



Fraud in the Comperative Perspective of Civil and Criminal Law with Special Focus in Kosovo

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Abstract: *The object of this study is fraud in the comparative aspect of civil and criminal law based on the relevant legislation and Kosovo legal theory. The results of this study prove that fraud in the Kosovo courts practice is relatively common, and that there are many irregularities in its handling. Irregularities mostly refer to the lack of clarity matter of differences that this harmful phenomenon contains in itself when handled in the civil legal aspect from the treatment given to it in the criminal legal aspect. These uncertainties have influenced that in each concrete case the phenomenon of fraud in Kosovo is first addressed in the criminal aspect and then eventually in the civil aspect. The study highlights the similarities, differences and existing ambiguities of fraud when handled in the civil legal aspect from the treatment given to it in the criminal legal context, as well as it addresses the appropriate ways of clarifying such situation. The contribution of this study is theoretical and practical, bearing in mind the fact that it deals with an almost unaddressed issue in Kosovo and perhaps in many other countries.*

Keywords: *fraud, relationship, obligations, civil, criminal.*

I. INTRODUCTION

Fraud is a phenomenon that marks a relatively high presence in the realities of Kosovars practical life. This fact has influenced the state courts in their practical work to constantly face this harmful phenomenon. According to the Kosovo legislation in force, fraud is considered to be an illegal phenomenon, with material consequences for persons, groups of

individuals (organized in the enterprise) and for the entire society. Property fraud is defined by the Law on Obligational Relationships (hereinafter LOR) as a defect of will when it comes to concluding contracts, whereas by the Criminal Code (hereinafter CC) is determined as a special criminal offense.

The existing legal regulation it results not to have clearly made the distinction

between fraud in cases where it should have been dealt with in civil proceedings, and property fraud in cases when it should have been dealt with in criminal proceedings. Consequently, this phenomenon in any case is initially handled in criminal proceedings, and then the paths are opened to be treated in civil proceedings (in the context of contract annulment and compensation of damages), which undoubtedly affects the increase in workload of courts without having such a need (the same case is handled in two proceedings - criminal and civil) and in the procrastination of court proceedings for years, until the injured party realizes his rights.

Bearing in mind the fact that there are ambiguities in theory and practice regarding these issues, in order to clarify this and the final findings of this matter, this scientific paper is organized in such a way that it analyzes every important element of property fraud. Observed in this regard, initially the fraud has been handled in the civil legal point of view, and then it has been handled in the criminal legal point of view and finally have been treated common and distinctive points related to the fraud, but elaborated in both aspects of treatment (civil and criminal law).

II. LEGAL MATERIALS AN METHOD

This research paper adopted normative judicial method which examine and analysis legal sources regarding frauds in civil and criminal law. This paper is also use descriptive and comparative method to get better understanding regarding the purpose of the research. Relevant journal and books are also used to support and strengthen this paper academic argument.

III. RESULT AND DISCUSSION

Comparative Background

In civil and criminal legal theory and in Kosovo case law, but perhaps in most countries of the world, there are many uncertainties related to the definition of boundary between civil legal liability and criminal legal liability concerning the phenomenon of fraud which results in causing material damage. In order to be able to clarify this very much-needed limit for the needs of case law, it is necessary to elaborate them in separate perspectives (civil and criminal) the most basic matters characterizing this harmful phenomenon, and then to point out their common and distinctive points. Such matters (specified below) shall first be handled in the manner how they are addressed by legislation and civil legal theory, and then the same shall be treated from the criminal legislation and criminal legal theory point of view, and finally shall be emphasized the points that unite and those that distinguish those issues within these two basic areas of law.

Fraud from the Civil Legal Point of View

In Kosovo, from the civil legal point of view, fraud is handled by the LOR and by the theory of legal relations of obligations, specifically in the field of contracts, where its elaboration shall be concentrated. In the context of this point of view shall be elaborated the following issues such as: notion, constitutive elements, subject, liability and legal remedies concerning the fraud.

a. Notion of fraud

In Kosovo, fraud in the civil legal aspect is handled by the LOR. In this Law, fraud is considered as a defect of the will that is expressed in the relations of obligations (specifically in contracts). According to the LOR provisions fraud is considered to exist if one party causes an error to the other party,

or keeps in error the other party in order to incite to conclude the contract, the other party may request for the contract to be declared invalid even in cases when the error is not substantial.¹

From a civil legal point of view, fraud in Kosovo is handled as a harmful phenomenon which aims to make the co-contractor have a false picture concerning the situation, in order to make him/her to render a decision to enter into a concrete contract, which is harmful to him/her.²

On the other hand, in the civil legal science of Kosovo, in addition to a brief overview made in a single commentary of the LOR,³ there is not a single sentence of scientific character regarding fraud. This finding also refers to the published textbooks of the law of obligations.⁴ However, in Albanian literature, fraud has nevertheless been addressed in several civil law textbooks published in Albania, including the recently published commentaries of Civil Code of this country. Based on the Albanian civil legal science, fraud is treated as a lie used by one party⁵ in order to mislead the other party,⁶

which if it knew about this fact (the lie) would not have entered into such a contract.⁷ Consequently, fraud exists even in cases when committed by the third person, but on the condition that the contracting party has benefited from such fraud and has known or had the possibility to know about the fraud at the time of entering into the contract.⁸

From the American point of view, the biggest challenge made to contracts comes from theories of honesty, unconsciousness and coercion. Honesty is intended to avoid deception and cunning behavior (infidelity) when entering into a contractual agreement. These theories empower courts to review contractual provisions or to annul them altogether in defense of justice.⁹ Generally speaking, English-speaking authors consider that fraud may result from a false statement made by the party knowingly.¹⁰

Bearing in mind what was above-mentioned it can be concluded that by fraud in contractual relations should be implied the defect of will which consists in the fact that one contracting party with its fraudulent¹¹ and conscious actions, which can be active

¹ Law on Obligational Relationships, Article 49, par. 1. Law no. 04 / L-077, Official Gazette of the Republic of Kosovo no. 16, dated 19 June, 2012. Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2828> . Even in the draft Civil Code of Kosovo (which is still under discussion) regarding the aspects of obligations, fraud takes place only in Book II. It is addressed in Article 178 and does not contain any changes from the solutions currently available to the LOR. Available at: <http://konsultimet.rks-gov.net/vieëConsult.php?ConsultationID=40578> .

