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A CRITICAL LOOK AT THE SUBJECTIVE AND OBJECTIVE PURPOSES OF CONTRACT IN AHARON BARAK'S THEORY OF INTERPRETATION

Marija Karanikić Mirić

**Associate Professor of Civil Law; Ph.D.
University of Belgrade Faculty of Law (Serbia)**

Contact information

Address: Bulevar kralja Aleksandra 67, 11000 Belgrade, Serbia

Phone: 00 381 60 555 0346

E-mail address: marija@ius.bg.ac.rs

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ABSTRACT

Sometimes parties to a contract agree on the wording of the contract, but disagree about its meaning. In such cases, the goal of purposive interpretation is to identify a legal meaning, within the limits of the language actually used, which best achieves the purpose of the contract in question. This paper presents the main features of Justice Aharon Barak's theory of purposive interpretation of contracts, and examines his notions of subjective and objective purposes. Barak's theory demands, at some point along the process of interpretation, that the judge determine the actual joint intent of the parties, as it was at the time of their entering into the contract, and in the situation where the parties themselves disagree over it. This requires a posterior inquiry into the true state of mind of other persons. The past intentions of others are regarded as historical-subjective psycho-biological facts. The author questions what goes on behind this subjective rhetoric, starting from the presumption that the inner reality of another person's will, i.e. their past or present

intentions, cannot be learned as a physical reality, but only as a socially constructed fact. Furthermore, the author examines the seemingly unwanted merging of Barak's subjective purpose of contract with his objective purposes of contract at the lower levels of abstraction.

KEYWORDS

Interpretation of contracts, Aharon Barak, purposive interpretation, objective purpose, subjective purpose.

NOTE

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INTRODUCTION

When parties to a contract agree on the wording of the contract, but disagree over its meaning, the goal of purposive interpretation is to identify a legal meaning, within the limits of the language actually used, which best achieves the purpose of the contract. Aharon Barak understands the purpose of the contract as a normative concept – a legal construction consisting of subjective and objective purposes. In Barak's view, the subjective purpose of contracts gives expression to the autonomy of the private will. It reflects the actual intent of the parties, their true state of mind at the time of contract formation, and may lack reasonableness. Objective purpose of contracts reflects the fundamental values and principles of the legal system, and indicates hypothetical intent. It is based on reasonableness, and gives precedence to the external fact of the wording of the contract. Barak sees the purpose of the contract to be an interpretive criterion, and privileges interpretation of contracts according to their subjective purpose, i.e. in keeping with the actual joint intent of the parties.

Still, the question remains of how subjective the subjective criterion of contract interpretation can be: Barak's judge must determine the actual joint intent of the parties at the time of their entering into the contract, in the situation where the parties themselves disagree over it. According to Barak, achieving this goal requires a posterior inquiry into the true state of mind of other persons, as a historical-subjective psycho-biological fact. The question emerges of what goes on behind this rhetoric. Furthermore, it seems that Barak attributes too much importance to the distinction between the subjective purpose of contract and its objective purpose, to the extent to which the objective purpose reflects a hypothetical joint intent of the parties in question. In any case, before offering a critical perspective on Barak's subjective and objective purposes of contract, it is necessary to first present the main features of his theory of contractual interpretation.

1. BARAK'S STANCE ON PURPOSIVE INTERPRETATION OF CONTRACTS

Barak defines interpretation very broadly, starting from the presumption that every text requires interpretation. For him, this is accurate also for the statements that are clearly intelligible, since even the impression of the interpreter that there should be no dispute over the meaning of the statement in question results from the process of interpretation. In other words, deciding that it is proper to take the

wording of a contract by its literal meaning represents an early instance of interpretation.¹

It is easy to agree with Barak on this. Pronouncing a text clear and unambiguous and, therefore, in no need of further interpretation, really is a result of an earlier stage of the interpretive process. The rule *in claris non fit interpretatio* does not exclude the need for interpretation. It simply compels the interpreter to start the process of interpretation by examining the plainness of the wording of the contract at hand, and to take the plain and unambiguous statements of the contract by their literal meaning.

Civil law systems prefer to start with the ordinary meaning of the contractual statements as used by the parties. In some jurisdictions the rule *in claris non fit interpretatio* is even codified, i.e. restated in their civil codes.² A party to the contract will sometimes be able to prove the existence of elusiveness and ambiguity in a seemingly straightforward contractual term, by demonstrating its vagueness in relation to a specific context of the dispute.³ The practical outcome of the rule *in claris non fit interpretatio* is that the court will not consider the evidence against the ordinary meaning of a contractual statement, regardless of the fact that the parties are in dispute over the meaning of the statement at hand, if one of the parties does not sufficiently support the claim of its vagueness. As Mitchell puts it:⁴ "Parties want the interpretation dispute resolved not because they want to know what contract means, but because the interpretation is instrumental to the imposition of legal liability."

Therefore, the mere fact that parties are in dispute over the meaning of a contractual term does not mean that the court will go beyond the ordinary

¹ Aharon Barak, *Purposive Interpretation in Law*, (Princeton – Oxford: Princeton University Press, 2005), 4. However, Barak's theory of interpretation is not on the end of this spectrum. Some authors posit the notion of legal interpretation even more broadly. For example, Dworkin believes that the aim of legal interpretation is to impose purpose on social practice of law, in order "to make of it the best possible example of the form or genre to which it is taken to belong" (Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986), 52).

