el integrativismo tridimensionalista, sostenido por juristas como Miguel Reale, Werner Goldschmidt, Luis Recaséns Siches, etc., en el Derecho hay que atender a la realidad social, las normas y los valores. Conforme a la teoría trialista, fundada por Goldschmidt, el tridimensionalismo se plantea en repartos de vida, captados por normas y valorados por un complejo de valores que culmina en la justicia. El Literatura y el Arte en general son expresiones de los sentidos *profundos* de la cultura en su conjunto y del Derecho en particular que hay que *integrar* socio-normo-axiológicamente.

Nuestro tema ha sido tratado también en la *Argentina*. Personalmente nos hemos ocupado, por ejemplo, de “*Edipo*”, “*Antígona*”, “*La Divina Comedia*”, “*Fuenteovejuna*”, “*Don Quijote*”, “*El Mercader de Venecia*”, “*El Alcalde de Zalamea*”, “*Facundo*”, “*Martín Fierro*” y las letras de diversos *tangos*. *Facundo* y *Martín Fierro* constituyen un horizonte de significación muy especial para la comprensión de la cultura jurídica argentina manifestada en el *Código Civil de 1869*, que con modificaciones todavía rige.

La *cultura argentina*, como gran parte de la cultura iberoamericana, está signada por el conflicto entre los sectores, *ibérico tradicional* y *anglofrancés*. El primero, reforzado por la inmigración europea del sur y la asimilación de grupos originarios, es más organicista y comunitarista, paternalista, católico tradicional y romántico. Entre sus exponentes se encuentran Felipe II, Rosas y Perón. El segundo, reforzado por influencias norteamericanas, es más contractualista, en cierto sentido liberal, afín a la Reforma e ilustrado. Entre sus exponentes se hallan Carlos III, Moreno, Rivadavia, Mitre y Aramburu. Desde mediados del siglo XX, el primero suele apoyarse en la democracia rousseauiana, en tanto el segundo resulta más liberal y republicano, con afinidades con Locke y Montesquieu. El estilo del gobierno peronista actual es, en diversos aspectos, ibérico tradicional. La oposición suele ser

más aglofrancesada.

La clave del Código Civil de 1869 -de carácter liberal en el sentido económico-dictado durante la presidencia de Sarmiento, está en la interpretación anglofrancesa de la cultura argentina que éste había hecho en “Facundo”, cuyo subtítulo es “Civilización y Barbarie”. La “civilización” era anglofrancesa y la “barbarie”, ibérica tradicional, gauchesca. En relación con la juridicidad implementada por el grupo anglofrancesado, en 1871 el gaucho lloró su tristeza en el poema “Martín Fierro” de José Hernández.

**Key words:** Law. Civil Code. Literature. Argentina. Iberoamerican culture. Traditional Iberian Sector. Anglo-French Sector. “Facundo”. “Martín Fierro”. Integrativism. Tridimensionalism. Trialism. Partitions. Norms. Values. Justice.

**Palabras clave:** Derecho. Código Civil. Literatura. Argentina. Cultura Iberoamericana. Sector ibérico tradicional. Sector anglofrancés. “Facundo”. “Martín Fierro”. Integrativismo. Tridimensionalismo. Trialismo. Repartos. Normas. Valores. Justicia.

## I. Fundamental ideas

1. The Art in general and within it, especially literature, are manifestations of deep senses of culture as a whole, and of Law in particular, with the limitations of the differences between the literary and the juridical thought. Each work of literature, especially when it is a classic, often builds a space of suggestions useful to understand the problems of Law, and constructs it as a *paralegal literary expression*<sup>2</sup>. The paralegal character of