² Dauti Nerxhivane, Berisha Ruzhdi, *Vokshi Adem, Aliu Avdulla*, (Komentar, Ligji për marrëdhëniet e detyrimeve, Libri I, Prishtinë, 2013), p. 62.

³ Ibid. p. 62.

⁴ For this see two single textbooks of the law of obligations written by Kosovo authors: Alishani Alajdin, *E drejta e detyrimeve*, (Prishtinë, 2002); and Dauti Nerxhivane, *E drejta e detyrimeve*, (Pjesa e përgjithshme, Prishtinë, 2016).

⁵ By the party should be implied, in addition to the contracting parties, also the person in whose

interest a unilateral legal action is performed, for example the testamentary heir.

⁶ In fact, fraud is the result of a premeditated action, where one contracting party intentionally pushes the other party into error.

⁷ Below. When discussing about classifications and types of fraud, it shall be emphasized the fact that fraud according to the latest approach can be reciprocal (bilateral), but for many reasons in the comprehensive elaborations of this topic shall be addressed this phenomenon only in the context of committing by one of the contracting parties and by a third person.

⁸ Compare: Kondili Valentina, *E drejta civile I*, (Pjesa e përgjithshme, Tiranë, 2008), p. 254.

⁹ Frid Charles, *Kontrata si Premtim – Një teori mbi detyrimin kontraktor*, (Tiranë, 2013), p. 99.

¹⁰ Salmond John, Williams James, *Principles of the Law of Contracts*, (Oxford, 1945), p. 244.

¹¹ The deceiver intends to achieve his goal by instilling a false belief in his co-contractor and thus it can be said that he causes harm by influencing the other's mind, just as the attacker does by laying his hand on his victim. The liar secures this

(presentation or coherent repetition of false facts) and passive (inaction by silencing the facts), or fraudulent actions of a third person of which he is aware of or should have been aware of at the time of entering into the contract, causes error to the other contracting party, respectively does not undertake anything to eliminate the error (keeps him/her in error), under the effects of which it suffers any harm.¹²

b. Constitutive elements of fraud

Despite the differences that exist between theorists, I consider that in any case as elements of fraud in the contracts of obligations should be considered the following: a) the existence of a valid contract, b) fraudulent action, c) the purpose of fraud, d) causal link, and e) the existence of damage.¹³ Concerning these elements of fraud shall be discussed in the following treatments.

1) Existence of a valid contract:

Based on Article 49 of the LOR, contract can be annulled due to fraud. As it is known, a contract which has already been concluded by the contracting parties can be annulled, which means that cannot be annulled something that is non-existent. This implies that in order for a contract to be annulled, it is required to be a valid contract, respectively to be concluded in accordance with the conditions specified by law. Therefore, contract is valid if: its subject matter is possible, determinable, permissible (it is not

contrary to legal provisions, personal rights, the morality of society and the form of contract), and when the contracting parties have agreed with their free will regarding the essential elements of contract (LOR, Articles 2, 15, 18, 34). In fact, contract is valid if it meets the “conditions of validity”. On the contrary, if contract is bound by not respecting these conditions it shall be considered null. Based on this, it is easily concluded that if contract is invalid it is considered that it does not exist as a valid contract.

2) Fraudulent action: This key element of fraud is considered to be fulfilled in any case when the fraudster at the time of entering into the contract is served with fraudulent actions, such that bring or keep the deceived (the other party) in error. Fraud, as abovementioned is expressed through active deceptive actions, but it can also be expressed through passive deceptive actions.¹⁴ Active deceptive actions are manifested through the false presentation of facts, respectively through the assertion of a fact which does not exist, or through the presentation of facts different from the format in which they exist. Meanwhile, passive deceptive actions are manifested through concealment of facts, or silence of facts when there was an obligation of the deceiver to show them.¹⁵ A deceptive action is considered if the person makes a false statement knowing it is incorrect, or does not take care about the truth whether it

superiority by arousing and exploiting the faith of the other, as lying takes place only by nurturing the expectations that arouse faith. This evil is reinforced, especially when the lie is used in the manner of a promise. For this, in more detail, see: Fried, op., cit., p. 104 - 105.

¹² Hajdari Egzonis, *Fraud - A comparative approach between the law of obligation in Turkey and Kosovo*, PhD thesis defended at Marmara University of Istanbul (Turkey) in May 2019, p. 108.

¹³ The authors who deal with the phenomenon of fraud define these elements in different ways, such

as the use of a false statement, being aware of the existence of a false statement by the fraudulent party, the purpose of the fraud, the basis of the false statement in the decision-making for concluding the contract, etc.

¹⁴ Eren Fikret, *Borçlar Hukuku Genel Hükümler*, Cilt 1, Ankara, 1991, fq. 480; Bigili Fati, *Demirkapi Ertan, Borçlar Hukuku*, Dora, 2016, s.66; Kiliçoğlu M. Ahmet, *Borçlar Hukuku*, 13. Bası, Ankara, 2010, p. 167.

¹⁵ Salihu Ismet, *Zhitija Hilmi, Hasani Fejzullah, Kodi penal i Republikës së Kosovës, Komentar*, Prishtinë, 2014, p. 937.

is correct or not.¹⁶ Such should be considered the fraudulent action, for example, in the case when the seller sells to the inexperienced buyer the crashed car, whose scratches have been masked, while he declares to him that the same had never suffered from any accident. By viewing this approach, it can be freely said that there is no fraud in cases where the seller sells a car to the buyer without declaring anything to him about the accident, while the buyer is a car mechanic for many years and who had noticed several damages under the car which can only be caused by any accident. “Hence, even though the seller knew that through his passive action he was trying to deceive the buyer, in such a case there is no deception as it can be assumed that such buyer could easily have known that the car was crashed, as it contained damages which could only be caused by car accidents.¹⁷” In this case it can be concluded that the buyer knew about the car accident, therefore the contract cannot be annulled due to the fraud.¹⁸ Consequently, even “the false statement given as a result of negligence does not constitute fraud.¹⁹