² It is interesting to mention here the provision of Art. 994 of the *General Property Code of Montenegro* (1888, no longer in force), which explicitly states that if everyone understands something in the same manner – it needs no interpreter. In detail: Jasminka Hasanbegović, "Pravne izreke Valtazara Bogišića skraja OIZ = Katalog narodnjačkih opštih pravnih toposa?" (Legal Sayings of Valtazar Bogišić from the Last Section of the General Property Code of Montenegro = A Catalogue of Folk Legal Topoi?); in: Luka Breneselović, ed., *Spomenica Valtazara Bogišića o stogodišnjici njegove smrti (In Memoriam of Valtazar Bogišić on the Centenary Anniversary of His Death)* (Beograd: Službeni glasnik, 2011).

³ MacCormick explains that any rule may prove to be ambiguous and unclear with regard to some context of litigation. See: Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: OUP, 1994), 65–66.

⁴ Catherine Mitchell, *Interpretation of Contracts* (London & New York: Routledge-Cavendish, 2007), 28. In that sense: Arguing from Art. 99 and 100 of *Serbian Code of Obligations* of 1978 (further on in this paper: SCO), one may infer the position of Serbian legislator that only the unclear and controversial terms of contracts should not be taken literally and merit further interpretation: The legislator states that contractual clauses must be implemented in the way they are worded, and prescribes further rules of interpretation only for the clauses that are ambiguous and unclear. However, the mere fact that the parties to the contract are in dispute over the meaning of a contractual statement does not, in itself, mean that the statement in question is ambiguous and unclear. It is a task for the court to examine whether there is any ambiguity or dubiousness of the text in question.

meaning, unless one of the parties prove the term vague with respect to a specific context of litigation.

Barak argues that a request of one of the parties in dispute to replace his or her actual intent with that of the hypothetical reasonable person is not a good faith argument. He maintains that it is a requirement of good faith to interpret a contract in line with the actual joint intent of the parties.⁵

In any case, one may easily agree with Barak that the very process of locating the ordinary meaning of the text, and inferring that the statement in question is clearly intelligible and should be taken literally, represents in itself an instance of interpretation.

The state sometimes supplies parties with the vocabulary, i.e. with a collection of common meanings that may be used in a contract. For instance, the state may adopt some pre-defined commercial terms developed by private trade organisations. This is not to say that contract clauses with pre-defined terms are exempt from interpretation. Anyway, the question may arise of the parties' actual understanding of a pre-defined term at the time of contract formation. Supplying of contracting vocabularies is a regulatory function shared between the courts and legislature. On the contrary, the adjudicatory function of interpreting private agreements remains reserved for the courts.⁶

Barak understands interpretation in law as a rational process of isolating the normative message of a text from its semantic meaning. He maintains that legal interpretation is what turns a semantic text into a legal norm. The sole manner of accessing the text for him is by submitting it to interpretation; only through legal interpretation we come to know the normative message of a text. According to Barak, one may compare different interpretations of a given text and decide that one of them is proper, or fitting, or appropriate; but one may never compare an interpretation to the "true" meaning of a text, as there can be no meaning which precedes the act of interpretation.⁷

Other authors have drawn attention to a separate interpretative issue, commonly merged with the problem of what the language of the contract means. The existence of multiple linguistic communities raises a prior question of language in which the contract was written. The court's usual interpretive task is to find what the parties intended to say. However, if the parties differ on the issue of what

⁵ Aharon Barak, *supra* note 1, 327.

⁶ Alan Schwartz, "Contract Theory and Theories of Contract Regulation," *Yale Law School Faculty Scholarship Series Paper 313* (2000): 104.

⁷ Summed up from: Aharon Barak, *supra* note 1, 6–9.

language they used, the court must firstly ask “whether the parties wrote their contract in majority talk, or in a particular private language”.⁸

The object of interpretation is the text. When it comes to interpretation of contracts, the object of interpretation is the wording of the contract. In Barak’s words, however:⁹ “(t)he word ‘text’ is not limited to a written text. For purposes of interpretation, any behaviour that creates a legal norm is a ‘text.’”

In line with this position, Serbian courts have explicitly held that the object(s) of interpretation are statements of will of contractual parties, and not their psychological will, nor the true intentions behind the statements at hand. The contents of the true will of a party to the contract may be the object of evidentiary process, but not the object of interpretation.¹⁰ In Serbian legal doctrine it has been argued that the immediate object of interpretation is the expressed will, which may be articulated not only in words, but also by comportment, and even by omissions, or silence in some circumstances.¹¹ The true or real joint intent (the shared will) of the parties to the contract is what the judge seeks to discover by interpreting the parties’ expressions (declarations, statements, wordings). But, only the expression of an intent can be *interpretandum*, and not the intent as such (the will itself). Meaning is assigned to the communicated words in order to discover the intent behind those words. Stojanović expands the notion of expression to include different behaviours which imply the existence of will under the given circumstances.¹² Along the same lines, under Art. 8(1) of CISG (the 1980 UN Convention on Contracts for the International Sale of Goods), “statements made by, and other conduct of a party are to be interpreted according to his intent, where the other party knew or could not have been unaware what that intent was.”

Barak asserts that matters of interpretation should be examined separately from the question of validity. He argues that the process of interpretation deals with the proper normative content of the text, whereas validity may or may not be among the qualities of the norm which is extracted from the text as a result of interpretation.¹³ Furthermore, Barak insists that judicial interpretation of contracts should be distinguished from altering contractual statements and filling in the gaps in contracts, as the latter entails producing a new text.¹⁴

⁸ Alan Schwartz and Robert E. Scott, “Contract Theory and the Limits of Contract Law,” *Yale Law Journal* 113 (2003): 570.

⁹ Aharon Barak, *supra* note 1, 3.

¹⁰ *Decision of the Higher Commercial Court in Belgrade*, Pž. 6351/2005 of 28 (November 2005).

¹¹ Dragoljub Stojanović, “Član 99. Primena odredaba i tumačenje spornih odredaba” (Article 99. Implementation of Terms and Interpretation of Disputed Terms): 203–204; in: Slobodan Perović, ed., *Komentar Zakona o obligacionim odnosima* (Commentary of the Code of Obligations) (Belgrade: Savremena administracija, 1995).