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<sup>2</sup> As in literature with jurical content. It can also be recognized a “parajudicial aesthetic” (it can be query Miguel Angel Ciuro Caldani, *Comprensión jusfilosófica del Martín Fierro*, Rosario, Fundación para las Investigaciones Jurídicas, 1984, Pg. 5). As in other cases, the beauty is achieved mainly through love. Especially in literary works such as Martin Fierro, it is obtained through justice (*Ibid.*, PG. 5). The beauty refers more to “resemble”; instead, justice is more related more to “being” (vid. José Ortega y Gasset, “Ensayo de estética a manera de prólogo”, en *Obras Completas*, RdO, Madrid, 1961, t. VI, Pg. 256). Maybe the tension between beauty and justice has extreme expressions in Nietzsche’s ideas, which submit justice to beauty. And in the Christian thought, that in a certain way submit beauty to justice (and sanctity) (vid. Friedrich Wilhelm Nietzsche, *El origen de la tragedia*, trad. E. Ovejero Mauri, Espasa-Calpe, Madrid, 1980, Pg 16;

literature is especially present when the juridical object is constructed with the breadth of the tridimensionalist integrativism of the Trialist Theory of the Juridical World. According to the tridimensionalist integrativism, supported by jurists such as Miguel Reale, Werner Goldschmidt, Luis Recaséns Siches, etc., Law must address social reality, norms and values. In accordance with the Trialist Theory of the Juridical World, founded by Goldschmidt, tridimensionalism raises itself on partitions of life, conceived by norms and valued by a complex of values that culminates in justice<sup>3</sup>.

Unlike the pure simplicity of the Kelsenian normativist proposal and the impure complexity, in which what we consider juridical object is "caught" from the outside by the Economy, the Sociology, the Psychology, etc., and unlike the internal "compression" -realist or iusnaturalist-, the Trialism proposes to differentiate and integrate the social reality, the norms and the values and to differentiate and integrate the Law within the cultural world, in respective pure complexities<sup>4</sup>.

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Gustav Radbruch, *Filosofía del Derecho*, Revista de Derecho Privado, Madrid, 1952, Pg. 143/144.; about the political meaning of art, it is possible to query, for example, Pierre-Joseph Proudhon, *Sobre el principio de arte y Sobre su destinación social*, trad. J. Gil Rames, Aguilar, Madrid, 1980).

<sup>3</sup> About the trialist theory of the juridical World, it can be query Werner Goldschmidt, *Introducción filosófica al Derecho*, 6ª ed., 5ª reimp., Bs. As., Depalma, 1987; Miguel Ángel Ciuro Caldani, *Derecho y política*, Bs. As., Depalma, 1976; *Estudios de Filosofía Jurídica y Filosofía Política*, Rosario, Fundación para las Investigaciones Jurídicas, 1982/4; *La conjetura del funcionamiento de las normas jurídicas. Metodología Jurídica*, Rosario, Fundación para las Investigaciones Jurídicas, 2000; *Estudios Jurídicos del Bicentenario*, Rosario, Fundación para las Investigaciones Jurídicas, 2010; *Estrategia Jurídica*, Rosario, UNR Editora, 2011; María Isolina Dabove, "El Derecho como complejidad de saberes diversos", in *Revista Cartapacio de Derecho*, (Revista electrónica de la Escuela Superior de Derecho. Universidad Nacional del Centro de la Provincia de Buenos Aires) 4, 2003, <http://www.cartapacio.edu.ar/ojs/index.php/ctp/article/view/29/17>, 8-2-2013. Also: Centro de Investigaciones de Filosofía Jurídica y Filosofía Social, <http://www.centrodefilosofia.org.ar/>, 8-2-2013. It is possible to query various opinions in Escuela Superior de Derecho, Universidad Nacional del Centro de la Provincia de Buenos Aires, Sistema de Publicaciones, <http://www.cartapacio.edu.ar/>, 8-2-2013.

