Codrin CODREA [*]

# *Error communis facit jus* via Baudrillard – the Complicity between Law and Simulacra[**]

**Abstract:** Contemporary Western laws of both continental-European and common law legal families express a certain concern regarding the legal effects that should be recognized to appearances. *Error communis facit jus* was a phrase coined to justify the rather counterintuitive solution adopted since Ulpianus, who argued in favor of recognizing legal effects to appearances in Roman law. This is a counterintuitive solution because, since such appearances are eventually proven to be false, if they are not already explicitly prohibited by law, they should not be recognized the legal effects of a true and real situation. This article analyses the relation between the law and reality, and the broader consequences of the legal apothegm *error communis facit jus* in the light of the notion of *simulacrum*, as it was developed by Baudrillard in relation to the orders of simulation.

**Keywords:** simulation, simulacrum, Roman law, good faith, legal theory of appearance.

## I. Preliminary notes

The concern that Western law expressed through different doctrines regarding the legal effects appearances should have is common to both continental-European and common law legal systems, and it can be traced back to Roman law. Ulpianus explained in *Digeste* the mechanism behind a certain kind of appearance in two particular cases, and his reasoning in favor of recognizing legal effects to such appearances was expressed by the medieval glossators' phrase *error communis facit jus*. The perspective of Ulpianus would gradually be adopted by the Western law, although with differences specific to each legal family, and it would constitute the basis for contemporary legal solutions in similar situations.

In the continental-European legal family the strategy in dealing with certain appearances was formulated in a *theory of appearance*, which is similar to the *estoppel doctrine* elaborated in the common law legal family. In order to protect the reliance on a particular situation or the confidence in a certain person, the *estoppel doctrine* prohibits the person who created an appearance

[*] PhD Student, Faculty of Law, Comparative Private Law Department, "Alexandru Ioan Cuza" University of Iasi, Romania, email: codrin_codrea@yahoo.com.

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to contradict it, requiring him to adopt a coherent and reasonable conduct with regard to this appearance[1]. The correspondent theory of the continental-European legal family emerged in the absence of specific norms regulating the regime of appearances and, thus, it was the judiciary practice that gave it full enforceability[2]. The theory recognizes legal effects to acts which do not comply with the legal norms that govern their regime, and which, precisely for this reason, should be null and void. However, there is a certain condition that the appearance should satisfy in order to be recognized legal effects – it has to present itself as a true and real situation[3].

The term *simulacrum*, deriving from the latin *simulare*, which means to simulate, to imitate, to make like, to copy, refers to the results of simulations – appearances, images, copies, semblances.[4] Baudrillard traced the meaning of *simulacrum* through different orders of simulation which succeeded one another, and which presupposed a different understanding of the notion[5]. Firstly, the simulacrum was regarded as a reflection of reality, secondly, as a façade which veils the truth behind a false image, thirdly, as an appearance which conceals the inexistence of truth, and, finally, as a substitution for reality itself. In order to analyze the relation between the law and *simulacra*, it should be established a prior identity between the appearances which constitute the concern of the law and Baudrillard's notion of *simulacra* corresponding to different orders of simulation. This identity would allow a translation of Baudrillard's insights on the relation between simulations, simulacra and reality to the realm of law and it would reveal certain consequences of the solutions adopted by the law when dealing with simulacra in the light of Baudrillard's interpretations.

## II. Baudrillard's notions of simulacra and orders of simulation

In his 1976 'Symbolic exchange and death', Baudrillard proposes a classification of the orders of simulation as corresponding to particular laws of value. Baudrillard's analysis is centered on the gradual displacement of the symbolic exchange with the laws of value, a process which implies suc-

[1] Elizabeth Cooke, *The Modern Law Of Estoppel*. New York: Oxford University Press, 2000, p. 2; Brian A. Blum, *Contracts: Examples & Explanations*, 4th ed. New York: Aspen Publishers, 2007, pp. 205-222.

[2] Robert Kruithof, „La théorie de l'apparence dans un nouvelle phase". In *Revue critique de jurisprudence belge*, 1991, p. 51.

[3] Anne Danis-Fatôme, *Apparence et contrat*. Paris: Librairie générale de droit et de jurisprudence, 2004, p. 535.