¹² *Ibid.*: 203.

¹³ Aharon Barak, *supra* note 1, 10.

¹⁴ *Ibid.*, 15.

However, others have argued that every interpretation represents a “mixture of discovery and creation,” and that the interpreter – together with the author(s) of the wording (in our case: the judge, together with the contracting parties) – necessarily contributes to the final delineation of the meaning.¹⁵ In addition, German courts use what is called constructive interpretation (*ergänzende Vertragsauslegung*) to fill in the unintended gaps in contracts. The basis for this kind of interpretation is a hypothetical intention of the parties. Where the parties have omitted something, and no default rule is supplied by the statute, the judge will analyse, in light of the whole purpose of the contract, what rational and honest parties would have agreed upon, should they have detected the gap and acted pursuant to the requirements of good faith and good commercial practice.¹⁶

Still, there are the cases of undisputed judicial creation of a new text. For instance, under the rules of Serbian contract law, while reaching agreement on the constitutive elements of the contract at hand, the parties may leave out some secondary issues to be determined afterwards. Should they fail in agreeing upon those issues at some later point in time, the court shall fill out the non-essential content of their contract, taking into account the preliminary negotiations, the existing commercial practice between the parties, and *boni mores*.¹⁷

To return to Barak: Interpretation is *purposive* where its goal is to achieve the purpose of the legal text. Barak sees purpose as a legal construction which unites subjective elements (the subjective purpose; the author’s intent) with objective elements (the objective purpose; the intent of the hypothetical reasonable author; the legal system’s fundamental values and principles).¹⁸ The subjective purpose of a contract reflects the actual intent of the parties, the function or the effects those parties sought to accomplish at the time of contract formation. Objective purpose of a contract reflects the hypothetical (not actual) intent of legal order; the function that a contract of that type was designed to accomplish in a given legal system.

Barak’s purposive interpretation consists of three components: language, purpose, and discretion. One should bear in mind that these are closely integrated constituents, and not some separate stages of purposive interpretation. In Barak’s doctrine these three elements of interpretation are as follows:

(1) First of all, *language*. The legal meaning of the text at hand must remain within the boundaries delineated by its wording. Legal meaning of a contractual

¹⁵ Vittorio Villa, “A Pragmatically Oriented Theory of Legal Interpretation,” *Revus* 12 (2010).

¹⁶ Hugh Beale, Hein Kötz, Arthur Hartkamp, and Denis Tallon, eds., *Cases, Materials and Text on Contract Law* (Oxford: Hart Publishing, 2010), 579; Gerhard Dannemann and Stefan Vogenauer, *The Common European Sales Law in Context* (Oxford: OUP, 2013), 365–367. Compare: Art. II – 9:101 of the *Draft Common Frame of Reference (DCFR)*; Art. 1135 of the *French Civil Code* (under which contracts bind not only as to what is therein expressed, but also as to all the consequences that equity, usage, or law impose upon the obligation according to its nature).

¹⁷ Art. 32, Para. 2 SCO.

¹⁸ Aharon Barak, *supra* note 1, 88.

statement is extracted from the wording of a contract in the process of interpretation, and may not cross the actual semantic limits. In Barak's words:¹⁹ "(t)he language, the semantic medium, must be able to bear the purpose of the norm."

(2) Secondly, *purpose*. While the wording of a contract is created by the contractual parties, the purpose of a contract is formulated by the interpreter. Barak maintains that the purpose of contract is a normative concept, a legal construction, not a concept of a psychological or metaphysical nature. It consists of two elements: the subjective purpose, the joint intention of the parties; and the objective purpose, the function that the contract should represent in a democracy. For Barak, the subjective purpose is an actual, historical-subjective joint intent of the parties to a contract, i.e. the shared will of the creators of the text that needs to be interpreted. It is a fact in the past. The objective purpose of a contract reflects the values of the legal system. Barak notes that the interpreter will need to balance these values if they are competing. Objective purpose of contract is hypothetical intent of a reasonable man in a given situation, and the social-objective intention of the central values of the legal system. It is a legal norm, and not the fact; it resides in the present, and not in the past.

(a) An interpreter learns the joint intention of the parties, that is, their actual psycho-biological intent, which may well be unreasonable, through the language of the contract as a whole, and through the circumstances external to the contract, like the circumstances of its formation.²⁰ The judge learns the subjective purpose, *inter alia*, from the text itself, and to do so, he or she must interpret the text. Barak insists that this does not create a hermeneutic circle. Being a member of the legal community, the judge will always have a preliminary understanding of the text. Starting from there, the judge begins to learn about the intent of the parties, returns to the text, then back to intent, and so on, until the horizon of the judge and the horizon of the parties fuse.²¹

(b) An interpreter learns the intention or the will of the system from what Barak calls "objective" data: the language, character and type of the contract at hand; and the normative umbrella which is common for all the contracts, and which reflects the legal system's fundamental values, such as the constitutional considerations of the autonomy of the private will. Barak points out that subjective purpose is primary in the interpretation of contracts, while objective purpose plays a secondary and supplementary role. This ratio changes a little in case of consumer

¹⁹ Aharon Barak, *supra* note 1, 92.

²⁰ The extent to which external evidence of the circumstances surrounding contract formation is permissible in the process of interpretation is subject of ongoing debate.