<sup>4</sup> The assumption of complexity is one of the major challenges of our time (it is possible to query, for example, GOLDSCHMIDT, *Introducción ... cit.*, PG. XVII and ss.; BOCCHI, Gianluca - CERUTI, Mauro (comp.), *La sfida della complessità*, trads. Gianluca Bocchi y Maria Maddalena Rocci, 10ª ed., Milán, Feltrinelli, 1997; CIURO CALDANI, Miguel

Under the trialist proposal, the Juridical World has to be built as a set of partitions of power and powerlessness (which favor or harm life and especially human life) (sociological dimension) normatively conceived (normological dimension) and valued, partitions and norms by a complex of values that culminates in Justice (dikelological dimension).<sup>5</sup>

2. Our subject has been discussed also in Argentina. Personally we have engaged ourselves in the study of, for example, “Edipus”, “Antigone”, “The Divine Comedy”, “Fuenteovejuna”, “Don Quixote”, “The Merchant of Venice”, “The Mayor of Zalamea”, “Facundo”, “Martín Fierro” and lyrics from several tangos. *Facundo* by Domingo Faustino Sarmiento<sup>6</sup> by Domingo Faustino Sarmiento and *Martín Fierro* by José Hernández<sup>7</sup> constitute a skyline of significance very special to understand the Argentinean legal culture manifested in the Civil Code of 1869, which -with modifications- still rules<sup>8</sup>.

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Angel, “El trialismo, filosofía jurídica de la complejidad pura”, en *El Derecho*, t. 126, Pg. 884 and ss.; DABOVE, op. cit.).

<sup>5</sup> It is important that Literature, as an expression of culture, may be constructed three-dimensionally, considering facts, logic and values (vid. For example, Teum A. Van Dijk, *Texto y contexto*, trad. J. Domingo Moyano, Madrid, Cátedra, 1980, págs. 270 and ss.; also Hans Hörman, *Querer decir y entender: fundamentos para una semántica psicológica*, trad. A. Agud y R. de Agapito, Madrid, Gredos, 1982; about Art Philosophy and Aesthetics, vid. Theodor W. Adorno, *Teoría estética*, trad. F. Riaza, rev. F. Pérez Gutiérrez, Madrid, Taurus, 1980; Virgil C. Aldrich, *Filosofía del arte*, trad. J. Gómez de Silva, México, UTEHA, 1966.

<sup>6</sup> It is possible to query Domingo F. Sarmiento, *Facundo*, Bs. As., Tor, Edición del Cincuentenario, 1957. Also *Obras completas de Sarmiento*, Luz del Día, Bs. As., 1948-1956, 53 vols. Diverse perspectives on Sarmiento’s character can be query, for example, Leopoldo Lugones, *Historia de Sarmiento*, Publicaciones de la Comisión Argentina de Fomento Interamericano, Bs. As., 1945, and Manuel Gálvez, *Vida de Sarmiento*, Tor, Bs. As., 1952.

<sup>7</sup> V. El gaucho Martín Fierro, José Hernández, Proyecto Biblioteca Digital Argentina, [http://www.biblioteca.clarin.com/pbda/gauchesca/ferro/ferro\\_000indice.html](http://www.biblioteca.clarin.com/pbda/gauchesca/ferro/ferro_000indice.html), 20-4-2013.

<sup>8</sup> Vid. Our papers “La cultura jurídica argentina en sus expresiones literarias capitales. Significados jurídicos de *Facundo* y *Martín Fierro*”, en José Calvo González (dir.), “Implicación Derecho Literatura. Contribuciones a una Teoría literaria del Derecho”, 2008, PG. 71 and ss.; “Hacia una teoría general de la recepción del Derecho extranjero”, in *Revista de Direito Civil*, 8, 1979, Pg. 73 and ss.; “Originalidad y recepción en el Derecho”, in *Boletín del Centro de Investigaciones de Filosofía Jurídica y Filosofía*

The Argentinean culture, like a large part of the Iberoamerican culture, is marked by the conflict between *traditional Iberian*<sup>9</sup> and *Anglo-French* sectors. The first of them, reinforced by the south European immigration and the assimilation of indigenous groups, is more organicist and communitarist, paternalistic, traditional Catholic and romantic<sup>10</sup>. Its exponents are, for example: Felipe II, Juan Manuel de Rosas and Juan Domingo Perón. The second one, reinforced by American influences, is contractualist, in a liberal sense, kindred to the Reformation and illustrated. Its exponents are, for instance: Carlos III, Mariano Moreno, Bernardino Rivadavia, Bartolomé Mitre and Pedro Eugenio Aramburu.