3) The purpose of fraud: This element of fraud is considered to exist when the fraudster intentionally and willingly uses the false statement in order to mislead the deceived (his co-contractor) concerning one or more elements of contract. If the intent for

committing fraud is lacking, then we are not dealing with fraud. The intention to deceive is defined as an illegal act of the deceiver,²⁰ which can be direct or even indirect “*dolus eventualis*”.²¹ This is due to the fact that both the direct and the indirect purpose concretize the fact of fraud existence. Therefore, for the existence of fraud, the party which commits the fraud must act in order to deceive the other party. In this regard, it can be concluded that fraud is considered to be when one of the contracting parties intentionally misleads the other party. This implies that the false statement made as a result of negligence would not be considered fraudulent.²² Through the purpose of fraud, the fraudster intends to achieve two following effects: the desire: a) the contracting party to err, and b) the deceived party to enter into the contract.²³ Nevertheless, in several cases the existence of intent to defraud is justified only when trust is reached with the other contracting party.²⁴ This implies that, in various cases for the existence of fraud the deceived party must have trusted the fraudulent party that it is telling the truth.²⁵

4) Causal link: In addition to the abovementioned elements, for the existence of fraud, the element of causal link must be completed also. Although fraudulent action is a necessary condition for the existence of fraud when it comes to entering into a

¹⁶ Cheshire Geoffrey, Cheshire Fifoot, Cases on the Law of Contract, Butterworth, 1946, p. 156; Salamond, Williams, op., cit., p. 244 – 245.

¹⁷ Compare: Fraud. Available at: <https://contracts.uslegal.com/fraud/>

¹⁸ Karahasan Mustafa Resit, Türk Borçlar Hukuku, Genel Hükümler, 1 Cilt, Istanbul, 2003, p.110.

¹⁹ Guenter Treitel, An Outline of the Law of Contract, 5th edition, London 1995, p. 145.

²⁰ Kurşat Zekeriya, Borçlar Hukuku Alamanda Hile Kavramı, Istanbul, 2003, p. 25.

²¹ Antalya Gokhan, Borçlar Hukuku - Genel Hükümler, Istanbul, 2016, p. 239.

²² Turgut Önen, Borçlar Hukuku Genel Hükümler, Ankara, 1999, fq. 62; Esener Turhan, Gúdonđu Fatih, Borçlar Hukuku I – Sözlümlerinin kuruluđu

ve geđerliliđi, İstanbul, 2017, fq. 156; Akman Semat, Burcuođlu Halúk, Altop, Tekinay Borçlar Hukuku – Genel Hükümler, 7. Baskı, İstanbul, 1993, p. 447.

²³ Kurşat, op., cit., p. 27.

²⁴ Kayar İsmail, Borçlar Hukuku, İstanbul, 7 Baskı, 2008, p. 54.

²⁵ Hajdari Egzonis, Erlüle Fulya, Elements, types and consequences of fraud according to obligation law – a comparative approach between legislation in Turkey and Kosovo, International Comparative Jurisprudence 2018 Volume 4 Issue 2, fq. 167. Available at: <https://www3.mruni.eu/ojs/international-comparative-jurisprudence/article/view/4926/4474>.

contract “*condictio sine qua non*”, the presence of fraud is nevertheless determined by the existence of a causal link between the act (or omission) and the concluded contract.²⁶ Hence, the fraudulent action to the contracting party must have a decisive effect on the outcome of the concluded contract. “This implies that if there was no fraud the deceived party would not have entered into the contract.”²⁷ The causal link exists in cases when the deceived party would not conclude the contract at all “*dolus causam dans*” or would conclude it with better conditions for itself “*dolus incidens*”. All this dictates the expression of the element “*causal link*”.²⁸ Therefore, it can be concluded that if there is no causal link between the fraudulent act and the signed contract then fraud cannot be expressed in any way, and consequently the fraud-based contract cannot be annulled. “It is also worth emphasizing the fact that fraudulent action and the conclusion of contract must be manifested (occur) in parallel. This is due to the fact that there can be no fraud after the conclusion of contract, but in order for the fraud to exist, it is required to be committed before or during the conclusion of contract. This means that, after the conclusion of contract, the party cannot give up the fraud that it has committed, because the fraud it already exists.”²⁹

5) Existence of damage: This element of fraud consists in the damage suffered by one party due to the fraud committed by the other contracting party or by the third person. Of course, here it is required to be a matter of considerable damage. Therefore, it is considered that negligible damages should not be a basis for establishing the fact of

fraud existence within a possible court dispute.

c. The subject of committing fraud

The number of subjects that can be involved in committing fraud in the law of obligations it results to be relatively large. The subject of fraud in contractual relations in accordance with paragraph 1 of Article 49 of the LOR, in the first place, may be the contracting party. According to the legal solution defined in this paragraph, the contract is considered to be concluded by fraud when one of the contracting parties misleads (frauds), or keeps in error the other party in order to enter into a contract that is harmful to it.³⁰ “The capacity of contracting party may possess any person who has no legal obstacles to enter into a contractual relationship with other persons. Therefore, since the contracting parties enter into contracts to fulfill their interests (or those of their relatives), it is even possible for them to link these substantial interests by serving with the phenomenon of fraud. However, since, in the interest of the contracting parties, their representatives can also enter into a contract, bodies (responsible authority) of legal persons and assistants (deputies) of the parties, then in the capacity of fraudster (with or without the knowledge of contracting party) often appear even the abovementioned subjects.”³¹

In addition to the contracting party and their representatives, fraud in concluding contracts may also result from the third parties, which in the case of committing fraud may be guided by personal interests, others’ interests, but also on the basis of combined

²⁶ Antalya, op., cit., p. 239.

²⁷ Detyrimet dhe kontratat në përgjithësi, Luarasi, Tirana, 2009, p. 144; Biligili Fatih, Demirkapi Ertan, Borçlar Hukuku, Dora, 2016, p. 66.

²⁸ Tuhr V. Andres, Borçlar Hukukunun Umumi Kısmı, 1983, Cilt 1-2, p. 296.

²⁹ Kurşat, op., cit., p. 34.

³⁰ See: LOR, article 49 paragraph 1.

