

Szymon Osmola¹

European University Institute, Florence

They Live... and They Make Consumer Law a Poor Instrument of Distributive Justice²

1. Introduction

The titular “they” stands for zombie-like aliens controlling the Earth in John Carpenter’s iconic film from 1988. *They Live*³ is one of the bluntest and – at the same time – one of the funniest cinematic depictions of the perils of consumer culture, the others being David Cronenberg’s *Videodrome*,⁴ David Fincher’s *Fight Club*⁵ or, more recently, Boots Riley’s *Sorry to Bother You*.⁶ All of these films show, often in a somewhat exaggerated way, how excessive consumerism may lead to insensitivity, alienation, indifference to people’s suffering, and paranoia. Nada, the protagonist of *They Live*, accidentally comes into possession of a pair of sunglasses that reveal to him the truth about the true masters of our planet, who use media and consumer goods to send subliminal messages to people in order to make them docile and obedient. The film, originally intended as a critique of Ronald Reagan’s neoliberal economic policies,⁷ remains scarily valid: consumerism, and consumer culture in general, even though repugnant and inhumane, is the foundation of modern economy and constitutes the contemporary *status quo*.

Consumer culture, so vividly depicted by the above strand of cinema, has been of great interest for social scientists as well. This article follows suit and deals with its legal instantiation – consumer law. Starting from President John F. Kennedy’s famous speech of 1962,⁸ consumer culture and consumer law have been the subject of an ever-growing number of legislative and academic works on both sides of the Atlantic. In the US, the

¹ ORCID number: 0000-0002-0437-0653. E-mail: szymon.osmola@eui.eu

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³ J. Carpenter (dir.), *They Live* (film), Alive Films, Larry Franco Productions, United States 1988.

⁴ D. Cronenberg (dir.), *Videodrome* (film), Canadian Film Development Corporation, Canada 1983.

⁵ D. Fincher (dir.), *Fight Club* (film), Fox 2000 Pictures–Regency Enterprises–New Regency–Linson Films, United States 1999.

⁶ B. Riley (dir.), *Sorry to Bother You* (film), Significant Productions–MNM Creative–MACRO–Cinereach–The Space Program–Annapurna Pictures, United States 2018.

⁷ See: the interview with John Carpenter, *They Live in John Carpenter’s Own Words*, <https://www.youtube.com/watch?v=ORrasstzEY>, accessed on: 16 August 2020.

⁸ J.F. Kennedy, *Special message to Congress on protecting consumer interest*, 15 March 1962, <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/037/JFKPOF-037-028>, accessed on: 16 August 2020.

most striking example of this trend is the ongoing project of drafting a Restatement of Consumer Contracts.⁹ In Europe, this is confirmed by the fact that a significant share of European Union private law is consumer law.¹⁰

The article focuses on a particular theoretical issue regarding consumer law – consumer contract law in particular¹¹ – that is closely related to the cinematic examples from above, namely: whether consumer law might be considered an instrument of distributive justice. Since the subject is very abstract, invoking concrete examples from popular culture will be particularly useful for its main aim – arguing that consumer law is a poor instrument of distributive justice.

The article is structured as follows. Section 2 briefly introduces the principle of distributive justice and presents some accounts according to which contract law may be a useful instrument for implementing it. Section 3 continues and shows why consumer law might be considered particularly useful in that regard. Section 4 presents some arguments against consumer law as an instrument of distributive justice, focusing on the so-called *status quo* argument, according to which consumer protection may reproduce the state of affairs that causes injustice in the first place. Section 5 elaborates and makes the argument less abstract by referring to the cinematic example of *They Live*. Section 6 concludes and shows how the *status quo* argument can be mitigated.