Perhaps the traditional Iberian sector has more features related to feudalism, and the *Anglo-French* sector has more capitalist references. As for the philosophical disciplines, the traditional Iberian sector in general has more sympathy for the Metaphysics and is sometimes pre-Kantian; the Anglo-French refers more to other philosophical disciplines such as Gnoseology, Epistemology and Logic, and it is Kantian or post-Kantian. Since the mid-twentieth century, the first of these sectors, usually rely on Rousseauian democracy, while the second is more liberal and republican, affined with Locke and Montesquieu.

The architecture of the city of Buenos Aires shows the presence of the two: anglo-french areas that strongly resemble Paris and London -as the Recoleta-, and more *creole spaces*, such as San Telmo. In the "interior"<sup>11</sup> of the country, Salta is a traditional Iberian city, and Cordoba can be considered a synthesis between traditional Iberian and relatively current Anglo-French

*Social*, 9, 1987, Pg. 33 and ss.; "Nuevamente sobre los efectos de la recepción en la cultura jurídica argentina", in *Revista del Centro de Investigaciones de Filosofía Jurídica y Filosofía Social*, 29, 2006, Pg. 49 and ss; *El Derecho Universal*, Rosario, Fundación para las Investigaciones Jurídicas, 2001.

<sup>9</sup> The generalized reference to traditional Iberian should not mean to neglect the differences between the Hispanic and the Lusitanian.

<sup>10</sup> However, as an expression of the tension of a culture that is expressed in styles that are not proper to it, we recall that Sarmiento belongs to the Romantic movement of Argentina's culture. He is a romantic writer who writes against romanticism (about Illustration and Romanticism it is possible to query, for example González Porto-Bompiani, *Diccionario Literario*, 2ª. ed., Barcelona, Montaner y Simón, t. I, 1967, Pg. 254 and ss. - 475 and ss.).

<sup>11</sup> Sometimes the word "interior" leads to wonder if Buenos Aires is the "exterior".

elements. The style of the current peronist government is, in many ways, traditional Iberian. The opposition is usually more Anglo-French<sup>12</sup>.

3. The key to the *Civil Code* of 1869 -liberal, in the economic sense-, enacted under the presidency of Sarmiento, lies in the Anglo-French interpretation of the Argentinean culture that he had done in *Facundo*, subtitled *Civilization and Barbarism*. "Civilization" was Anglo-French and "barbarism", the Iberian traditional *gaucho*<sup>13</sup>. For this purpose were strategic -especially in the project of Sarmiento- scientific and technological developments; secular education: common, free and compulsory -the presence of American teachers was fundamental- (so remarkably embodied in Act number 1420 of 1884); the rigid application the Slothful and ill entertained Act; the Constitution; the Commercial Code; the Civil Code of private property and freedom of contract -akin to the French Civil Code-; and basically, the immigration of European people capable of grounding the national bourgeoisie, as intended very explicitly Alberdi. Related to the juridicity implemented by the Anglo-French group, in 1871 the *gaucho* cried his sadness in the poem *Martín Fierro* by José Hernández.

4. The origin of immigrants that arrived to the country was actually one of the reasons why the liberal project worked for a few decades and then came into crisis, thanks to the lack of support in the idiosyncrasies of much of the population. Many people came to work hard, but the spirit of entrepreneurship was not implemented.

The Peronism ascent to power -inspired by the Social Doctrine of the Church and certain characteristics of fascism<sup>14</sup>, mobilizer of sectors that had been marginalized-, emphasized the traditional Iberian harassment to the

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<sup>12</sup> However, at the present time Frente Renovador party, the opposition, has certain traditional Iberian influences (August, 2013).

<sup>13</sup> For further inquiry about the Argentinean gaucho, <http://jsis.washington.edu/latinam//file/Annual%20Essay%20Contest/2012%20The%20Gaucho%20&%20Argentine%20Identity%20-%20McGinty%20Liam.pdf>, 20-2-2013.