³¹ Kursat, op., cit., p. 37.

interests.³² The fact that fraud can also be committed by third parties is a well-known matter for civil law science and judicial practice, as well as it constitutes an issue that is addressed also in legal terms. This issue is addressed in the paragraph 3 of Article 49 of the LOR. However, the issue of fraud existence committed by a third party is related to the fact of being aware or being able to know from the contracting party that is favored by the fraud for the committed fraud at the time of entering into a contract.³³ This implies that if the contracting party knew or should have known about the fraud committed by a third party, then this fact determines the existence of fraud committed by the contracting party through silence.³⁴ In this case, fraud committed by a third person, the contracting party silence it in order to deceive the other party with whom it wants to enter into a contract. Consequently, the circle of persons who might have the capacity of a third person, respectively the possibility to commit fraud related to contracts can be very wide and in the theory of the law of obligations is difficult to list their number. This capacity and possibility may have the descendants and ancestors of the contracting party, any of his friends, etc.

d. Liability for committing fraud

Regarding the commission of fraud, the LOR has foreseen civil legal liability. Such liability consists in the obligation to

compensate the caused damage (paragraph 2 of Article 49). “This liability is based on the principal rule that in contractual relations all rights and obligations that arise belong to the contracting parties.”³⁵ In fact, the liability to compensate damage falls on the fraudulent party. But in order for this obligation to exist, it is required for the deceived party to have requested the realization of such right. As a rule, on the side of the deceived party lies the right to submit a lawsuit for annulment of contract concluded under the effects of fraud, and through it to seek compensation for the damage suffered. Although, it is not ruled out the possibility that for the realization of right to compensate the caused damage to be done with a special lawsuit. Such situations usually come to expression when criminal proceedings have already been conducted relating to fraud, and the court which has resolved the criminal case, has authorized the deceived party for the possibility to seek compensation for damages in civil proceedings.

On the other hand, in contracts concluded through representation, when they encounter the phenomenon of fraud, then it is always expectable that the consequences of this phenomenon affect the representatives as well, hence to include them also in obligation to compensate the damage.³⁶ As a rule, the representative mainly deals with the consequences of fraud in cases where he represents the party with absolute incapacity

³² Combined interests exist, for example, in cases where from the sale of a certain apartment in relation to which fraud has occurred (it is hidden the fact that the building where the apartment is located shall be demolished) has benefited in addition to the seller also a third person which may be the sales agent who knew about this fact but did not tell the buyer and in return received a certain reward from the seller.

³³ Akyol Şener, *Tam Üçüncü Şahıs Yararına Sözleşme*, İstanbul, 2008, fq. 133; Nomer N. Halûk, *Borçlar Hukuku – Genel Hükümler*, 13

Bası, İstanbul, 2015, fq. 71; Akıntürk Turgut, *Borçlar Hukuku, Hükümler Genel, Borç Özel İlişkileri*, 21 bası, İstanbul, 2013, p. 50.

³⁴ Antalya, op., cit., fq. 238; Eren, op., cit., p. 483.

³⁵ Compare: Tekinay Selhâtin, *Medeni Hukunun Genel Esasları ve Gerçek Kişiler Hukuku*, 6 Bası, İstanbul, 1992, p. 242 - 246; Aydın Zevkliler, *Giriş ve Başlangıç Hükümleri - Kişiler Hukuku - Aile Hukuku*, Ankara, 1992, p. 249 - 253.

³⁶ Akyol Şener, *Türk Medeni Hukukunda Temsil*, İstanbul, 2009, p. 220.

for action. This is because he has absolute authorizations to exercise all legal affairs, including property contracts on behalf of the party representing it.³⁷

Finally, it should be emphasized the fact that fraud committed by a third party, the deceived party in accordance with the paragraph 3 of Article 49 of the LOR may seek compensation from such person, and he may be obliged to compensate the damage caused.³⁸

e. Legal instruments of fraud

In order to ensure the protection of legal rights of persons who have entered into contracts under the effects of fraud with the LOR (Articles 97, 99 and 100), the relevant legal instruments against fraud have been established. These instruments are in function of protecting their violated rights, which are related to the right of annulment of contract,³⁹ return of items and the right for compensation of damage.⁴⁰

The right to annul the contract belongs to the deceived person. It represents a unilateral legal action,⁴¹ because for the annulment of contract by the deceived party, it is not required any approval from the other party (fraudulent party). The right to annul the contract cannot be used by the party that has acted in misfaith, as well as after its previous use.⁴² According to the LOR and

Kosovo civil legal theory, the annulment of contract can be done only through a lawsuit for its annulment. This instrument can be used by the deceived party within one (1) year of learning about the fraud. If the party does not submit a lawsuit before the court in order to annul such contract, it loses the right to use it, whereas in case of submitting a lawsuit within the legal deadline, the court is obliged to render a decision on its approval or rejection.⁴³ In this context, it is the court decision that determines whether the contract shall be declared invalid or not. The court decision has a constitutive character.⁴⁴ Since, the annulment of contract may be complete and partial, it is evident that also the contract concluded by fraud may be completely or partially appealed.⁴⁵

When a contract concluded under the effects of fraud is annulled the parties may request for the return of delivered items “*rei vindicatio*”.⁴⁶ To this situation, as a rule, comes only after the contract has been declared invalid due to the phenomenon of fraud. The right to request for the return of items belongs to both parties. The return of items that have been delivered and which are the subject of contract, can be requested through the lawsuit “*rei vindicatio*”, but if this is impossible then the return of items may be requested through the lawsuit for unjust enrichment.⁴⁷

³⁷ Serozan Rona, *Medeni Hukuk – Genel Bölüm*, 7 Bası, İstanbul, 2017, p. 434.

³⁸ Zevkiler Aydın, Ertaş Şeref, Havutucu Ayşe, Aydoğdu Murat, Cumalioğlu Emre, *Borçlar Hukuku - Genel Hükümler ve Özel Borç İlişkileri*, 2. Baskı, İzmir, 2013, p.183.

³⁹ The consequences of null and void contracts are the same in terms of the return of what has been fulfilled in order to restore the previous situation and compensate the damage. Also, there is no difference between null and void contracts even in terms of the principle of partial nullity, namely voidability, although there are no express rules for partial voidability, but I consider that this issue should be addressed by analogy.

⁴⁰ Compare: Dauti, Berisha, Vokshi, Aliu, op., cit., p. 114.

⁴¹ Demircan Nezir, *Ansiklopedik Türkçe İngilizce Arapça Sözlük*, İstanbul, p. 95.