2. Distributive justice and contract law

There is vast philosophical literature on the principle of distributive justice. According to John Rawls, who developed the most influential contemporary theory of distributive justice, it consists of the two more specific principles:

First Principle: Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all;

Second Principle: Social and economic inequalities are to satisfy two conditions:

- a. They are to be attached to offices and positions open to all under conditions of *fair equality of opportunity*;
- b. They are to be to the greatest benefit of the least-advantaged members of society (the *difference principle*).¹²

Since the main argument of the article does not depend on any particular version of the theory of distributive justice, we can simplify the above account and, rather uncontroversially, assume that the principle of distributive justice demands that social institutions be designed in a way that benefits members of society who are worse-off through no particular fault of their own.

Contract law is one of the most important institutions of contemporary market societies. Should it therefore be an instrument of distributive justice? The *prima facie*

⁹ See: O. Bar-Gill, O. Ben-Shahar, F. Marotta-Wurgler, *The American Law Institute's Restatement of Consumer Contracts: Reporters' Introduction*, "European Review of Contract Law" 2019/15, pp. 91–102.

¹⁰ See e.g.: T. Wilhelmsson, *Varieties of Welfareism in European Contract Law*, "European Law Journal" 2004/10, pp. 726–733; M. Hesselink, *Private Law, Regulation, and Justice*, "European Law Journal" 2016/22, pp. 681–695; H. Micklitz, *The Politics of Justice in European Private Law*, Cambridge 2018, pp. 222–245.

¹¹ Even though there are other important areas of consumer protection, such as competition law or product liability, its core is constituted by contract law, both in the US and in Europe. Therefore, in what follows, consumer law will be understood as consumer contract law. Nevertheless, the article's conclusion may be applied to other areas of consumer protection as well.

¹² J. Rawls, *Justice as Fairness: A Restatement*, E. Kelly (ed.), Cambridge (Mass.) 2001, pp. 42–43.

answer seems to be negative. After all, contract law is concerned with voluntary agreements between private parties. Therefore, treating it as an instrument of distributive justice is problematic for at least two reasons. First, it seems to be ineffective in that regard: since a contract is a voluntary agreement between private parties, those who are better-off can simply refuse to deal with those who are worse-off. This would be not only ineffective, but could even contribute to further deterioration of the situation of the worse-off. Second, distribution through contract law is at risk of being arbitrary – whereas the principle of distributive justice is concerned with the systemic inequalities in society, contract law covers disputes between private parties. Treating contract law as an instrument of distributive justice would therefore arbitrarily burden some members of society with what should be the collective effort of all. In other words, as Aditi Bagchi puts it, “[e]ven if distributive injustice gives rise to corrective compensation, that compensation would be arbitrarily distributed among those with valid claims if distributed through adjudication of private contract disputes”.¹³ For those reasons, namely ineffectiveness and arbitrariness, it is often claimed that contract law should not be concerned at all with the principle of distributive justice, and leave the quest for it to other institutions, such as progressive taxation.¹⁴

Despite those objections, there are many scholars, in the US and in Europe, who claim that contract law can and should be, at least to some extent, an instrument of distributive justice. Anthony Kronman famously argued that reasonably designed rules of contract law may contribute to distributive justice by determining “which of the many forms of advantage-taking possible in exchange relations render an agreement involuntary and therefore unenforceable”.¹⁵ More recently, Bagchi has observed that although contract law should enhance moral agency by allowing parties to enter into voluntary agreements, “to the extent the rules of contract have distributive consequences, those rules are constrained by the demands of distributive justice”.¹⁶ The state, committed both to enhancing the moral agency of individuals and pursuing distributive justice, should take into account the distributive consequences of contract law rules and it should not “undo with one hand, contract law, what it pursues with its other hand, its regulatory apparatus”.¹⁷

In Europe, the alignment of contract law and distributive justice has been strong at least since Otto von Gierke’s seminal article *The Social Role of Private Law* from 1889, where he urged for improving the German private law of his times with “a drop of socialist ointment”.¹⁸ In the last two decades, the interest in contract law as an instrument of distributive justice has been revived in the context of harmonization of laws of EU Members States within the ongoing project of completing the European internal market. The most vivid example is the *Manifesto* published by the Study Group on Social Justice in European Private Law, grouping various scholars who argue that including distributive justice should be on the agenda of contract law reform in the EU.¹⁹

¹³ A. Bagchi, *Distributive Justice and Contract*, in: G. Klass, G. Letsas, P. Saprai (eds.), *Philosophical Foundations of Contract Law*, Oxford 2014, p. 198.