²¹ Aharon Barak, *supra* note 1, 136-137. Barak points here to Hans-Georg Gadamer's *Horizontverschmelzung*.

contracts, collective agreements, and contracts of adhesion, where more weight is given to the fundamental values of the system, and less to the joint intention of the parties. In support of this claim one may say that many legal systems have devised special rules of interpretation of these types of contracts. Under the rule *in dubio contra proferentem*, in cases of uncertainty, the wording of a contract should be interpreted against the party who drafted the wording, i.e. the one who caused the uncertainty to exist. The *contra proferentem* rule is codified in the EU in the context of consumer protection.²²

(3) Thirdly, discretion. When the interpreter learns the subjective purpose of the contract, i.e. the joint intention of the parties, and the objective purpose of the contract, i.e. the values of the legal system the contract should actualize, they should proceed to determining the ultimate purpose of the contract. Barak states that contracting parties generally act as reasonable persons. Therefore, a judge should start from a rebuttable presumption that the objective purpose of a contract is also its subjective purpose. Where the two purposes are in conflict, the subjective purpose should prevail, even if this means that the contract is not valid. In certain types of contracts, such as consumer contracts, or adhesion contracts, the subjective purpose bears less importance than normally. Also, in long-term transactions, the historical intent of the parties loses some of its relevance as the time passes. In the cases like these, judges should assign more weight to objective purpose. Finally, where the presumptions of purpose are on a par, judges should use discretion to determine the ultimate purpose of the contract. However, discretion is never unrestrained in Barak's theory. It operates within the framework of interpretive rules. Therefore, the relationship between the joint intent of the parties to the contract, on the one hand, and "the will of the legal system", on the other, should be resolved by observance to the constitutional considerations of the autonomy of private will, and its relationship to the social workings. Once the ultimate purpose has been determined, it will thereafter serve as an instrument or criterion for extracting the legal meaning of the text from the range of semantic possibilities.²³

Along the similar lines, Serbian legislator prescribes that where the contractual clause is ambiguous and disputed, the interpreter should not follow the literal meaning of the wording employed, but inquire into the joint intention of the contracting parties, and construe the statement at hand in accordance with the legal principles of the Code (Art. 99 SCO). In other words, the judge should search for the joint intent of the parties, i.e. what Barak would call the subjective purpose;

²² "Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail" (Art. 5, Para. 2 of the *Directive on Unfair Terms in Consumer Contracts*).

²³ The three components are summed up from: Aharon Barak, *supra* note 1, 89–94, 325–338.

and read it in a manner which best serves the codified fundamental legal principles (autonomy of will, good faith, prohibition of abuse of rights, principle of proportionality of mutual obligations, *pacta sunt servanda*, etc.) In case of more than one plausible understanding of the joint intent of contractual parties, the court should opt for the one which favours the above stated codified legal principles. Here, the presumption is that the parties have been aware of the codified principles, and wanted to abide by them.²⁴

In addition to everything said, Barak accentuates the importance of contract theory to contractual interpretation, and puts forward the idea that each contract theory warrants a certain system of interpretation:²⁵ For instance, a theory which identifies freedom of contract as an expression of the autonomy of private will requires the subjective theory of interpretation. Or, the idea that a contract serves to fix reasonable expectations among the parties calls for the objective theory of interpretation. In other words, a decision on a 'proper' system of interpretation is contingent upon our understanding of the reasons for which contracts are binding.²⁶

2. SUBJECTIVE PURPOSE OF CONTRACT: THE JOINT INTENT OF THE PARTIES

A contract represents an expression of the autonomy of private will of the contractual parties. It gives rise to reasonable expectations among the parties to it, and also may induce a reliance interest in others.²⁷ The parties enter into a contract with the primary purpose of realizing some joint intent and, therefore, it is the common position of the modern European legal systems that a contract should be interpreted in line with the joint intent of the parties to that contract, namely, in the manner which best serves realization of their intent at the time of contract formation.

It is Barak's understanding that subjective purpose of a contract reflects the actual intent of the parties, i.e. their true state of mind at the time of contract

²⁴ Ratomir Slijepčević, "Tumačenje ugovora" (Interpretation of contracts): 329–330; in: *Enciklopedija imovinskog prava i prava udruženog rada (Encyclopaedia of Patrimonial Law)* (Belgrade: Službeni list, 1978).

²⁵ Aharon Barak, *supra* note 1, 321–324. There is a broader argument to go with this, namely, that "the nature of legal interpretation and the nature of law are related, and that law should be fundamentally understood as a practice of reason-giving, subject to certain kinds of constraints. The most basic constraint on what counts as an interpretation of law is that law must be viewed as a purposive activity, as having some point or end" (W. Bradley Wendel, "The Craft of Legal Interpretation": 170, in: Yasutomo Morigiwa, Michael Stolleis and Jean-Louis Halpérin, eds., *Interpretation of Law in the Age of Enlightenment* (Heidelberg & London & New York: Springer 2011)).

²⁶ "Subjective purpose gives expression to the autonomy of the private will and individualistic views. Objective purpose gives expression to the needs of the collectivity and communitarian views" (Aharon Barak, *supra* note 1, 325).

²⁷ To that effect, contracts may be considered as commissive legal speech acts which commit the speaker to do something in the future (Brenda Danet, "Language in the Legal Process," *Law and Society* 14(3) (1980)). As utterances which commit the contracting party to do something in the future, they give rise to mutual expectations among the parties, and also to certain expectations in others.

formation. The task of the court is understood as finding out the actual, historical-subjective, psycho-biological, shared intent of the parties to the contract in retrospective, that is, as a fact in the past. In Barak's words:

The subjective purpose reflects a true intent of the author at the time the text was created. It is a physical-biological-psychological-historical fact. It is an 'archaeological' fact. It is a 'genetic' fact. It is a 'static' fact. It does not change with time. It is not the intent that the author would have had, had he or she thought about the matter, nor is it the intent of the reasonable person; these types of intent constitute objective purpose. Subjective purpose is the 'real' intent of the text's author, the intent the author(s) had, as a matter of fact, at the time he or she (or they) created the text.²⁸