⁴² Eren, op. cit. (2015), p. 412.

⁴³ Dauti, Berisha, Vokshi, Aliu, op., cit., p. 114.

⁴⁴ If the court decides to annul, the contract is considered invalid from the beginning “*ex tunc*” and in principle has the same consequences as the null contract.

⁴⁵ Dauti, Berisha, Vokshi, Aliu, op., cit., p. 114.

⁴⁶ “*Rei vindicatio*” is a legal action by which the plaintiff demands that the defendant returns a thing that belongs to the plaintiff.

⁴⁷ Yildirim, op., cit., (2017), p. 150.

In the contract concluded with fraud, the deceived party, in addition to the above-mentioned rights, also enjoys the right for compensation of damage. Although, this right is proclaimed by the LOR, however it does not clarify whether the deceived party has the right to seek for compensation of damage when he/she does not exercise the right to annul the contract. Pursuant to Article 100 of the LOR, the party who is guilty of concluding an invalid contract (including contracts concluded by fraud) is liable for the damage caused to the other contracting party, if it did not know or could not have known about causes of annulment.⁴⁸ Finally, it should be emphasized the fact that the right to seek the compensation of damage does not belong only to the deceived party, but this right is also legally recognized to the other contracting party (if it has suffered damage). Hence, no contracting party is excluded from the right to compensation of damage, it suffices to argue the fact of damage existence.

FRAUD FROM THE CRIMINAL LAW POINT OF VIEW

In Kosovo, from a criminal legal point of view, fraud is treated by the Criminal Code and by the theory of criminal law. Even in the context of this point of view, shall be elaborated the following matters: notion, constitutive elements, subject, liability and sanctions threatened for the commission of fraud.

a. The notion of fraud

According to the CC, fraud is considered a criminal offense. Under this Code,⁴⁹ this criminal offense exists when a person through the false presentation of facts, or by hiding facts, or by using another fraudulent way, and with the purpose of illegally gaining material benefit for himself or another person, or in order to cause material damage to another person, deceives or keeps in error the certain person and thereby incites that person to perform or not to perform an action, which results in material damage to his property or the property of another person, or which results in unlawful property gain to oneself or to another person. For the commission of fraud, perpetrator can be punished by fine and imprisoned from three (3) months up to ten (10) years.

Even in the Kosovo criminal legal context, the phenomenon of fraud is handled in a very limited way, and only in the context of a text published by criminal law, from a single author and in the only commentary made to CC. Therefore, concerning this phenomenon so far there is a lack of advanced studies. According to this poor literature, “fraud is a criminal offense through which the perpetrator brings unlawful material benefit to himself or to another person.⁵⁰ Being as such fraud is directed against the property in general,⁵¹ but it does not present an attack on psychic and intellectual ability as a special personal value and does not even attack security in legal communication.⁵² In fact, according to this literature, by fraud is implied the act of taking through using lies or abuse of trust the

⁴⁸ Dauti, Berisha, Vokshi, Aliu, op., cit., p. 115.

⁴⁹ Criminal Code of the Republic of Kosovo, Article 323, Code no. 06 / L-074, Official Gazette of the Republic of Kosovo, no. 2, 14 January 2019. Available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18413> .

⁵⁰ Salihu Ismet, E drejta penale, Pjesa e posaçme, Prishtinë, 2009, p. 354.

⁵¹ Salihu, Zhitija, Hasani, op., cit., p. 937.

⁵² Kambovski Vlado, Kazneno pravo, Poseben del, Skopje, 1997, p. 439.

property or property rights of a natural person, legal person or state, committed intentionally and for the purpose of material benefit for themselves or for others.⁵³

From what was mentioned above, it can be concluded that fraud in the criminal law perspective implies a criminal offense directed against property which consists in undertaking active fraudulent actions (presentation of false facts, for example, the perpetrator claims to have a house, possesses a sum of money etc.) and passive (concealment of facts, for example, the perpetrator knows that he has 5,000 euros in his account, but the amount of 50,000 euros were erroneously deposited to his bank account, and when the bank official asks him if he wants to withdraw all these 50,000 euros, he is accorded to this by using the error of bank officials he misappropriates 45,000 euros)⁵⁴ or keeping in error the deceived person, by inciting him to commit or not to commit any action to the detriment of his property, in order to realize the illegal property benefit for himself or for another person.⁵⁵

b. Constitutive elements of fraud

Similar to the case of civil legal relations (specifically contracts), as well as in the criminal legal context, fraud includes in itself several elements. Even in the criminal legal point of view as elements of fraud are considered the following: a) the existence of fraudulent action, b) the purpose of fraud, c) the causal link, and d) the existence of damage.⁵⁶ In the following treatments, due to the similarity of such elements have with the

elements of fraud from the civil legal point of view, shall be discussed very briefly.

1) Fraudulent action: This element of fraud in criminal law is considered to exist when a person in a relationship with another person (natural, legal, state institution etc.) is served with fraudulent actions, such that keep in error such person. The deceptive action even in the criminal configuration is conducted through the false presentation of facts (presentation of facts that do not exist, or presentation of facts differently from those that exist) or their concealment (silence of facts, when there was an obligation to tell them). “For the existence of criminal offense of fraud, it is required that the conduct or misbehavior of a person has been done in order to realize the illegal property benefit for himself or for another, respectively in order for the perpetrator not to have legal basis for this. Hence, there shall be no criminal offense of fraud if the creditor has fraudulently pushed the debtor to repay the debt.”⁵⁷

2) The purpose of fraud: In order for the criminal offense of fraud to exist there must be intent to defraud the other person. This intention is manifested in the desire of perpetrator of fraud to use his false statement or concealment of facts in order to mislead or keep in error the other person in relation to any essential element of legal work of property nature, and with the purpose to realize the illegal material benefit for oneself or the other person. The purpose of fraud in both civil and criminal law contexts may come from direct or indirect actions.

3) Casual link: For the existence of criminal offense of fraud, an indispensable

⁵³ Elezi Ismet, *E drejta penale, Pjesa e posaçme I*, Tiranë, 1999, p. 139 - 140.

⁵⁴ Decision of the High Court of the Republic of Albania, no. 284/2000.

⁵⁵ Salihu, Zhitija, Hasani, op., cit., p. 937.