<sup>14</sup> Vid., despite our opinion, Mario G. Losano, "Ancora sui termini "peronismo" e "giustizialismo" dal Sudamerica all'Italia, e ritorno", in *Teoria politica*, XX, n. 1, 2004, Pg. 15 and ss.

liberal Anglo-French model already present years before. The Civil Code was significantly amended, some of these reforms were alleged to be exceptional, and a new Constitution was dictated. Of course, it did not pass the intended path settle to reform a legal instrument such as that, and was annulled from the Anglo-French culture by the so-called Liberating Revolution in 1956<sup>15</sup>. If the Anglo-French space relied heavily on the Civil Code, the traditional Iberian sector referred more to Labor Law. The non-class unionism, sometimes corporative, was one of the great foundations of the Peronist movement (Justicialista).

5. The excision of the country's culture is so pronounced that has come to have two sectors on the right, center and left, although the anglo-french element manifests itself as parties or "pre-parties", conformed by different sharper ideologies, and the traditional Iberian Peronist element expresses itself in a movement that covers all three orientations.<sup>16</sup> Military sectors that frequently clashed in the early sixties of the twentieth century evidenced the opposition between the two sectors: *Colorados*, Anglo-French oriented, and *Azules* less hostile to traditional Iberians<sup>17</sup>. When the *guerrillas* arrived, there was an Anglo-French faction: the People's Revolutionary Army (ERP)<sup>18</sup>; and another traditional Iberian faction: the Montoneros<sup>19</sup>, which shared affinities and strained liaisons with the historical Peronism.

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<sup>15</sup> It is relevant to understand the cultural jusphilosophical structure of Argentine political parties. Vid. Our paper "Notas básicas para un curso de comprensión jusfilosófica de los partidos políticos argentinos", en *Boletín ... cit.*, 9, 1987, págs. 15 and ss.

<sup>16</sup> A moment of agreement between the two tendencies, achieved for different purposes, allowed the constitutional reform of 1994. Vid. for example, Carla Carrizo, "Entre el consenso coactivo y el pluralismo político: La Hora del Pueblo y el Pacto de Olivos (1973-1993)", in *Desarrollo Económico*, vol. 37, núm. 147, Pg. 389 and ss..

<sup>17</sup> Siglo XX, Hechos que conmovieron a nuestra sociedad, <http://www.oni.escuelas.edu.ar/olimpi99/vision20/hechos.htm>, 20-2-2013.

<sup>18</sup> Porque el Ejército Revolucionario del Pueblo no dejará de combatir, <http://www.marxists.org/espanol/santucho/1973/abril.htm>, 20-2-2013.

<sup>19</sup> Página 12, El Lanusse que estudió a Montoneros, by Mario Wainfeld, <http://www.pagina12.com.ar/diario/elpais/1-55735-2005-08-28.html>, 20-2-2013. A controversial work on the subject *Montoneros. Sus proyectos y sus planes*, is by Mario Orsolini (Tcnl.), Bs. As., Círculo Militar, 1989.



The Military Dictatorship Process had in itself factions of both orientations<sup>20</sup>.

6. Heir to the Spain of the Castile's Mesta and to non industrialization, the divided Argentinean population "*parasitized*" a large and rich territory, leading the country to a position that produced wonder and even sympathy<sup>21</sup> from the rest of the World. In addition to a model of integration of the juridical object, Argentina needs especially the integration of its culture, which should engage each and every Argentinean. The country requires not only the complex thought in Law but the recognition of the *juridical subject's complexity*<sup>22</sup>. The introversion of the tensions between sectors often hides the real problems and the possibilities of their solution. This often results in profit for those sectors leading their actions in bad faith.

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<sup>20</sup> To avoid making oversimplifications it is possible to consult, for example: Clarín.com, July 28th 1966: El derrocamiento de Arturo Illia, Los entretelones de un golpe militar que anticipó la tragedia de 1976, <http://www.clarin.com/diario/2006/06/27/elpais/p-01215.htm>, 20-2-2013.