[4] *simulacrum*. (n.d.) American Heritage® Dictionary of the English Language, Fifth Edition. (2011)

[5] For Baudrillard's analysis on the orders of simulation – Jean Baudrillard, "Symbolic Exchange and Death", in Mark Poster (ed.), Jean Baudrillard. *Selected Writings*. Stanford, California: Stanford University Press, 1988, pp. 119-148.

cessive substitutions of different simulacra as products of simulations specific to certain orders. The orders of simulation as particular relations of signs to reality evolve in a synchronic manner as the laws of value go through different mutations from the Renaissance, passing through the Industrial Revolution, to the contemporary social order. Since Renaissance, the simulacra of each order of simulation have gradually blurred the distinction between signs, representations, and reality, to a point where simulacra of the third order present themselves as emancipated from the problem of correspondence to reality.

The epoch of the symbolic exchange is anterior to all orders of simulation, and Baudrillard places it in the time before Renaissance[6]. It is from this moment on when the symbolic, which constituted the real, started to be infused and seized by the arbitrary sign. Since the Renaissance, the real itself is constituted by simulacra of the symbolic, once the sign as form rather than content produces, through its reference, an illusion of the real. The first order of simulation which substituted the order of the symbolic exchange is placed by Baudrillard in the epoch between Renaissance and the Industrial Revolution, it corresponds to the 'natural law of value' and the simulacrum is defined by *counterfeit* [7]. The second order is the one of the Industrial social organization, it corresponds to the *commodity law of value*, which is the market law of value, it is based on production and the simulacrum is characterized by being one of another simulacrum[8]. The third order corresponds to the contemporary social organization of the consumer society, it is based on the *structural law of value* and it is characterized by *operational simulation* and the simulacrum becomes the reality[9].

The first order of simulation presupposed a departure from the premodern social hierarchies, from the archaic or medieval caste social organization, which implied a complete social allocation of signs, since they were subjected to a restrictive regime, which limited their amount and scope. The sign bounded persons or castes in an unbreakable reciprocal relation of obligations and, thus, it was not yet arbitrary, as it would become since Renaissance, when the sign would no longer imply the reciprocal connection between persons or castes, but rather signify through its relations to other signifiers. The transition Baudrillard mentions is the one from the rigid regime of restricted and limited production and circulation of

[6] Jean Baudrillard, "The Stucco Angel". In *Jean Baudrillard. Selected Writings*, ed. Mark Poster, 135-137. Stanford, California: Stanford University Press, 1988, p. 135.

[7] For Baudrillard's analysis on the first order of simulation, see the chapter "The Stucco Angel" from "Symbolic Exchange and Death", pp. 135-137.

[8] For Baudrillard's analysis of the second order of simulation, see the chapter "The Industrial Simulacrum" from "Symbolic Exchange and Death", pp. 137-139.

[9] For Baudrillard's analysis of the third order of simulation, see the section "The Metaphysics of the Code" from "Symbolic Exchange and Death", pp. 139-143.

signs by sacred injunctions and taboos to a proliferation of signs governed by the law of demand which emerged along with the incipient forms of democracy which substituted the caste social organization[10]. Therefore, since Renaissance the arbitrary sign seized the symbolic realm, substituting the symbolic bound and the reciprocal relation with a *counterfeit* of it. The fundamental characteristic of the first order simulation is that the sign, with its reference to *nature*, is a counterfeit of the prior symbolic relation, and as such it is a *simulacrum of symbolic obligation* [11]. In the first order of simulation, the boundary between simulacra and reality is still noticeable, there is still a transparent difference between representations and reality, and this brings the problem of the *counterfeit* specific to this order and the entire metaphysics of appearance and reality specific to this epoch that Baudrillard points out[12].

The second order of simulation arises with the Industrial Revolution and it is characterized by the mass, serial production of signs, which, through its large scale, renders the problem of *counterfeit* superfluous. By analyzing this second order of simulation characterized by production, Baudrillard noticed that the relation between identical serial products cannot be compared with the relation of the original with the counterfeit. Serial products are embedded in a relation of equivalence and indifference to one another, and thus they become a *simulacrum of one another* [13]. This becomes a general trait of the sign in the industrial era, when production has as a condition of possibility the abandonment of any reference to the original, which was fundamental to the prior social organization of the first order of simulation. In the Industrial age, characterized by production, the simulacrum is nothing but a copy of a copy, that is to say, a copy without the original, since the original is lost in the string of copies. Thus, simulacra of the second order of simulation emancipate themselves from the notions of authenticity or originality and from the original/counterfeit problem which was at the core of the first order simulacra, and by this blur the distinction between signs, representations and reality.