⁵⁶ The authors who deal with the phenomenon of fraud define these elements in different ways, such

as the use of a false statement, being aware of the existence of a false statement by the fraudulent party, the purpose of the fraud, the basis of the false statement in the decision-making for concluding the contract, etc.

⁵⁷ Salihu, Zhitija, Hasani, op., cit., p. 938.

condition is the existence of causal link between the act or omission of perpetrator and the conduct or keeping in error the other person (injured party) in relation to any essential element of legal work with property nature. Therefore, the competent court, before deciding on the allegations of committing the criminal offense of fraud, must verify whether the perpetrator by falsely presenting or concealing the facts has brought the other person into error or has kept him in error. This implies that, “only usage of fraud in which the passive person is in, it is not sufficient for the existence of criminal offense of fraud.”⁵⁸

4) Existence of damage. - As a necessary element for the existence of criminal offense of fraud is the existence of material damage. The caused damage must in any case be as a result of the act or omission of perpetrator (fraudster).⁵⁹ Due to this reason, it is considered that there is no fraud when the seller in his shop, in order to attract buyers, has posted the real price of the goods at the supposedly discounted price, which in fact does not constitute a discount. In such situation were not consumed the elements of criminal offense of fraud, as the buyers bought the goods at the existing price and in that case, they were not materially damaged, even though they bought the goods being deceived because they thought they had to do with alleged price reductions.⁶⁰ In such circumstances, it may be the existence of the criminal offense of deceiving buyers.

c. Subject of fraud

The person who commits criminal offense is called the subject of criminal

offense.⁶¹ Therefore, the subject of criminal offense of fraud is the person who with the intention to bring to himself or another person any material benefit deceives or misleads the other person or keeps him in error by presenting falsely or by hiding the facts and thereby induces such person to act or not to act to the detriment of his property or the property of another person.⁶²

According to several authors, as subject of criminal offense of fraud is considered, in addition to the person who by his action or omission has harmed the other person by deceiving, misleading or keeping him/her in error, also the person whose fraudulent acts or omissions have remained in the attempt. According to them, “the perpetrator of this criminal offence is considered the person who has commenced the action to mislead or keep in error the other person, however he has not taken the action which would damage the property of the other person, or has undertaken such action but for other reasons the property of that person has not been damaged.”⁶³ Nevertheless, based on the solutions addressed by the CC, the capacity of perpetrator of the criminal offense of fraud cannot be attributed to the person whose fraudulent actions have remained attempted. This is due to the fact that the Kosovo legislator in paragraph 2 of Article 28 of this Code has explicitly provided that an attempt to commit another criminal offense is punishable only if expressly provided by law, which in the case of fraud does not exist because this legislator with no legal provision specifies the fact of punishment for attempted fraud (Article 323).

⁵⁸ Ibid, p. 938.

⁵⁹ Buna Gjokë, Kodi penal (i pasuruar me praktikë gjyqësore), Tiranë, 2011, p. 66.

⁶⁰ The Supreme Court of the former Yugoslavia, AP., No. 54/06.

⁶¹ Salihu Ismet, E drejta penale, Pjesa e përgjithshme, Prishtinë, 2008, p. 189.

⁶² Kmbovski, op., cit., p. 387.

⁶³ Salihu, Zhitija, Hasani, op., cit., p. 939 – 940.

However, for a person to be considered perpetrator of a criminal offense of fraud, it is required for that person to be liable, to have the age for criminal liability and to have committed the criminal offence by intent.

d. Liability for committing fraud

A person is considered criminally liable if at the time of commission of criminal offense, he/she possessed certain psychic qualities, and if he had a certain psychic relationship to the offense he has committed. In other words, a person is considered criminally liable if he/she was responsible and guilty at the time of commission of criminal offense (he/she has committed the criminal offense intentionally or by negligence).⁶⁴ Therefore, a person is considered liable for committing the criminal offense of fraud if he/she at the time of committing this offense was responsible (possessed psycho-physical qualities that made him understand the offense and its consequences and had the age for criminal liability) and guilty, respectively of having committed the offense intentionally (to have been aware that the other person was fraudulently incited to act to the detriment of his or her property or that of another person and with the intent of illegally property gain). Therefore, the criminal offense of fraud does not exist, for example, if the buyer of goods on credit decides after a period of time of concluding contract not to repay the loan and thus realizes illegal property gain.

Consequently, concerning the criminal offense of fraud, the Kosovo legislator determines criminal liability for perpetrator only for cases related to causing consequence (damage), and not for the perpetrator whose

actions have remained tentative (without the existence of material damage), as exists, for example, in the case of some other criminal offenses (murder or any other offense). This legislator also specifies the criminal liability of perpetrator at the following levels: the so-called basic, qualified and privileged liability.

e. Punishment of fraud

In order to punish fraudulent actions and omissions, concrete criminal sanctions have been provided by the CC. "Criminal sanctions are measures through which society is protected from criminality, which are imposed by court against the perpetrator of criminal offense, according to the conditions stipulated by law."⁶⁵ Being as such, they represent a certain evil that threatens the perpetrator of criminal offense.⁶⁶ When it comes to the criminal offense of fraud, the Kosovo legislator threatens the perpetrator with a punishment by fine and imprisonment, as classical types of criminal sanctions that dominate when it comes to the possibility of imposing them against perpetrators of criminal offenses. Consequently, against the perpetrator of criminal offense of fraud CC, depending on the form of commission, provides for the possibility of imposing a punishment by fine and imprisonment from three (3) months up to ten (10) years. Hence, for the first (ordinary) form of committing this criminal offense, the legislator has provided a punishment by fine and imprisonment from three (3) months up to five (5) years. For the second (qualified) form when fraud is related to public funds or public institutions, banks, credit unions or other financial institutions

⁶⁴ Shala Afrim, Hyrje në të drejtën penale, Gjilan, 2013, p. 91.

⁶⁵ Stanković Nedeljko, Krivično pravo, Opšti dio, Brčko, 2016, p. 187.

⁶⁶ Novoselec Petar, Bojanić Igor, Krivično pravo, Opšti dio, Zagreb, 2013, p. 366.

and which may result in material damage to them, the legislator has provided a punishment by fine and imprisonment from one (1) year up to eight (8) years. For the third form (qualified) when the material benefit or damage caused by the fraud exceeds 50,000 euros, the legislator has provided a punishment by fine and imprisonment from three (3) years up to ten (10) years. Finally, for the fourth form (privileged - facilitated) when the fraud results in material benefit of less than 50 euros, the legislator has provided a punishment by fine or imprisonment of up to six (6) months.