<sup>21</sup> It can be query our paper "Una Argentina *parasitaria* entre la feudalización y la colonización", in *Investigación y Docencia*, 34, 2001, Pg. 59-65. An affirmation of the "nonexistence" of Argentina and the necessity for production, can be query in LaNacion.com, February 18th 2004, Alain Touraine: el país debe olvidarse del peronismo, [http://www.lanacion.com.ar/Archivo/Nota.asp?nota\\_id=574102](http://www.lanacion.com.ar/Archivo/Nota.asp?nota_id=574102) (20-2-2013). About the importance of production it is proper to recall, for example, Claude-Henry Saint-Simon, *Catecismo político de los industriales* (1823), trad. L. David de los Arcos, Bs. As., Aguilar, 1964. About argentinean culture it is possible to query, for example, El País, Viernes 27 de Septiembre de 2002, La Argentina todavía, Julio María Sanguinetti, vid. [http://www.libreopinion.com/members/jose\\_marmol/La\\_Argentina\\_todavia.htm](http://www.libreopinion.com/members/jose_marmol/La_Argentina_todavia.htm) , 20-2-2013; Proyecto Ensayo Hispánico, <http://www.ensayistas.org/repertorio.htm> , 20-2-2013; Ezequiel Martínez Estrada, <http://www.ensayistas.org/filosofos/argentina/eme/20-2-2013>; Raúl Scalabrini Ortiz, [http://www.todo-argentina.net/biografias/Personajes/raul\\_scalabrini\\_ortiz.htm](http://www.todo-argentina.net/biografias/Personajes/raul_scalabrini_ortiz.htm) , 20-2-2013; Arturo Jauretche, [http://www.todo-argentina.net/biografias/Personajes/arturo\\_jauretche.htm](http://www.todo-argentina.net/biografias/Personajes/arturo_jauretche.htm) , 20-2-2013; Página Principal de Leopoldo Marechal, <http://victorian.fortunecity.com/palace/10/> , 3-4-2007); Biblioteca Virtual Miguel de Cervantes, <http://www.cervantesvirtual.com/servlet/IndiceTomosNumeros?portal=0&Ref=8434> , 3-4-2007).

<sup>22</sup> José Calvo González, "Doce preludios a la filosofía jurídica y política del siglo XXI", in *Anuario de Filosofía del Derecho* (Madrid), T. XVII, 2000, Pg. 419 and ss., especially Pg. 424-425. Available in <http://webpersonal.uma.es/~JCALVO/docs/preludio.doc>, 20-2-2013.

7. Based on the development of Private International Law we have developed a theory of *juridical responses* that deals with its scopes, its dynamics and its situation. This theory helps to understand the deployments of sectors from Argentinean culture, with processes of "plusmodelation", "minusmodelation" and domination and scarce integration and coexistence of the Anglo-French and Iberian traditional areas<sup>23</sup>.

## II. "Facundo" and "Martín Fierro" in the Juridical World

### 1) *The Juridical World in general*

#### a) *Sociological dimension*

8. The Trialist Theory of the Juridical World positions Law in the field of allotments of power and powerlessness, i.e., what helps or hurts being and especially human life. The principal allotments are partitions. These are the product of human conducts which can be determinable and realize the value of "conduction". There is also a great interest in distributions, which are caused by nature, diffuse human influences or chance, which satisfy the value of "spontaneity". The world of the Pampa<sup>24</sup>, in which to varying degrees are installed -in acceptance or rejection- the two sectors, is marked by the predominance of distributions of nature, diffuse human influences and, perhaps, chance. "Martín Fierro" is a strong expression according to that world. However in "Facundo" the author shows his significant pretension of replacing distributions by partitions -replacing

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<sup>23</sup> It is possible to further the information in our papers *Aportes para una teoría de las respuestas jurídicas*, Rosario, Consejo de Investigaciones de la Universidad Nacional de Rosario, 1976 (re-print in "Investigación ..." cit., N° 37, págs. 85/140), Cartapacio, <http://www.cartapacio.edu.ar/ojs/index.php/mundojuridico/article/viewFile/959/793>, 3-3-2013; "Veintidós años después: la Teoría de las Respuestas Jurídicas y Vitales y la problemática bioética en la postmodernidad", in *Bioética y Bioderecho*, N° 3, págs. 83 and ss.