Distinct from the first order of simulation, with its problem of the *counterfeit* of the original, and from the second order of simulation, centered on the serial production, the third order of simulation is based on the *reproducibility* of signs generated by a model. The model becomes the source of all meaning, since it produces both the signs and the differences between them[14]. This order of simulation is self-referential, since it is disconnected from any teleology, from any finality whatsoever, and since all signs gain

[10] Jean Baudrillard, „The Stucco Angel", In *op. cit.*, p. 136.
[11] *Ibidem*.
[12] *Ibidem*.
[13] *Ibidem*, p. 137.
[14] Jean Baudrillard, „The Industrial Simulacrum". In *Jean Baudrillard. Selected Writings*, ed. Mark Poster, 137-139. Stanford, California: Stanford University Press, 1988, p. 139.

meaning only as a part in and through the model that produces them. Simulacra of the third order of simulation are beyond the true/false dichotomy, as they are completely disconnected from any reference point outside the model. There is no reality as a reference in this order of simulation, since the model does not take reality as a starting point, but precedes and produces it[15].

A parallel analysis of simulacra in the symbolic order and the other three subsequent orders of simulations is given by Baudrillard in "Simulacra and Simulations"[16], where he is concerned with the understanding of the image in relation to reality. In the first stage, which corresponds to the symbolic order, the image is considered to be a reflection of the reality; in the next stage, which corresponds to the first order of simulation, with the natural reference of the sign and the original/counterfeit problem, the image is regarded as a distortion and a mask of reality[17]. A simulacrum of the first order would be a representation which preserves a transparent relation to reality, that is to say a simulacrum whose artificial character is obvious. In the following stage, which corresponds to the second order of simulation, characterized by production, and where the signs become simulacra of one another, the image is considered to conceal the absence of reality[18]. As an illustration of a second order simulacrum which blurs the distinction between representation and reality, Baudrillard evokes Borges' fable 'Of Exactitude in Science', where the cartographers managed to draw such an elaborate and detailed map of the territory that it completely covered and matched the reality. The effect of this simulacrum is that the distinction of representation and reality becomes less visible and more indiscernible to a point where the representation becomes as real as the real[19]. In the final stage, which corresponds to the third order of simulation, the image has no relation to reality whatsoever, that is to say, the simulacra is beyond the true/false dichotomy, since it is produced as real by a model which has no need of reality as a reference point[20].

## III. *Error communis facit jus* – the legal discourse

The legal apothegm *error communis facit jus* is a phrase which refers to the legal theory of appearance, whose origin is to be found in the reasoning

[15] Jean Baudrillard, „The Metaphysics of the Code". In *Jean Baudrillard. Selected Writings*, ed. Mark Poster, 139-143. Stanford, California: Stanford University Press, 1988, p. 140.
[16] Jean Baudrillard, „Simulacra and Simulations". In *Jean Baudrillard. Selected Writings*, ed. Mark Poster, 166-184. Stanford, California: Stanford University Press, 1988.
[17] *Ibidem*, p. 170.
[18] *Ibidem*.
[19] *Ibidem*, pp. 166-167.
[20] *Ibidem*, p. 167.

elaborated in Roman law. The question of the legal effects of an appearance when confronted to the truth it managed to conceal appeared for the first time as a legal issue in Roman law, as Ulpianus notes in his 1,14,3 *Digesta*:

"Barbarius Philippus, being at the time a runaway slave, was a candidate for the praetorship at Rome, and became praetor designate. Here, according to Pomponius, the fact of his being a slave did not stand in his way, so as to prevent him from being praetor: as a matter of fact, he did discharge the office. However, let us consider the question. Suppose a slave has kept his legal position a long time unknown and has so discharged the office of praetor, — what are we to say? will everything that he enunciated by way of edict or decree be null and void? or will it be [upheld] for the sake of those persons who took proceedings in his court in pursuance, say, of a statute or on some other legal ground? My own opinion is that nothing would be set aside, and this is the more indulgent view; the Roman people was quite competent to confer the authority in question, even on a slave; and, if they had known that he was a slave, they would have given him his liberty. Much more must this power be held good in the case of the Emperor."[21]