In principle, bearing in mind the sentences by means of which the CC threatens the perpetrator of criminal offense of fraud are considered fair. This is due to the fact that such an approach is estimated to be “in line with the relatively high degree of social dangerousness that this criminal offense represents, related to the relatively high level of its presence in Kosovo society, but without excluding also aspects related to the personality characteristics of perpetrators of this criminal offense.”⁶⁷

Common and Distinctive Features of Fraud from the Law of Obligations and Criminal Law Point of View

In the civil and criminal law theory, as well as in Kosovo case law, but perhaps also in other countries, there are many uncertainties regarding the determination of boundary between the civil legal and criminal legal context of fraud phenomenon. In order to be able to clarify this boundary it is necessary to draw common and distinctive points, of all the above-mentioned issues, which are related to fraud and reflected

within these two substantial areas of justice. I consider that such an approach is important so that the Kosovo theory and case law (perhaps even beyond), when it comes to the phenomenon of fraud, to take them into account in the treatment of this phenomenon that shall be made in court proceedings in the future.

1. Regarding the notion of fraud as common points are considered the following:

- a) LOR and CC as well as the civil law and criminal law theory have defined the notion of fraud. Hence, the Kosovo legislator and Kosovo legal theory have not abstained from the tendency to give a definition concerning this harmful social phenomenon; and
- b) The definition of fraud in both these spectrums (civil and criminal) is made within the relevant laws (LOR and CC) and in a limited number of scientific literature. It has been handled in a single textbook of criminal law - the special part and in a commentary of CC and commentary of LOR, as well as in a published scientific paper of one of the authors of this work (Egzonis Hajdari) and within his doctoral dissertation. This implies that the civil and criminal legal literature is rather vague regarding the issue of defining the phenomenon of fraud, which greatly hinders the understanding of its essence, and especially its differentiation in terms of civil and criminal context.

⁶⁷ Compare: Hajdari Azem, *Kriminaliteti i organizuar*, Prishtinë, 2006, p. 278.

In meanwhile, as distinctive points regarding the notion of fraud are considered as following:

- a) In the civil legal terms, is given a very narrow notion of this phenomenon. The issue is different when it comes to the definition of fraud in criminal legal terms;
 - b) There are clear differences in the definitions of fraud between these two main aspects of these two areas of law. They mainly relate to the legal instruments, types of liability and consequences, which are part of the definition;⁶⁸ and
 - c) When it comes to the definition of fraud in the civil legal aspect, the basic postulates of civil law are expressed, and the opposite happens in the definition of fraud in criminal legal aspect. In essence, in the civil legal aspect, fraud is treated as a defect of will, while in the criminal legal aspect fraud is handled as a criminal offense.
2. Regarding the elements of fraud as common points are considered as following:
- a) In both perspectives (civil law and criminal law) the existence of fraud is determined by the existence of its constitutive elements. This means that the existence of this phenomenon requires the existence of concrete elements which shape this harmful social phenomenon; and
 - b) In the four basic elements of fraud (the existence of fraudulent act, the purpose of fraud, the causal link and the existence of damage) no

difference is outlined regardless of the point of view of its treatment (civil legal aspect or criminal legal aspect). Herein lies the essential problem, why legal theory and case law in Kosovo consider the phenomenon of fraud first of all a criminal legal problem, and afterwards a civil legal problem.⁶⁹

Meanwhile, as a distinguishing point regarding the elements of fraud is considered the fact that the first element from which fraud is established as a defect of will (civil legal context) does not constitute a constitutive element of fraud in the criminal legal context. This implies that, in accordance with what has been stated above, in the civil legal terms, in order for fraud to exist, a valid contract must exist. Meanwhile, for the existence of fraud in the criminal point of view, the existence of a valid contract is not necessary. This means that in the criminal terms fraud is considered to exist in any case when someone undertakes a fraudulent act (whatever it may be, with or without the existence of a valid contract) against another person with whom he is incited to commit or not to commit an act which results in material damage to his property or the property of another person or which results in unlawful material benefit, for himself or another person. This is an important difference which, in relation to other differences, it may help to clarify the phenomenon of fraud, and its specifics, in dealing with the civil and criminal legal aspects.

3. In relation to the subject of fraud as common points are considered the following:

⁶⁸ Compare: Stojanović Zoran, *Krivično pravo, Opšti deo*, Belgrade, 2019, p. 86.

⁶⁹ Compare: Babić Franjo, *Krivično pravo, Posebni dio*, Zagreb, 1979, p. 177.

- a) The subject of fraud in both civil and criminal legal context is considered the fraudulent person. Such may be any person who by his actions or omissions harms the other person by deceiving him/her, misleading or keeping him/her in error regarding an issue, and therefore brings to himself or to another person unlawful material benefit; and
- b) In civil and criminal relations there is a large (perhaps unlimited) number of persons who can receive the epithet of fraudulent subject. Such may be the contracting party, but also any other person (third party) which in the case of committing fraud can be guided by personal interests, others' interests, but also on the basis of combined interests.⁷⁰
- b) Fraud committed more than once (recurring fraud), which is expressed in cases when the person A cheats several times different persons or the same person, but at different time intervals.⁷¹

Meanwhile, as a distinguishing point in relation to the subject of fraud is considered the name given to the fraudulent person. Hence, the fraudulent person in the relationship of obligations (contractual) is called "fraudulent party" in such relationship, whereas in criminal law the fraudulent person is called perpetrator of criminal offense. These different names of the subject of fraud are a logical consequence of the basic concepts on which the law of obligations and criminal law are based and shaped.