He additionally notes that:

Investigating the joint intent of the parties is no different than any other legal investigation into facts. Direct testimony from a party about his or her intent should be admissible. It would not impair security and certainty in law. To the contrary: It would assure more security and certainty than the current situation, in which everything depends on a judge's sense of the contractual language.²⁹

It is hard to agree with Barak on this point, as it seems obvious that past mental states of the parties (the content of their will at the time of entering into the contract, *i.e.* their actual intention at some moment in past) cannot be learned as a physical reality, but only as a socially constructed fact. As Henket puts it:

No matter how careful we are and how many particulars we take into consideration, the intentionally we find will always be a conjecture. We can never be sure to have discovered the real subjective intentions of the actor at the time of the act. It is, therefore, at the most a probable intent that serves as a basis for judicial decision-making.³⁰

Therefore, it is questionable whether the task of pinpointing the subjective purpose of the contract really represents a fact-finding endeavour as Barak would have it. There are no facts to be known where there is no meaning, and there is no meaning without some prior understanding. Thus, the process of interpretation always includes a degree of projecting of one's own understanding of the world

²⁸ Aharon Barak, *supra* note 1, 141. In his critique of Barak's doctrine of interpretation, Fish points out that subjective intention (or purpose) "belongs to psychology rather than to an account of interpretation"; it requires "a theory of mind, an account of physiology and its relationship to cognitive processes, a program of controlled experiments designed to infer mental states from observable phenomena, and so on. The act of interpretation, legal or otherwise, requires none of these. Rather it requires an understanding (and specification) of what role an actor/author is performing in a particular institutional setting" (Stanley Fish, "Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law," *Cardozo Law Review* 29(3) 2008: 1130-1131).

²⁹ Aharon Barak, *supra* note 1, 320.

³⁰ Maarten Henket, "Contracts, Promises and Meaning: The Question of Intent," *International Journal for the Semiotics of Law* 5 (1989): 131.

onto the other.³¹ Or, put differently: the processes of qualifying the facts and interpreting the norms cannot be fully separated. The court may determine the parties' past intentions only on the basis of some external manifestations of those intentions. The party may prove their past behaviours; and after that the court may attach a certain meaning to the established external manifestations of the party's past intentions. However, the court can only do so by relying on some prior understanding of the meaning of such behaviours, that is, by applying some pre-existing norms to the situation at hand. For instance, an illuminated dome light on a taxi is an external manifestation of the taxi driver's willingness to accept a passenger. However, one may only know this if they are aware of the pre-existing rule that the illuminated dome light means the taxi is vacant and for hire.

Furthermore, determination of the actual past intentions of a person – for the purposes of establishing legal consequences of the external manifestations of these intentions – is inherently laden with normative considerations pertaining to: the legal capacity of the person in question; the legally relevant attributes of the manifested intent; the scope of legal consequences of the manifested intent; etc. Besides, not all actual, historical-subjective, psycho-biological intentions may (or will) create a legally binding contract. Such a contract may only derive from a legally relevant expression of an intent to be legally bound.

Since the court may establish the past intent of a person solely indirectly, that is, on the basis of an external display of the intent at the time it was communicated, a certain level of abstraction will always be necessary. Despite the subjective rhetoric, the judge may never know the other person's state of mind, past or present, as a matter of psycho-biological fact. He or she may only be sufficiently convinced that the person in question had a certain intention, judging by their behaviour in the given situation. And, when a party to the contract tries to prove the contents of their intentions at the time of contract formation, they normally offer evidence of their own past behaviours, and try to attach a certain meaning to those behaviours in the given context. It seems that in practice there can be no evidence of someone's past intentions, apart from the evidence of their past behaviours that, according to the pre-existing assumptions of the interpreter, reveal the underlying intentions.

Barak argues that: "(j)udges may use the circumstances to learn about subjective intent in the same way they evaluate evidence of any other factual proposition."³²

³¹ Hans Rott, "Words in Contexts: Fregean Elucidations," *Linguistics and Philosophy* 6 (2000): 627.

³² Aharon Barak, *supra* note 1, 330.

But, what can the judges really discover: the actual joint intent of the parties as a past psycho-biological fact, or the external appearance of what the parties intended or wished for at the time of entering into the contract? The latter seems more convincing.

In addition, there is no way of learning about, or proving that the actual joint intent of the parties was, in fact, different from what the parties' past behaviours, and the surrounding circumstances of those behaviours, disclose or reveal about their past intentions. Moreover, even if one accepts that the internal may differ from what the external says about it, it is not possible to distinguish (in retrospect) the external appearance of the parties' shared intentions from their actual intentions which supposedly differ from what the facade indicates. It is not only that a meeting of the minds is not possible if the intents are not communicated; it is that the difference between the true intents and the expressed intents cannot be discovered or proven as a physical fact.

Therefore, the courts must use yardsticks, criterions, standards for determining past states of mind. These criteria may be more or less objective, abstract, depersonalized. For example, the judge may observe the evidence of external manifestations of the party's intent, under the given circumstances and at the time of contract formation; and examine what the same behaviour of a hypothetical reasonable person of the same age, education, social background, knowledge, preferences, interests and experience normally means. The presumption of the party acting like a reasonable person cannot be discarded: if one needs to presume or consider unreasonableness in order to learn about the joint intention of the parties, the question of contractual capacity emerges, as well as the possibility of contract being void.³³ In any case, the more personal traits and conditions of the party in question influence the reference yardstick, the more subjective the approach. In contrast, an objective approach would involve the judge observing the evidence of external manifestations of the party's intent, under the given circumstances and at the time of contract formation; and examining what the same behaviour of a hypothetical reasonable person normally means, not taking into account age, education, experience and other traits of the parties in question.