¹⁴ See: L. Kaplow, S. Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, “Journal of Legal Studies” 1994/23, pp. 667–681.

¹⁵ A. Kronman, *Contract Law and Distributive Justice*, “Yale Law Journal” 1980/89, p. 474.

¹⁶ A. Bagchi, *Interpreting Contracts in a Regulatory State*, “University of San Francisco Law Review” 2020/54, p. 50.

¹⁷ A. Bagchi, *Interpreting Contracts...*, p. 84.

¹⁸ See the English translation: O. von Gierke, *The Social Role of Private Law*, “German Law Journal” 2018/19, p. 1050.

¹⁹ Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, “European Law Journal” 2004/10, pp. 653–674.

The authors claim, similarly to their American counterparts, that contract law is, among other things, “an expression of (...) a scheme of social justice for a market order”, and that it should “respect (...) demands for social solidarity, which prohibit individuals from taking advantage of superior economic strength or from ignoring the claims of justified reliance upon others”.²⁰ On these grounds, they critically assess the European Commission’s attempts to reform and modernize European contract law, which were based entirely on the efficiency-driven objective of facilitating the European internal market.

Although all of those accounts admit that contract law can play only a limited role in pursuing the principle of distributive justice,²¹ they claim that carefully designed contract law rules are able to avoid the above objections of ineffectiveness and arbitrariness. Since the main argument of this article is independent of both of those objections, we can simply assume that they can be dealt with in a plausible way, without analysing arguments for that in detail. Instead, we can move on and show why consumer law is one of the most promising areas of contract law for pro-distributive justice contract law scholars.

3. Distributive justice and consumer law

The principle of distributive justice concerns individuals or groups of individuals who are worse-off than other individuals or groups of individuals within society. Therefore, there are areas of contract law that are aligned with it more naturally than others, in which there are significant imbalances of power between the parties. Typical examples include agreements between landlords and tenants, employers and employees or, most importantly for our purposes, consumers and professionals – the most prevalent types of contracts in consumer-oriented economies.

In order to highlight the most important features of consumer law, in what follows we will refer to European Union law, which has developed the most sophisticated system of consumer protection in the world. European law defines consumer as “any natural person who (...) is acting for purposes which are outside his trade, business or profession”.²² Consumer contracts between consumers and professionals, or so-called B2C contracts, have two particular features. First, they are almost always standard form contracts drafted in advance by the professional. Therefore, the bargaining process is virtually absent, and consumers are effectively forced to accept the pre-drafted contractual terms on a “take-it-or-leave-it” basis.²³ Second, there are large information asymmetries between consumers and professionals, where the latter have extensive knowledge, both about the product and the relevant market circumstances, in contrast to the former.

²⁰ Study Group on Social Justice in European Private Law, *Social Justice...*, pp. 655, 656.

²¹ As noticed by L. Tjon Soei Len, another proponent of contract law as an instrument of distributive justice, all attempts to pursue distributive justice through contract law “should always take the effectiveness and efficiency of a proposed instrument into account”. In that regard, she concludes that “the role that contract law could play should not be inflated” and contract law, at least in her approach, “is not proposed as a problem-solving instrument” (L. Tjon Soei Len, *Minimum Contract Justice. A Capabilities Perspective on Sweatshops and Consumer Contracts*, Oxford 2017, p. 20).

²² See: Article 2(1) of Directive 2011/83/EU of the European Parliament and of the Council on consumers rights (OJ L 304/64) (hereinafter: the “Consumer Rights Directive”); Article 2(b) of Council Directive 93/13/EEC on unfair terms in consumers contracts (OJ L 95/29) (hereinafter: the “Unfair Terms Directive”); Article 1(2)(a) of Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171/12) (hereinafter: “the Consumer Sales and Guarantees Directive”).