In legal theory and contemporary court practice regarding the two spectrums (civil law and criminal law), related to the subject of fraud, is treated extensively also:

- a) The issue of fraud committed in collaboration (fraud committed from two or more persons by agreement), which is considered to exist when two persons (person A and B), in agreement between them, deceive the other person (person C) by taking a considerable sum of money with the promise that they would give him two rooms and a kitchen in the palace to be built, whereas in fact they took the money and did not build the palace at all; and
4. Common points regarding liability for committing fraud are considered as following:
- a) The LOR and CC contain concrete norms which determine the liability for the person who commits fraud. In both situations, the liability for fraud points out the interest that state has undertaken upon itself in order to combat this harmful phenomenon in property relations, respectively the interest to ensure progress of fulfillment of obligations of the parties in such relations; and
- b) In order to address the issue of liability for the fraudster, it is required an initiative to be

⁷⁰ Combined interests exist, for example, in cases where from the sale of a certain apartment in connection with which fraud has occurred (it is hidden the fact that the building where the apartment will be demolished) has benefited in addition to the seller a third person which may be

the sales agent who knew about this fact but did not tell the buyer and in return received a certain reward from the seller.

⁷¹ Elezi Ismet, Komentari i shitesave dhe ndryshimeve në Kodin penal me Ligjin nr. 8733 dated 24.01.2001, Tiranë, 2001, p. 74 - 75.

implemented concerning the application of relevant court procedure. This procedure is usually initiated by the deceived party or by other authority which is authorized by law (state prosecutor in the case of criminal liability).

Meanwhile, as distinctive points regarding the liability for committing fraud are considered as following:

- a) In the field of civil law, the liability is civil law, and it focuses on the annulment of legal work (contract) and compensation of damage, whereas in the field of criminal law is expressed criminal legal liability, liability with the consequence of imposing punishment by imprisonment and by fine; and
- b) In the criminal legal terms, depending on the value of damage caused by fraud and the scope of this phenomenon, the perpetrator of fraud may be subject to ordinary, qualified and privileged criminal liability,⁷² whereas these forms of liability, for their nature themselves, we do not encounter in civil legal relations. In the case of these relationships, as abovementioned, liability has reflections related to the breach of contract, compensation of damage and return of the item.

Finally, I consider that the main distinguishing point could be that the civil legal liability for committing fraud should be related to cases of transactions (purchase - sale, etc.) of items for which the fraudster has any legal supporting basis for instance has the item in his possession, or in cases of fraudulent transactions but related to the

exercise of authorizations that the law recognizes to the person who commits fraud. Meanwhile, criminal legal liability would be that related to cases of transactions of items for which the fraudster has no supporting basis, for example, sells the foreign apartment by presenting it as his own through forged documents, or in cases of transactions relating to the exercise of authorizations which the law does not recognize to the person committing fraud (exercises actions for which the competence belongs to someone else).

5. In relation to the punishment of property fraud, as common points are considered the following:
 - a) In both aspects (civil law and criminal law) by the respective laws LOR and CC are provided concrete rules that determine punishment for fraudulent actions or omissions; and
 - b) The punishment in both cases is addressed to the person who has committed the fraud. He faces the consequences of fraudulent actions or omissions, the consequence of which is causing damage to the deceived person and illegal property benefit for the fraudster or any other person.

Meanwhile, a distinguishing point regarding the punishment of fraud, as abovementioned, is considered the fact that in civil legal terms the punishment extends to the segment of contract annulment, compensation of damage and return of items. Meanwhile, in the criminal legal aspect, the fraudster is threatened with punishment by imprisonment and fine. Apparently, in civil legal terms, the penalty focuses either only on

⁷² Stanković Nedeljko, Krivično pravo, Posebni dio, Brčko, 2017, p. 212.

annulment of contract, annulment of contract and compensation of damage, or annulment of contract and return of item, and annulment of contract, return of item and compensation of damage. Whereas, in the criminal legal aspect, punishment includes the imposition of punishment by imprisonment and fine cumulatively, whose height varies depending on the circumstances that characterize the case.

The reflection related to the common points of fraud, observed from the civil and criminal legal point of view, points out the fact of the illegality of this phenomenon, the consequences that it causes and the commitment of legal community to combat it through numerous measures available to society. Meanwhile, the reflection concerning divergences regarding these two aspects of fraud highlights the need for legal specification of differences, such that would facilitate the courts' work in the context of when a fraud can only be dealt with in civil proceedings, and when it should attract attention and treatment even in criminal proceedings. Such difference does not exist in the Kosovo legislation, which has the effect of increasing the number of court cases that deal with this phenomenon, but also the procrastination of court proceedings dealing with fraud.

IV. CONCLUSION

Fraud is an illegal phenomenon, with mainly material consequences for individuals, groups of individuals (organized in the enterprise) and for the entire society. Fraud observed in the context of relevant civil and criminal legislation incorporates in itself common and distinctive elements. Such elements are encountered in all issues that in relation to this harmful phenomenon as topics have been addressed within this study (notion, elements, consequences, etc.).

In the theory of civil and criminal law and in the Kosovo case law, but perhaps also in other countries, there are many uncertainties regarding the definition of border between civil and criminal liability in relation to the phenomenon of fraud which results in causing material damage.

The uncertainty in definition of boundary between civil legal liability and criminal legal liability of fraud has influenced that in the judicial aspect this phenomenon, in almost every case, initially to be handled in criminal proceedings, and afterwards in civil proceedings. This fact, in addition to the burden on judiciary with cases, also affects the length of fraud-related court proceedings, and great delay in possible realization of the rights of injured parties.

In Kosovo, it is necessary that in the future the uncertainties existing regarding fraud to be clarified, initially through a transitional solution which can be made through a specific attitude of the Supreme Court of Kosovo (See: Article 26, paragraph 1, subparagraph 1.4 of the Law on Courts of Kosovo), whereas as a sustainable and long-term solution they should be addressed through the relevant norms and laws. In both cases it is required to define clear criteria through which this matter would be clarified, in terms of knowing exactly when the courts concerning fraud must conduct criminal proceedings, and when the solution is considered sufficient to address only in civil procedure (of course when this is requested by the parties). In this regard, I consider that a basic criterion could be one that links the civil liability of fraud to cases of transactions of items for which the fraudster has a supporting legal basis, for instance, is the owner of items, or in cases of transactions related to the exercise of authorizations that the law recognizes to fraudster. Whereas, criminal legal liability should be related to

cases of transactions of items for which the fraudster has no supporting basis, for example, he makes the sale of foreign dwellings for which he clearly knows that the documentation he possesses on ownership is forged, or in cases of transactions that are not related to the exercise of its legal responsibilities (exercises actions for which the competence belongs to another official).

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