Ulpianus refers to the particular case in which Barbarius Philippus, a slave who escaped his master, managed not only to create a common perception of him as a free man, but also managed to get the position of a praetor in Rome by hiding his real civil status. Later, when his real identity was discovered, the totality of his acts concluded in the position of a free man and praetor was brought into question. One possible solution was to annul all those acts, since they were concluded by a de facto slave, who only appeared to be a free man. However, considering the third parties who genuinely trusted the person to be what he pretended to be, the annulment of the acts concluded by the de facto slave would have affected their interests. Therefore, considering the interests of the third parties, Ulpianus appreciated that the most humane and equitable solution (*hoc enim humanius est*) was the acceptance of the validity of those acts.

The error of the third parties consisted in a false representation of the reality. However, Ulpianus refers to the condition required for such an error

[21] Cf. Monro, Charles Henry (transl). 2014. *The Digest of Justinian*, Volume I. Cambridge: Cambridge University Press, pp. 49-50.
Ulpianus, *Digesta*, 1, 14, 3 "Barbarius Philippus cum servus fugitivus esset, Romae praeturam petiit et praetor designatus est. Sed nihil ei servitutem ob stetisse ait Pomponius, quasi praetor non fuerit. Atquin verum est praetura eum functum et tamen videamus: si servus quamdiu latuit, dignitate, praetoria functus sit, quid dicemus? Quae edixit, qua e decrevit, nullius fore momenti? an fore propter utilita tem eorum, qui apud eum egerunt vel leg e vel quo alio iure? et verum puto nihil eorum reprobari: hoc enim humanius est: cum etiam potuit populus romanus servo decernere hanc potestatem, sed et si scisset servum esse, liberum effecisset. quod ius multo magis in imperatore observandum est." (From Roberto-Josepho Pothier, *Pandectae Justinianeae*, Tomus I, 4th edition, Paris: Belin-Leprieur, 1818, pp. 41-42)

to have the effects of a true appearance in his 14,6,3 pr. *Digesta:* "Si quis patrem familias esse credidit non vana simplicitate deceptus nec iuris ignorantia, sed quia publice pater familias plerisque videbatur, sic agebat, sic contrahebat, sic muneribus fungebatur, cessabit senatus consultum"[22]. This text refers to a *senatus-consultum*, a decision adopted by the Senate, which forbade the loan of money to *filii familias*, sons who were subjected to the paternal authority of their *pater familias*, the fathers and the authority figures of the Roman families. As an effect of the *senatus-consultum*, if the sons wanted to return the illegally borrowed sum of money to the lender, the delivery of the sum of money wouldn't transfer the property to the lender. Ulpianus examines a case of someone lending money to a son who was thought to be a father. This confusion, however, was not a simple error, nor was it due to the ignorance of the law, but was caused by the son behaving as the father, since he acted and contracted as a father. Ulpianus considers that this situation, in which the lender breaks the interdiction provided in the *senatus-consultum*, should not be subjected to the legal consequences provided in the *senatus-consultum*. From this case it can be deduced the condition which the error, as a false representation of reality, has to satisfy in order to be recognized the same legal effects of a true representation – it has to be common, in the sense that anyone who would have been in the position of the lender would have made the same error.

It was the 13th century glossator Accursius of the School of Bologna who formulated the legal maxim *error communis facit jus*, in his 1250 *Glossa Ordinaria*, as a note to the *Digesta* of Ulpianus*,* giving expression to the essence of the reasoning of Ulpianus in the case of Barbarius Philippus. A similar version of the apothegm of Accursius in relation to the same *Digesta* of Ulpianus was provided by another glossator, Bartolus, who stated that *error populi pro veritate habetur; ut hic et ius facit* (*the error of the people is true, and as such, it makes the law*)[23].

From Ulpianus and the medieval Glossators, this legal apothegm would justify the validity of the acts concluded by a person who acted as someone else, thus being commonly considered to hold the public function that would authorize him to perform those acts. For example, in 1593, the Parliament of Paris validated an act concluded by a notary before he took the oath required for his legal investiture, since this situation was unknown to the community, who regarded him as a legitimate public servant[24]. The same solution was adopted by the Flemish Parliament in 1751 in the case of

[22] Paulus Krueger, Theodorus Mommsen (transl). *Corpus Iuris Civilis*, Volume 1, Editio Stereotypa. Berolini Apud Weidmannos, 1872, p. 193.