²³ For a seminal statement, see: F. Kessler, *The Contracts of Adhesion. Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions*, “Columbia Law Review” 1943/43, pp. 629–642.

Combined, those two factors constitute a great imbalance of power, which may result in professionals taking advantage of, or even exploiting, consumers in order to increase their profits. Therefore, as noted by the Court of Justice of the European Union in the landmark *Océano* judgment, “the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge”, and therefore deserves protection.²⁴

European consumer law offers different instruments of such protection. In order to remedy information asymmetries, it sets extensive information duties on professionals in their dealings with consumers and guarantees the latter the right of unconditional withdrawal from contracts made under certain circumstances.²⁵ It regulates the practice of standard form contracts by stating that

[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.²⁶

It grants consumers certain remedial rights and enacts rules regarding guarantees in consumer sale contracts.²⁷

If consumers, because of their lack of bargaining power and insufficient knowledge, are considered “worse-off” than the professionals they are dealing with, then apparently the above protective measures should be welcomed by those aligning contract law with distributive justice. However, in the next section we will claim just the opposite, arguing that consumer law is a rather poor instrument of distributive justice.

4. Why consumer law is a poor instrument of distributive justice

There are plenty of arguments against consumer law as an instrument of distributive justice, apart from the above objections of ineffectiveness and arbitrariness. It is claimed, for one, that mandatory disclosure is an illusionary way of helping consumers because they are not able, or even willing, to process information provided by professionals.²⁸ More extensive protective measures may even make consumers worse-off. For instance, many economists argue that prohibiting professionals from including “unfair” terms in standard form contracts will make them pass on the costs of such a prohibition to consumers by raising prices.²⁹ This, in turn, will hurt consumers who prefer lower prices over the absence of such terms. Moreover, it is generally pointed out that most of the consumer protection measures mentioned above – mandated disclosure, unfair terms control or granting consumers with certain remedial rights – benefits only consumers who are already in a relatively good position. Only well-educated consumers are able to understand information provided by professionals. Only rich consumers can afford

²⁴ *Océano Grupo Editorial SA*, Joined Cases C-240/98 to C-244/98, ECLI:EU:C:2000:346, par. 25.

²⁵ See, respectively, Articles 5–8 and Articles 9–16 of the Consumer Rights Directive 2011/83/EU.

²⁶ Article 3(1) of the Unfair Contract Terms Directive 93/13/EEC.

²⁷ The Consumer Sales and Guarantees Directive 1999/44/EC. The directive is soon to be replaced by Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136/28).

²⁸ See: O. Ben-Shahar, C. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure*, Princeton (NJ) 2014, pp. 59–78.

²⁹ See: R. Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, “Stanford Law Review” 1991/43, pp. 361–398.

to seek redress when affected by unfair terms in standard contracts or denied a remedy for defective goods provided by a seller. The costs of those protective measures, however, in the form of higher prices, are borne by all consumers: both well- and poorly educated, rich and poor. It is therefore an instance of a cross-subsidization, where the protection of consumers who are already better-off (well-educated and rich) comes at the expense of consumers who are worse-off (poorly educated and poor). Consumer protection may thus have even regressive distributive effects within the group of consumers.³⁰

Those objections, which to a large extent depend on empirical observations on how consumers and professionals behave, although relevant, will not be considered in what follows. They might reinforce the main argument against consumer law as an instrument of distributive justice, according to which excessive protective measures may contribute to entrenching the unjust *status quo*, and therefore compound, rather than eradicate, distributive injustice. This argument, called henceforth the *status quo* argument, is nevertheless self-standing.