³³ Barak accepts this. He states there is a rebuttable presumption that parties act as reasonable people. In rare instances, where there is a conflict between the objective and the subjective purpose of the contract, that is, where the unreasonable actual joint intent of the parties leads to the unreasonable result that conflicts with the fundamental values of the system, the judge needs to give priority to the subjective purpose, even if it means the contract should be declared void as contrary to public policy. See: Aharon Barak, *supra* note 1, 337. However, the actual joint intent may be determined and recognized as unreasonable only by employing the pre-existing concepts and norms regarding the meaning of a certain behaviour in a given context, and regarding the outer shell of reasonableness under the circumstances at hand.

Barak himself emphasizes that: "most subjective systems are not really 'subjective' at all because they do not investigate the actual will of the author."³⁴

He makes a distinction between the "true" subjectivity which searches for the actual intent of the parties, as revealed by the wording of the contract and the circumstances of its creation, and "pseudo" subjectivity, which hides behind subjective rhetoric, but really examines reasonable readings of the text at hand.³⁵

However, it seems that Barak's critique of intentionalism applies verbatim to one of the tasks his judge must perform in order to complete the mission of purposive interpretation of a contract, as this mission is envisioned by Barak. Namely, in order to determine the ultimate purpose of the contract, the judge will, at some point, have to ascertain the subjective purpose of the contract (the actual, psycho-biological, past joint intent of the parties).³⁶ It seems that Barak's critique of intentionalism falls on this part of his own concept of purposive interpretation. He claims that his theory: "leaves room for considering the real intent of the author of a text (subjective purpose). This is the actual, 'true' intent. It is not pseudo-intent; it is not hypothetical intent; it is not the intent of a reasonable person."³⁷

However, he does not propose a method, a technique of accessing this 'true' intent of another from the outside – apart from saying that the judge needs to look into the language of the contract as a whole, and into some circumstances external to the contract, such as the circumstances surrounding its formation.

By stating that the subjective purpose of a contract reflects the true intent of the parties at the time of contract formation as a biological-psychological-historical fact from the past,³⁸ Barak seemingly accepts the will theory (*Willentheorie*). The will theory accentuates the importance of private autonomy and freedom of contract, and affirms the idea that legal obligations originate from the free will of the individuals. In contrast, the expression theory (*Erklärungstheorie*) focuses on the external appearance of consent, that is, the used words as an external fact. It acknowledges that the sole way to learn about the will of the others is to listen to what they are saying and to rely on the words in which the will is expressed.³⁹

But, how can a judge come to know the past true joint intent of the parties at hand? According to Barak, the sources of the judge's knowledge about the true intent of the parties are: the wording of the contract which needs to be read as a

³⁴ Aharon Barak, *supra* note 1, 265. Fish argues to the contrary that "the fact that intentionalism pays little or no attention to 'subjective' intention is all to its credit and not a mark against it" (Stanley Fish, *supra* note 28: 1144).

³⁵ Aharon Barak, *supra* note 1, 265–266.

³⁶ The ultimate purpose is "the criterion for pinpointing the legal meaning along the spectrum of semantic possibilities." A judge determines the ultimate purpose on the basis of the information on subjective and objective purposes of the contract at hand (Aharon Barak, *supra* note 1, 336).

³⁷ Aharon Barak, *supra* note 1, 266.

³⁸ *Ibid.*, 120.

³⁹ Hugh Beale, Hein Kötz, Arthur Hartkamp, and Denis Tallon, *supra* note 16, 556.

whole; and, the circumstances surrounding the contract formation.⁴⁰ This seems, basically, to be a return to the external manifestations of the internal will of the parties to the contract at some point in past.

3. THE JOINT INTENT OF THE PARTIES IN MODERN LAW

Zimmermann explains that the early stages of the development of legal culture were marked by a “very literal, word-oriented (objective) approach” to interpretation. Only with the maturity and sophistication of legal systems do the subjective elements begin to matter. However, this process has peaked at certain times, and we have come to understand that sole reliance on the subjective criteria would harm the certainty of law and the security of commerce. Therefore, in the matters of interpretation, modern legal systems, usually attempt to establish the balance between subjective and objective approaches.⁴¹

In German law, in interpreting a declaration of intention, the true or real intention shall be ascertained without regard to the literal meaning of the statement (§133 of German Civil Code – *BGB*). The judges interpret contracts in accordance with the requirements of good faith and in line with commercial usages (§157 *BGB*).⁴² In French law the judge must seek the common intention of the contracting parties, rather than stop at the literal meaning of the words (Art. 1156 of French Civil Code – *CC*). Also, contracts bind not only with respect to the express terms used, but also with respect to all the consequences that equitable principles, usage, or law impose upon the obligation in accordance with its nature (Art. 1135 *CC*).⁴³ As stated before, in search for the joint intention of contracting parties, the judges in Serbia do not adhere to the literal meaning of the wording, and they take into account the codified principles of the law of obligations (Art. 99 *SCO*).

European judges normally consider both subjective and objective purposes of a contract (as Barak puts it, the joint intent of the parties and the will of the system), and decide on possible contradictions between them. In doing so, the

⁴⁰ Aharon Barak, *supra* note 1, 329–332.

⁴¹ Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: OUP 1996): 621–622. Others have also questioned whether there is any provable substance today in the statement that the common law favours the expression theory, while the civil law gives preference to the will theory; confirming that “(m)ost of civil laws hover between ‘objective’ and ‘subjective’ interpretation” (Hugh Beale, Hein Kötz, Arthur Hartkamp, and Denis Tallon, *supra* note 16, 556).

⁴² Historical roots of these rules may be found in the Digest of Justinian I, as pointed out by Reinhard Zimmermann, *supra* note 40, 622.