[23] Laurent Boyer, „Sur quelques adages: notes d'histoire et de jurisprudence". In *Bibliothèque de l'École des chartes*, tome 156. Paris, Genéve: Librairie Droz, 1998, p. 50.

[24] Alfred Loniewski, *Essai sur le rôle actuel de la maxime „Error communis facit jus"*, Thèse. Université d'Aix-Marseille: Aix Nicot, 1905, p. 23.

a procedure conducted by a person who did not have the required authority at the time he performed the procedure, since the community did not know that he had lost the authority to perform those acts[25].

Since Premodernity, the scope of *error communis facit jus* was gradually expanded by the judiciary practice of continental-European legal systems.[26] The idea of the general, common error would justify in the French judiciary practice the acquisition of property from a *non-dominus*, who is someone who does not have the ownership of the property, but who appears to be the owner. For example, the legal acts through which persons acquired property from an apparent inheritor who made a false testament in order to prove his quality of inheritor were considered valid. The real inheritor who would promote an action against the persons who acquired the property from the apparent inheritor would find himself deprived of any means to recover the property that was given away by a *non-dominus*. The French Cassation Court, in the 'De la Boussinière' cause, decided, in 26 of January 1897, that since those persons who acquired the property were subjected to *error communis*, which is the fact that the error regarding the *non-dominus* who appeared as a real inheritor was a common one, the acts concluded with the *non-dominus* are valid (thus *error communis facit jus*)[27].

In the contemporary private law of various legal systems[28], the sphere of application of *error communis facit jus* was broadened to different areas of law, from property and contract[29] to tort, and across different fields of private and public law. Today there are also apparent creditors, agents or administrative representatives whose acts are considered valid by judges if the community had good reasons to believe in the legitimacy of those persons. For example, in French law, in the case of a payment to an apparent creditor, in which a person pays his debt to someone who has the title of the credit (*la créance*) without being the real creditor, the debtor is considered to be relieved of his debt. A similar solution is applied in the field of tort law, for example in the situation in which a person who is not interested in concluding a contract, but has a certain behavior during the negotiations which legitimately justifies the other party to believe that the

[25] Laurent Boyer, loc. cit., p. 51.

[26] For a detalied analysis of the theory of appearance which embodies the maxim error communis facit jus in French civil law, see Jacques Guestin¸ Traité de droit civil: Introduction générale (Paris: Librairie générale de droit et de jurisprudence, 1994), pp. 824-863

[27] Henri Capitant, François Terré, Yves Lequette, *Les grandes arrêts de la jurisprudente civile*, 11e éd., tome I. Paris: Dalloz, 2000, pp. 483-488.

[28] André Tunc, „Introduction" to *International Encyclopedia of Comparative Law*, ed. Viktor Knapp, Volume 11. The Hague, Boston, London: Martinus Nijhoff Publishers, 1983, p. 45.

[29] Jacques Mestre, „Peut-on encore se fier à l'apparence dans la formation des contrats?". *Revue trimestielle de droit civil*, 1998, p. 361.

contract is going to be concluded, is considered to be liable for damages.[30] Also, in continental-European legal systems, in the case of the acts concluded between third parties and an agent who acts outside the authority of the principal, if the third parties relied on the appearance of authority of the agent, the acts are valid, as an effect of *error communis facit jus* [31]. In all these cases, *la croyance légitime* (*the legitimate belief*)[32], trust, faith, the common and legitimate error suffice for the application of *error communis facit jus*.[33]

## IV. Complicities between the law and simulacra

In the cases mentioned above, where *error communis facit jus* was applied, the legal effects of the simulacra were considered to be an extreme outcome of a situation in which the appearance had finally been confronted to reality. In this respect, *error communis facit jus* is nothing but a retroactive solution to a situation which would have indefinitely continued to produce real effects. That is to say, the appearance was in a sense true, since the reality itself was concealed. As Baudrillard shows, the first and second order simulations still maintain a certain transparent relation to reality as a background to which the effect of simulations can be contrasted. It is definitely the case of the apparent agent, whose powers provided in the agency contract can be checked by the third parties with the principal. However, in the Barbarius Philippus case of Ulpianus, for example, the appearance created by the runaway slave and his true identity could not have been verified, since it was precisely the reference to his true identity that had to be hidden in order for the simulacrum to work. Since it was precisely the impossibility of delimiting between the real and the appearance that made it possible for the simulacrum to function as reality, what kind of simulations are the cases subjected to *error communis*?