<sup>24</sup> It can be query our paper "La *Cautiva* de Esteban Echeverría y la *juridización* de Argentina", in *Investigación ... cit.*, 3, 1987, Pg. 11 and ss.

spontaneity by conduction-. “Facundo” is a gaucho, but Sarmiento desires a new reality that extinguishes the world of the gauchos.

9. “Facundo” and “Martin Fierro” present a great bid for the partition of power and powerlessness, what helps or harms human life. The author of “Facundo” wants to grant power to a man of an “Europeanized” civilization, and powerlessness to the gaucho. “Martin Fierro” defends exactly the opposite order of allotments.

10. Partitions may be authoritarians, developed by imposing, and doer of the value “power”; or autonomous, and developed by agreement, satisfying the value of “cooperation”. These two realities: the traditional Iberian and the Anglo-French worlds are spaces where authority predominates. But both worlds want to limit it: the first, to provide deployment of the sense of the antique rural man; the second one, to develop the capitalist economic life and "progress".

11. Partitions can be sorted according to a working government’s plan, indicating who the supreme partitioners are and which are the supreme criteria of partition, and realize the value of “previsibility”. Exemplary conduct is carried out pursuant to the scheme: model and sequel, and bound by “reasonableness”, which satisfies the value of “solidarity”. Simplifying, often we speak of "law" and "custom". “Facundo” intends, at least, to impose its model -a *planned* order-, which realizes the value of “previsibility”. “Martin Fierro” instead prefers to keep the exemplary conduct of the gaucho’s costumes, which satisfies the value of “solidarity”.

12. Partitions may find necessary limits, emerged from the nature of things (usually physical, psychological, logical, socio-political and socio-economic limits). The two literary works demonstrate an awareness of limits, but “Facundo” shows a major drive to overcome them, while “Martin Fierro” gives to a certain sense of defeat. It wouldn't be until a long time after that the traditional Iberian sector was protagonist again to Argentinean life and even limited the access to power for Anglo-French space.

*b) Normological dimension*

13. According to the trialist proposal, the norm contains the logical conception of a projected partition made by an observer, and can be classified primarily as *individual*, which conceive past social sectors and therefore, realize the value of “immediacy”. Norms can also be *general*, related to future social sectors, and therefore realize the value of “predictability”. Although both literary works rather prefer “predictability”, it is clear that the Anglo-French culture of “Facundo” has a special sympathy for this value, to the point that one of his greatest achievements was Civil Law codification.

14. Between the beginning of the literary expression process -with “Facundo”-, and the sanction of the Civil Code and the appearance of “Martin Fierro”’s first part, the Constitution was dictated in 1853-60. It included a large number of civil rights and political rights, practically always denied to the gauchos. The sanction of the Commercial Code is also of relevance.

*c) Dikelogical dimension*

15. According to the trialist proposal, Law must realize a complex of values that culminates in “Justice”. There are also other values which are part of that complex, such as utility and love. We can say that the complex of all values culminates in the value of “Humanity”, the thorough “must be” of our own being. “Facundo” refers to a justice much more integrated with utility, while “Martin Fierro” is a protest on behalf of humanity. Hernandez’s<sup>25</sup> tragedy seems to refer to a cosmic justice (metajustice), while Sarmiento’s ideal is referred to a value that is considered parallel to justice (parajustice).

16. Justice can be thought in various ways (kinds of justice) whose path has been already superbly signaled by Aristotle. Unwrapping these

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<sup>25</sup> With some basic features of "epic".

trials is possible to conceive extraconsensual and consensual justice, with or without consideration of people (of people or their roles), symmetrical or asymmetrical (easy or difficult comparability of the powers and powerlessness), dialogic or monologic (one or more reasons) and commutative or spontaneous (with or without repayment). Justice can also be differentiated as "partial" or governmental (from part of the system or from all of it), sectorial or integral (directed to a part or to the whole), of isolation or participation, absolute or relative and particular or general (directed to particular good or commonweal). The particular justice is the ultimate Private Law requirement. General Justice is usually the requirement of Public Law. "Facundo" is more oriented towards symmetric justice, commutative, of isolation and particular: in relation to that, it is more "privatist". "Martín Fierro" is directed especially to asymmetric justice, spontaneous, of participation, and perhaps even general. Maybe the traditional Iberian sector has metaphysical basis that make general justice more viable and therefore more "publicist". However, in general, Argentina has very limited sense of commonweal. "Facundo" contains a strong reference to "arrival" justice, which sacrifices the present for the future, different from "departure" justice that keeps intact the present time.