While the philosophical foundations of the *status quo* argument may be found in Amartya Sen's critique of ideal theories of justice,³¹ its most sophisticated form is presented by Danjan Kukovec in his works on structural hierarchies of power within law, in particular the relationship between the "centre" and the "periphery".³² The gist of the argument is that "the rhetorics of justice could (...) entrench existing legal thinking, which reproduces the current hierarchies", and therefore "provide (...) a forum for the normalization of exploitation and appropriation".³³ This rhetorics does so by highlighting some aspects in which certain social groups can be worse-off, while neglecting the others. "[T]he identity of the 'weaker party'", Kukovec claims, "is always subject to interpretation".³⁴ Since such an interpretation is often provided by those who are already quite powerful, law- and policy-makers in particular, there is a danger that identifying the worse-off members of society who deserve protection will reflect the existing hierarchies of power or, in other words, the existing *status quo*.

The hierarchical structure of the social world, and its influence on our interpretative practices, makes it very hard to determine which groups are objectively worse-off and should therefore be covered by the principle of distributive justice. As mentioned, one argument against consumer law as an instrument of distributive justice is that it favors consumers who are already better-off over those who are already worse-off. The *status quo* argument advances that case even further. As Kukovec notices, "we tend to forget that the state of injustice concerns the relationships between people in their various functions or (...) in other words, between various legal subjects".³⁵

The relation between the *status quo* argument and the article's subject should be now clear. While it is claimed that consumer law is an instrument of distributive justice because it helps those who are worse-off, the *status quo* argument challenges the

³⁰ For this line of argumentation see in general: O. Bar-Gill, O. Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, "Common Market Law Review" 2012/50, pp. 109–126.

³¹ And Rawls's theory of justice in particular. See: A. Sen, *The Idea of Justice*, Cambridge (Mass.) 2009, pp. 87–113.

³² D. Kukovec, *Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo*, in: D. Kochevov, G. de Búrca, A. Williams (eds.), *Europe's Justice Deficit?*, Oxford 2015, pp. 319–336. See also: D. Kukovec, *Law and the Periphery*, "European Law Journal" 2015/21, pp. 406–428.

³³ D. Kukovec, *Taking Change Seriously*..., pp. 319, 324.

³⁴ D. Kukovec, *Taking Change Seriously*..., p. 330.

³⁵ D. Kukovec, *Taking Change Seriously*..., p. 321.

assumption that those consumers are really worse-off in the first place. There might be other legal subjects who are even more worse-off and therefore require even more protection. In that case, in focusing on consumer protection as a matter of distributive justice we are at risk of neglecting those other legal subjects. This, in turn, would have adverse distributive effects within society and therefore compound, rather than eradicate distributive injustice.

The most striking example of such a *status quo* bias is focusing on consumers while, at the same time, neglecting workers as subjects of distributive justice. Damjan Kukovec mentions that point explicitly.³⁶ Many real-world examples prove that point as well. Think of the working conditions in Amazon warehouses or sweatshops in the Global South; in both cases excessive consumer protection may adversely affect the situation of workers, who will most probably bear at least some costs associated with it.³⁷ However, the groups of consumers and workers are often coextensive – consumers and workers are the same people acting in different social roles. Therefore, excessive consumer protection may adversely affect the overall situation of those whom it should protect in the first place. In that way, it may entrench the existing *status quo* and thus contribute to greater distributive injustice.

As mentioned at the beginning, the contemporary *status quo* is constituted in large part by consumer culture and consumer protection as its legal instantiation. Since the above considerations may seem very abstract, it is therefore useful to illustrate the *status quo* argument against consumer law as an instrument of distributive justice by referring to the vivid cinematic example introduced there.

5. They Live!

Before Nada, the protagonist of *They Live*, came into possession of his curious sunglasses, he had been a drifter hopelessly looking for a job, his backpack being the sum of his belongings. When he finally finds a job on a construction site, demanding and poorly paid, he soon finds out that many of his co-workers are forced to live in a nearby squatter area, dirty and crowded. Their only entertainment is watching TV shows and commercials (containing aliens' subliminal messages broadcast in order to control them). The transmission is occasionally taken over by a group of hackers who try to reveal the truth to the workers. Even though for Nada those interruptions are the first impulse which ultimately leads him to finding his peculiar sunglasses, most workers constantly complain about them, as they cause headaches.