In the section 'The Divine Irreference of Images' of 'Simulacra and Simulations', Baudrillard analyses the distinction between dissimulation and simulation[34]. He argues that the former produces an appearance of not having what one has in reality, while the latter produces an appearance of

[30] See the decision of the French Court of Appeal which appreciated that the person was liable for damages to the other, in CA Riom, 10-6-1992, RJDA 1992, no. 893 at 732, RTD Civ 1993, 343.

[31] Séverine Santier, "Unauthorised agency in French Law". In *The Unauthorised Agent. Perspectives from European and Comparative Law*, eds. Danny Busch, Laura J. Macgregor, 17-60. New York: Cambridge University Press, 2009, pp. 20-22.

[32] Laurent Boyer, loc. cit., p. 62.

[33] For a comparative perspective on the theory of appearance in continental-European legal systems and common law, see Danny Busch, Laura J. Macgregor (eds.), *The Unauthorised Agent. Perspectives from European and Comparative Law*. New York: Cambridge University Press, 2009.

[34] Jean Baudrillard, „Simulacra and Simulations", In *op. cit.*, pp. 167-171.

having something that in reality one doesn't have. He gives the example of someone who feigns an illness pretending to have certain symptoms, in opposition to the one who simulates an illness, who produces the symptoms presupposed by the illness[35]. In the first case, the dissimulation produces an appearance with a certain relationship with true or false state of affairs in reality. The person who feigns to be ill can always be proved to be healthy, and what Baudrillard argues is that, with dissimulation, the reality principle is intact[36]. That is to say, the difference between appearance and reality is transparent, since there is always the background of reality to verify the success of a simulacrum which only masks the reality. However, with the second case, when someone simulates an illness and produces the symptoms, the difference itself between appearance and reality becomes blurred. The person simulating an illness doesn't simply *have* the signs of someone who is unhealthy, as it is the case with the dissimulation of an illness, but *is* ill, since being ill implies having those symptoms. With the simulation there is no distinction between the appearance and the true or false state of affairs in the reality and it is this undistinguishable character that places the simulacrum beyond true and false and makes it, in a sense, real.

In the case of an apparent agent in French-inspired legal systems, the third parties know from the start that they are not dealing with the principal, but with someone who represents the person on whose behalf the agent acts. The agent is not mistakenly considered to be another person, the representation is transparent and known to all the parties involved, and the error affects only the extent of the authority the agent has from the principal. The case of the apparent agent is, therefore, a dissimulation, since the agent is feigning not to be someone, but to not have something he does have, which is the limits to his powers, an appearance which can be verified, however inconvenient it may be.[37]

However, going back to the interpretations of Ulpianus from *Digeste,* both Barbarius Philippus and the son simulated to be someone else. Those cases were not dissimulations, which would have been matters of confusion or ignorance of the law, as Ulpianus considered, and which could have been elucidated through a thorough confrontation of the appearance to reality.

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35 *Ibidem*, p. 167.

36 *Ibidem.*

37 In French law, the theory of mandat apparent was originally applied by Courts when dealing with the acts of directors of companies concluded with third parties in breach of the powers recognized to them in the statutes of the companies. The acts concluded by directors with third parties were considered valid by Courts, but not because it would have been impossible for third parties to check the authority of the directors, but because such a constant verification of the legal powers was considered to be inopportune. See Santier, "Unauthorised agency in French Law", p. 22.

Both Barbarius Philippus and the son simulate to be someone they were not and the simulacra as false representations of reality are revealed as such by a rather contingent event, in the absence of which the simulacra would have continued to function as reality. Since Barbarius Philippus simulated a free man before he managed to become a praetor, just as the son who contracted the loan simulated a *pater familias,* there was no possible way to distinguish between reality and the simulacra, since they both acted in the same manner as the one who simulates an illness in Baudrillard's example. *Error communis facit jus* is, therefore, an expression of the way in which the law gives full legal effects to both dissimulations and situations in which reality and simulacra become interchangeable, overlapping one another. This seems a rather strange solution to be validated through law, which is obsessively concerned in the modern Western legal procedures with the truth and the real. The quest in the judicial process for the most accurate picture of reality, of facts, in order to evaluate the most equitable legal decision, is thoroughly pursued through an elaborate set of procedural norms related to the evidence. This legal mechanism is put in motion so that any false representations, any appearances would break in the process of drilling for reality. The content of the law in settling for the solution expressed by *error communis facit jus* implies that, when the truth is finally revealed, everything should remain unchanged, instead of a *restitutio in integrum*, which the truth of the crumbling simulacrum would require. What does *error communis facit jus* say about the law and its relation to reality and truth, in the light of which the restoration of reality would most imperatively imply a general reversal of all the consequences derived from the simulacrum?