⁴³ Actually, French legislator has prescribed a number of principles to help the judges interpret contracts (Art. 1156–1164 *CC*). For instance, if a contractual statement is open for two meanings, the court should opt for the meaning which may produce some effect, rather than the one which produces no effect (Art. 1157 *CC*). Also, should a statement be open for two meanings, the court must opt for the meaning which best fits the substance of the contract (Art. 1158 *CC*). However, it has been argued that these rules are mere guidelines, used by the judges only to justify the opinions they have already formed on other grounds; and that, in contrast, German statutory rules on interpretation of contracts are scarce, as it is consented there that the judges do not need lectures from legislature in practical logic (Hugh Beale, Hein Kötz, Arthur Hartkamp, and Denis Tallon, *supra* note 16, 567).

judges may consider the circumstantial context: primarily they will rely on the external circumstances of contract formation, but sometimes also on the explanatory circumstances from before or after the contracting.⁴⁴ Along the same lines, Barak's purposive interpretation of contracts favours subjective purpose, but acknowledges the continuous application of objective purpose as well, and allows the judges to take the external circumstances into consideration in an effort to determine the actual joint intent of the parties.⁴⁵

There can be no contract if the parties did not share a joint intent at the time of contract formation.⁴⁶ However, the situation may arise in which one party holds an erroneous belief at the time of contracting, and the other party knows or should have known of this, but still proceeds to contract formation, without correcting the first party's mistake. This demonstrates how the matters of mistake and interpretation are interconnected: whether there is an error or not often depends on how a contract, or the prior communication among the parties, is to be understood.⁴⁷ In one German case the court held that one party must have known that the other party, as a layperson, would not understand the technical meaning of the phrase ("demand guarantee" as a type of guarantee); therefore, the words used in the contract cannot be interpreted in line with their technical meaning.⁴⁸ Barak draws attention to the national restatements and international instruments suggesting that, in situations like this, the mistaken intent of the first party should be considered the joint intent.⁴⁹

4. OBJECTIVE PURPOSE OF CONTRACT

Barak understands the objective purpose of a contract to be a legal construction which reflects the values of the legal system, that is, the policies and

⁴⁴ English law permits a judge to consult the circumstances only when the language of the contract is not plain and creates ambiguity. This is the mischief rule (Aharon Barak, *supra* note 1, 331–332). English courts have held that the words used in a contract must be interpreted in a way which makes sense in the context as a whole: the notion of "literal meaning" is unhelpful when words may mean different things in different contexts (Hugh Beale, Hein Kötz, Arthur Hartkamp and Denis Tallon, *supra* note 16, 561).

⁴⁵ Aharon Barak, *supra* note 1, 326. Barak criticizes the traditional objective approach of English common law that contracts should be interpreted according to the intention attributable to reasonable parties (*ibid.*, 319–320).

⁴⁶ And even this idea is debated: It is claimed that parties to a contract are potential adversaries, entering into the contract, each believing that in case of a dispute their view of the true meaning of the employed wording will prevail. For instance, each of the parties trust that the court would affirm their idea of what the words "the reasonable time from the occurrence of a specified event" mean, and not the idea of their adversary. The parties are collaborating only because they want to carry out a transaction. Meeting of their minds (*consensus ad idem*) simply does not exist, nor is it necessary for the formation of an enforceable contract. Therefore, the notion that the purpose of interpretation is to discover intent is – false (Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul MN: Thompson–West, 2012), 382).

⁴⁷ Reinhard Zimmermann, *supra* note 40, 621.

⁴⁸ Hugh Beale, Hein Kötz, Arthur Hartkamp, and Denis Tallon, *supra* note 16, 560.

⁴⁹ Aharon Barak, *supra* note 1, 328: Art. 201 of the Restatement (Second) of Contracts; Art. 4.2(1) of the Principles of UNIDROIT; Art. 8 of CISG; Art. 101.5 of the Principles of European Contract Law (PECL).

functions a contract of a certain type is meant to carry out in a society. Objective purpose is the "intention of the system." As opposed to the subjective purpose of a contract, the objective purpose is not the actual intent of the parties; it may reflect their hypothetical intent at best. Usually, the two purposes – the actual past intent of the parties and their hypothetical past intent to abide by the values of the legal system – correspond to one another.

Starting from the lowest level of abstraction and moving up, Barak's objective purpose of a contract appears as: (a) the purpose the parties would have intended, had they thought about the matter; (b) the purpose the parties would have intended, had they acted as reasonable persons; (c) the purpose that is typical for the type of contract at hand; (d) the fundamental values of the legal system in question.

For Barak, the level of abstraction the judge should strive for depends on accepted contract theory. Barak maintains that the judge should start at the lowest level of abstraction and move upwards: in a system which attributes significant weight to the autonomy of the private will, the judge should start from the idea that the objective purpose of a contract is the joint intent the parties would have had, had they acted as reasonable persons under the given circumstances. Only if that is not sufficient for resolving the legal dispute, should the judge move upwards on the ladder of abstraction.⁵⁰

According to Barak's doctrine, at the lower levels of abstraction objective purpose is based on reasonableness, logic, and efficiency; it reflects the intent of a hypothetical reasonable person. At the highest level of abstraction, Barak's objective purpose reflects the fundamental values of the system. He affirms that presumptions for identifying the objective purpose of a contract may contradict each other. These presumptions reflect security, certainty, satisfaction of reasonable expectations, and normative harmony, as well as ethical values, social goals, proper modes of behaviour, and human rights.⁵¹

In the beginning, Barak pinpoints 'the purpose the parties would have envisaged, had they thought about the matter' (a) as the objective purpose of a contract at its lowest level of abstraction. Later on, when deciding on the starting point for the judge in determining the objective purpose of a contract, Barak omits the purpose the parties would have had in mind, had they thought about it, and instructs the judge to start from 'the purpose the parties would have intended, had they acted as reasonable persons' (b), explains that this one is the closest to the

⁵⁰ Barak's stance on the objective purpose of contracts summed up from: Aharon Barak, *supra* note 1, 332–333.