The world depicted in *They Live* and the adventures of its main protagonist are a perfect illustration of the *status quo* argument against consumer law as an instrument of distributive justice. As mentioned, the film ridicules the neoliberal ideology of Ronald Reagan, of which consumer culture – and consumer law as its legal instantiation – is one of the most important parts. In the film, aliens represent greedy corporations whose ruthless pursuit of money leads to alienation, desolation, and deprivation of both human beings and their environment. In order to make profits, they need two things

³⁶ D. Kukovec, *Taking Change Seriously...*, p. 329: "In a particular case, a universalised consumer may actually not be the weakest party. A worker of the company going bankrupt as a result of social considerations favouring the consumer might be the weakest party, but he is out of the picture in the pursuit of benevolent social considerations".

³⁷ On the relation between working conditions in sweatshops and consumer protection see generally: L. Tjon Soei Len, *Minimum Contract Justice...*; A. Bagchi, *Production Liability*, "Fordham Law Review" 2019/87, pp. 2501–2538.

– obedient and mindless consumers on the one hand, and cheap labor, guaranteeing low prices that further the consumption even more, on the other. As it happens, both groups happen to be the same people: the more protected – also by law – they are as consumers, the more exploited they are as workers. Interpreting consumer law as an instrument of distributive justice forces us to focus on the situation of the former, while losing sight of the latter. By treating consumers as worse-off and deserving protection, such an interpretation legitimizes the unjust *status quo*, in which workers are the real victims of exploitation and distributive injustice.

Moreover, *They Live* shows how the legitimization of the *status quo*, partially caused by interpreting consumer law as an instrument of distributive justice, is “reinforced by the complicity of the dominated”.³⁸ Consumerism is used by aliens not only to make people complacent, but also indifferent to the real source of injustice: exploitation of their work by capital in pursuit of profit. In the most famous scene in the film, Nada gets into a ridiculously long fight with his friend who refuses to wear the truth-revealing sunglasses. Influenced by the aliens’ propaganda, he does not want to acknowledge the truth, the real source of distributive injustice. Therefore, one can be tempted to say, he makes that same mistake as the proponents of consumer law as an instrument of distributive justice, against whom the *status quo* argument is developed.

At the end of the film, Nada and his friends join the anti-alien movement and ultimately destroy the transmitter of the aliens’ mind-controlling signal. This frees the people from the illusion they had been previously living under and reveals to them the real state of affairs and the real, most important, source of injustice in the world. Will it result in more distributive justice? *They Live* leaves that question open. However, John Carpenter seems to suggest that this is a much more promising way of pursuing distributive justice than remaining within the current *status quo*, inherently unjust and inhumane. Theoretical arguments meet cinematic vision in challenging consumer law as an instrument of distributive justice.

6. Conclusions

The *status quo* argument against consumer law as a tool of distributive justice seems very convincing, especially when supported by powerful cinematic examples illustrating the perils of contemporary consumer culture. However, there are some ways in which such the argument can be mitigated.

First, to the extent it is based on the assumption that consumer culture is inherently unjust – the assumption shared by all of the films mentioned in the introduction – the *status quo* argument against consumer law as an instrument of distributive justice does not hold for those who do not share such an intuition. While acknowledging the force of that argument, it has to be noted, however, that consumer culture, even if not inherently unjust, can certainly lead to certain aberrations, as vividly depicted by contemporary cinema. Those aberrations should always inform our attempts to interpret consumer law as an instrument of distributive justice, even if we do not see consumer culture as inherently unjust. While this objection may weaken the *status quo* argument, it does not make it entirely lose its power.

³⁸ D. Kukovec, *Taking Change Seriously...*, p. 335.