Certain answers may be derived from Baudrillard's analysis of the dispute between Iconoclasts and Iconolaters, the former denying icons and expressing a rage against any images portraying God, and the latter being in favor of such representations[38]. For Iconoclasts, images of God would have been against the fundamental religious interdiction of fabricating idols, false representations of the Divine, and Baudrillard argues that the radical position of Iconoclasts against icons is not a simple expression of their distrust in images, which they are generally associated with. On the contrary, it is rather the recognition of the power of simulacra in all representations of God that fuels their rage, recognition of the fact that the simulacra would conceal not some deep truth regarding God, but the very absence of God. It was the intuition that the images concealed not an original, according to which the icons were imperfect copies, but nothing at all, that constituted the core of their rejection of simulacra[39]. The Iconolaters, on the other

[38] Jean Baudrillard, „Simulacra and Simulations", In *op. cit.*, pp. 169-170.
[39] *Ibidem*, p. 169.

hand, saw in icons a simple reflection of God, and thus were able to venerate him by using these mediated images of the Divine. However, Baudrillard argues that Iconolaters, in spite of their belief in images as reflections of God, concealed his absence by already enacting his disappearance in those representations, and, as an illustration, he gives the example of the Jesuits, who based their worldly pursue of power on the disappearance of God[40].

Just as the Iconoclastic claims against images were based on the religious interdiction of representations of God, the claims of return to reality of the one deceived by the simulation are based on the legal interdiction of the acts concealed by the simulacrum and resulting from it – in relation to the cases of Ulpianus, it is the legal interdiction of a slave to act as a free man and become a praetor, and of a son to borrow money as a father. The demand for the undoing of the acts of the simulator according to the revealed truth hides, just as in the case of Iconoclasts, the fear that the reality behind the simulacra does not exist, that the very clear distinctions sanctioned by law, between the slave and the free man, the son and the father, are nothing but simulacra themselves. Since the simulacra managed to function as real it endangers reality itself – if a slave can produce an effect of reality by acting as a free man or a son by acting like a father, then maybe the slave and the free man, on one hand, and the son and the father, on the other, are interchangeable. Just as Iconoclasts feared the substitution of the image of God with God, so does the claimant, the one who bases his claims on reality against the simulacrum, fear the substitution of the slave with the free man, of the son with the father, ultimately of the reality with the simulacra.

However, Ulpianus and the continental-European laws, following the solution expressed by *error communis facit jus,* embraced the Iconolaters' perspective on simulacra – there are appearances which dissimulate reality, but this fact does not threaten the core of reality itself. The law can deal with the simulacra and maintain a clear distinction between true and false, reality and appearance. But if the solution of Ulpianus is similar to the game of representations of the disappearance of God the Iconolaters played, already knowing, as Baudrillard argues, that the icons no longer represent anything[41], it is implicitly admitted through *error communis facit jus* that the law is not concerned with reality as such and that reality is not given legal effects because it would posses some sort of merits that imperatively require legal recognition.

It is precisely the meaning of the phrase *error communis facit jus* that suggests the departure of the law from the problem of reality and truth by

[40] *Ibidem*.

[41] *Ibidem*, pp. 169-170.

indicating that the ground on which the law is based is the common error, which functions as reality and truth since it has no transparent connections to either of them. The subsequent consequence is that reality and truth themselves are nothing but *simulacra*, representations which are recognized full legal effects by law, since they cannot be proven to be false or they haven't been proven to be false yet, that is to say, their final confrontation to a true state of affairs in reality is indefinitely postponed. With the indefinite delay of meeting reality, the law recognizes through *error communis facit jus* not reality against appearances, the truth against the false or the reverse preference of appearances and falsehood against reality and the truth, but the simulation itself, which is beyond these dichotomies, and produces, as Baudrillard illustrated through the case of the simulation of an illness, true and real symptoms.