⁵¹ *Ibid.*, 334–336.

actual joint intent of the parties. However, it seems that the omitted purpose would have been even closer to the true intentions of the parties.

This exclusion reveals how proximate Barak's notions of subjective and objective purposes are. If the parties have not thought about 'the matter', that is, about the subjective purpose of the contract (their actual joint intent), the question arises of the very existence of the meeting of their minds (*consensus ad idem*). If the parties did actually think about 'the matter', the subjective purpose and the lowest level of abstraction of the objective purpose will become intermingled.

Furthermore, the judge may ascertain the past true joint intent of the parties solely indirectly, discursively, via the external expressions of such intent at the time of contract formation. As previously mentioned, the judge may never know the other person's state of mind, past or present, as a matter of psycho-biological fact. Therefore, a certain level of abstraction is always necessary, including the point in which the judge establishes the subjective purpose of the contract in question, i.e. the actual intent of the parties to it.

Barak makes a very clear distinction between the subjective and the objective purposes of contracts. For him, the subjective purpose is the joint intent of the parties to the contract, as a psycho-biological fact from the time of contract formation. Barak's objective purpose of contracts may reflect, depending on a level of abstraction, the hypothetical joint intent of some imaginary reasonable parties to the contract under the given circumstances, or the fundamental values and principles of the legal system in question.

However, and in contrast with what Barak is stating, the subjective purpose of contracts (as he defines it) cannot be determined directly, but only with some degree of abstraction, construction and hypothesizing. It seems that Barak ascribes too much weight to the distinction between the subjective purpose of a contract, and its objective purpose which reflects the hypothetical joint intent of the parties. In other words, it seems that there can be no clear division between Barak's subjective purpose of the contract and his objective purpose at the lower levels of abstraction (the objective purpose which reflects the parties' presumed reasonableness, logic, and efficiency). Moreover, it could be argued that all of Barak's objective purposes of the contract, apart from the one at the highest level of abstraction, represent more or less objective, abstract, depersonalized criteria or standards for determining past states of mind of others.

Meanwhile, at the highest level of abstraction, Barak's objective purpose of contracts reflects the fundamental values of the system. In his own words:

The legal system's fundamental values permeate private law through the ordinary doctrines of private law. These values include interpretive rules. The

objective purpose of a contract is therefore to promote justice and the public interest. Because human rights are central among fundamental values, the objective purpose of a contract is also to promote equality, free speech, and freedom of occupation.⁵²

The idea that the judge should take into account the fundamental legally protected values when reading the contract seems like a constant in modern civil law systems. First of all, it concerns the boundaries each legal system sets for the exercise of freedom of contract. Although this issue is regulated inconsistently throughout Europe, the limits to freedom of contract exist in every single jurisdiction. Some limits to private autonomy of contracting parties are embedded in all legal systems.⁵³ For instance, an agreement to carry out an illegal act cannot be enforced by law, and the court may declare null and void such contract by virtue of their office. Secondly, statutory rules on interpretation of contracts often instruct the judge to take certain general legal principles into account, when trying to ascertain the joint intent of the parties.

For instance, in French law, agreements impose obligations not only in regard to their express wording, but also in regard to the consequences which equitable principles, usage, or law may attach to the obligation, compliant with its nature (Art. 1135 CC). In German law, contracts are to be interpreted in accordance with the requirements of good faith and in line with commercial usages (§157 BGB). The provisions of Art. 99 SCO instruct the Serbian judge to isolate the joint intent of the parties from the wording of their contract by reading the contractual statements in the manner which best serves the codified fundamental legal principles.

CONCLUDING REMARKS

The main objective of this paper is to examine the notions of subjective and objective purposes of contract in Aharon Barak's theory of purposive interpretation. First, the observations here on Barak's subjective purpose of contracts derive from the idea that the inner reality of another person's will, i.e. their past or present intentions, cannot be learned as a physical reality, but only as a socially constructed fact. Every attempt in determining the actual past intentions of another for the purposes of establishing legal consequences of the external manifestations of these intentions, will be inherently loaded with normative considerations. Despite the subjective rhetoric, the judge may never know the other person's state of mind, past or present, as a matter of psycho-biological fact. He or she may only be

⁵² Aharon Barak, *supra* note 1, 334.

⁵³ For one view on different modes of approaching the question of the limits of freedom of contract, see: Maria Rosaria Marella, "The Old and the New Limits to Freedom of Contract in Europe," *European Review of Contract Law* 2 (2006).

sufficiently convinced that the person in question had certain intention, judging by their behaviour in the given situation. Therefore, it seems that Barak's critique of intentionalism falls on a part of his own theory of purposive interpretation – the part that requires the judge to ascertain the subjective purpose of the contract in question as the actual, psycho-biological joint intent of the parties at the time of contract formation.

Second, the paper points out the proximity, or even merging, of Barak's subjective purpose of contract with his objective purposes of contract at the lower levels of abstraction. It seems that no clear distinction can be made between the subjective purpose of contract, and those objective purposes of contract which should reflect the hypothetical joint intent of the parties. Moreover, it seems that all of Barak's objective purposes of contract, apart from the one at the highest level of abstraction, represent more or less objective, abstract, depersonalized criteria for establishing the past intentions of others. In other words, they do not differ from what the judges normally do in order to establish the subjective purpose of contract, that is, the joint intent of the parties at the time of their entering into the contract in question.

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