Second, it can be argued that the *status quo* argument proves that consumer law should not be the *only* instrument of distributive injustice, but can nevertheless contribute to achieving that objective. If other distributive policies are in place – aiming at improving the position of workers, for instance – consumer protection can advance the principle of distributive justice even further. There might be some truth in that argument. Consumer law and labour law are not necessarily in conflict, and both may be seen as instruments of distributive justice that protects the interests of weaker parties – consumers and workers, respectively. However, while consumer law and labour law can harmoniously coexist in national legal orders, as soon as we adopt the broader, global perspective, the overall interests of both groups – consumers in rich, Western countries and workers in poor countries of the Global South – part ways. Even if the balance between their interests can be struck at the national level to the benefit of local distributive justice,³⁹ striking such a balance at the global level is hardly possible, also because state-based law-makers lack the effective legislative instruments to do so.⁴⁰ Accordingly, focusing on the interests of consumers often leads to ignoring the interests of the global workforce – the result that is obscured by interpreting consumer law as an instrument of distributive justice.

Third, the *status quo* argument should not be treated as an argument against consumer protection as such. While disapproving of it as an instrument of distributive justice, the argument does not deny that consumer law may be valuable for other reasons, such as enhancing consumers' personal autonomy or promoting interpersonal (commutative) justice, i.e. justice between parties of the particular contract, in voluntary agreements between consumers and professionals.⁴¹ Accordingly, it does not settle the issue of conflict of those values, for instance when the principle of distributive justice points towards different solutions than the principle of personal autonomy or interpersonal justice. Therefore, we should not prematurely conclude that the *status quo* argument urges abandoning consumer protection measures, such as mandated disclosure or unfair terms control. In fact, interpreting consumer law as an instrument of interpersonal, rather than distributive, justice can even lead to abandoning the narrative of consumers as weaker parties, and treating the provisions of consumer law as the tools of restoring consumers' freedom of choice rather than protection.⁴² Those considerations, however, are beyond the scope of this article. The relevant conclusion is that, while undermining the value of such measures as tools of distributive justice, the *status quo* argument does not have any direct practical consequences for current consumer law regimes.

This last point is reinforced by that fact that, while focusing on the current state of affairs, the *status quo* argument does not offer any alternatives. More specifically, it does not guarantee that other ways of pursuing distributive justice would have better overall results than the current system, with all its vices. "Eliminating one set of regressive allocations", as noticed by John Gardner, "does not always help the cause of securing progressive allocations across the board".⁴³ The same conclusion applies also to the ending of *They Live*. It does not show the consequences of people realizing that they

³⁹ I thank the anonymous reviewer for pointing that out to me.

⁴⁰ See: A. Bagchi, *Production Liability...*, pp. 2506–2516.

⁴¹ For such an argument see: M. Hesselink, *Unjust Conduct in the Internal Market*, "Yearbook of European Law" 2016/35, pp. 428–430.

⁴² I thank the anonymous reviewer for pointing that out to me.

⁴³ J. Gardner, *What Is Tort Law For? Part 2. The Place of Distributive Justice*, in: J. Oberdiek (ed.), *Philosophical Foundations of the Law of Torts*, Oxford 2014, p. 336.

have been controlled by aliens for all that time. It might start a war. Or, a revolution that will make everyone, including consumers and workers, even worse-off than they had been before. For this reason, combined with the three other arguments mentioned above, perhaps we should treat the *status quo* argument presented in this article with some caution.

**They Live... and They Make Consumer Law
a Poor Instrument of Distributive Justice**

Abstract: Even though consumer contract law concerns voluntary agreements between private parties, it is often considered to be an instrument of the principle of distributive justice, according to which the design of social institutions should benefit the worse-off members of society. The article claims that such a view is mistaken. It appeals to the so-called *status quo* argument, according to which interpreting consumer law as an instrument of distributive justice may entrench the current, unjust state of affairs, and therefore compound, rather than eradicate, distributive injustice. Within that framework, consumer law is treated as the legal instantiation of consumer culture, which, even if not inherently unjust, poses several risks for individuals and their overall wellbeing. Apart from presenting the abstract argument, the article illustrates it with a vivid example from popular culture – John Carpenter’s iconic film *They Live*.

Keywords: consumer law, contract law, distributive justice, *They Live*

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