17. Justice is thought as a pantonomous category<sup>26</sup>, directed to all allotments: past, present and future. As that universe of allotments is unapproachable to us, because we are neither omniscient nor omnipotent, we feel the need to fracture justice to produce legal certainty. "Facundo" was designed with a contradictory reference to the future: on the one hand it *unfractures* it, opening possibilities. On the other hand, it compresses it to make the future happen in a certain way. It proposes a strong authority to ensure a certain course for the future. "Martín Fierro" design is oriented to the past and present. The gaucho feels insecure facing that un-fractured future.

18. The supreme principle of Justice proposed by the Trialism, is to grant each individual a sphere of freedom to fully develop, that is, to become

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<sup>26</sup> Pan=all; nomos=norm that rules.

a person. Applied to the elements of the partitions, this principle indicates the justice of partitioners, its receivers, its objects of partitions, its form and its reasons. As for the receivers, the legitimating titles are specifically the *meritoriousness* linked to the need, and the *merit*, which depends on behavior. “Facundo” is a strong allegation in favor of merits, obtained from a specific behavior according to the Anglo-French standards. “Martin Fierro” refers to meritoriousness. “Facundo” shows the importance of the Anglo-French development for allotments of *patrimonial powers*.

19. To satisfy the supreme principle of Justice adopted, the system should be Humanistic and non totalitarian, i. e., it must consider each individual as an end, and not as a mean to obtain another end. Although in theory “Facundo” has a strong inclination to humanism, it is actually a significant *totalitarian deviation* that mediatized the gaucho.

Humanism can be abstentionist or interventionist (paternalistic), which leads to the respective risks of mediation by totalitarian individualism or totalitarianism strictly Initially, “Facundo” corresponds to an abstencionist model and Martin Fierro to an interventionist one, but finally “Facundo” has a paternalistic sense and even becomes totalitarian concerning the gaucho.

For the realization of Humanism we must address to the unicity, equality and community of all men, who tend to require political liberalism, democracy and the *res publica*. Although the gaucho has a remarkable sense of individuality, it is in “Facundo” where we can find a special inclination for the unicity. “Martin Fierro” claims a climate of greater equality and a sense of community.

To achieve the regime of justice it is necessary to protect the individual against all threats: other individuals -as such, and as a regime-, from himself and from all "the rest" (disease, poverty, ignorance, loneliness, unemployment, etc.). “Facundo” initially seeks protection from the others and from the regime, but at the end, it advocated for a dictatorship to *civilize* the gaucho, safeguarding him from himself. Martin Fierro needs circumstantially the protection against the regime and demands protection from poverty.

## 2) *The branches of the juridical world*

20. “Facundo” puts on special emphasis on *Patrimonial Law* and the application of Criminal Law regarding the gaucho’s “deviations”. We could say that a sophisticated Civil Law was made for the Anglo-French sector, while a rudimentary system of penalties sought to reduce the traditional Iberian culture. In present terms it would be feasible to say that through Martin Fierro traditional Iberian sector claims for the development of Social Security Law and Labour Law. At the time, Peronism unwrapped those claims and un-fractured the Anglo-French privatist patterns.

### **III. Conclusion**

21. “Facundo” and “Martin Fierro” manifest the profound connections between literature and law. In particular express the often strained ties between two cultural sectors whose differences have been splitting Argentina’s life and, to various degrees, the life of Hispanoamerica and the Hispanic life as a whole; Iberoamerican life and the whole of Iberic life. Pure complex juridical models, such as the trialist theory of the juridical world can help integrate these diversities<sup>27</sup>.

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<sup>27</sup> It can also provide recognition to the complexity of the legal subject.