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# ELEMENTS, TYPES AND CONSEQUENCES OF FRAUD ACCORDING TO OBLIGATION LAW – A COMPARATIVE APPROACH BETWEEN LEGISLATION IN TURKEY AND KOSOVO

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**Abstract.** One of the key elements of the Law on Obligations is the contract, which represents an obligational relationship between the contracting parties with a focus on promoting obligations. A contract ("contractus") is defined as the consent of will of two or more parties for the purpose of creating, amending or terminating an obligational relationship. In a significant number of cases, legal transactions are created with the presence of a defect of consent, including fraud, mistake and duress. Fraud is an unlawful act by which the contracting party has been induced to enter into a contract through a wilful mistake by the other party or a third person. According to this clause, the elements relating to fraud are: 1) a fraudulent act; 2) the purpose of fraud; and 3) a causal relationship. Fraud as a defect in consent in concluding contracts can appear in different forms. The main types of fraud are considered to be: 1) fraud by a fraudulent entity; 2) fraud by the manner of the fraudulent act; 3) fraud according to the importance of facts, etc. Furthermore, in this article we will discuss the consequences of fraud according to the Turkish Code of Obligations (TCO) and Law on Obligational Relationships of Kosovo (LORK). In accordance with the TCO and LORK, the deceived party has a right to avoid contact and to compensation for damages.

**Keywords:** fraud, contract, Kosovo, Turkey, compensation, annulment

## Introduction

Fraud, along with mistake and duress, is associated with a defect in consent, the appearance of which can cause the relative invalidity of the contracts. Fraud is a specific defect in consent whereby one of the contracting parties, through deceptive actions, causes mistakes to the other party, or doesn't undertake any action to avoid mistakes. The action must be intentional, but on the other hand it may also be active or passive. Likewise, fraud may result from the actions of a third person, but for which the contracting party is aware or should be aware at the time of conclusion of the contract.

The Ottoman Empire, which was one of the greatest, largest and longest-lasting empires of its time, had under its control most of the countries in Central Europe, including Turkey and Kosovo, as well as a significant influence on other countries' religions, culture and customs, and a huge effect on the implementation of this Empire legislation too. Now, the countries mentioned are two independent states that have created their own sets of legislation that

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have both similarities and differences between them. Comparing these two legislations, specifically elaborating on the phenomenon of fraud, highlights the advantages and disadvantages of each. We have also considered that an accurate reflection of the legal provisions affects in improving of the legal elaboration (treatment) of fraud, especially where there are flaws within the legislation of these two countries.

This paper is structured as follows: initially, the concept (meaning) of fraud will be described, followed by the elements involved in fraud, types of fraud and its consequences; all of these will then be analysed and compared based on Turkish legislation (TCO) and Kosovan legislation (LORK); and at the end of this paper, conclusions will be presented from all the research carried out about fraud as a harmful phenomenon for contractual relationships.

To achieve the relevant results, it was necessary to tackle this issue via an interdisciplinary approach, with a methodology involving analysis, synthesis, descriptive and comparative means. It is also worth noting that we faced the challenge of a lack of literature in Kosovo.

## 1. The meaning of fraud

To be able to give a clearer definition of fraud in the law of obligations, it is necessary for the concept of the word "fraud" to be examined from several perspectives. According to the Turkish dictionary, the word *"fraud"* means *"Goal with a view to gaining an unlawful or unfair advantage; artifice by which the right or interest of another is injured"* (Toparli, 2005, p. 891). Under another definition, the Turkish encyclopaedia says *"fraud is pointing to something when one knows it is false, in order to be accepted as true by someone else"* (Demircan, 1988, p. 412). Meanwhile, according to the Albanian linguistic dictionary, the word fraud means *"a ploy, a false vow or promise that someone uses to trick another"* (Academy of Sciences of Albania, 2002, p. 737). According to the Albanian encyclopaedia dictionary, *"fraud is the expression of something when one knows that it is false, in order to be accepted as true by the other"* (Academy of Sciences of Albania, 2008, p. 987). Another definition of fraud comes from Derry vs Peek, in which fraud is a false statement of *"knowing, without belief in its true or does not care if it's true or false"* (Charman, 2007, p. 175 / Salzedo and Brunner, 1999, p. 130).

In relation to fraud, Article 36, paragraph 1 of the TCO says the following (Antalya, 2016, p. 327):[3] *"When a party concludes a contract as a result of another party's fraud, he/she is not bound to that contract, even if his mistake is not fundamental."*

Meanwhile, Article 49, paragraph 1 of the LORK says on fraud: *"If one party causes the other party to be mistaken or keeps the other party mistaken for the purpose of leading the other to conclude a contract, the other party may request the annulment of the contract even when the mistake is not significant"* (Law No. 04/L-077, Article 49/I).

Defects in consent such as mistake, fraud and duress are well described in the TCO (Antalya, 2016, p. 236 / Yildirim, 2002, p. 8) and LORK. According to the Turkish scientific approach, fraud is considered to exist in cases in which *"a person to perform a legal work raises a deliberate conviction of fraud on it, in particular to secure the contract's conclusion or it continues to maintain and preserve the essence of a wrong conviction that currently*

[3] The term *"Hile"* was used in the Turkish Code of Obligation of 1926 (Article 28), while it was changed to *"Aldatma"* in the new Turkish Code of Obligations (Article 36).

*exists"* (Antalya, 2016, p. 327).[4] As we can see, in cases of fraud, a party is mistaken when declaring consent; and in cases in which a party concludes a contract as a result of fraud, even if the mistake is not essential, the deceived party is not bound to the respective contract (Akinturk, 2013, p. 50 / Karahasan, 2003, p. 330) – thus, for example, *instead of Picasso's original painting, a vendor deliberately gives a copy to the buyer*. Based on the definitions of Article 1/I of the TCO and Article 49/I of the LORK, the terms of fraud made by a contracting party are considered the following: (1) the party must have a motive for fraud; (2) this fraud must come from one contractual party; (3) fraud by a contracting party must be carried out intentionally; and (4) the fraud must determine the conclusion of the contract (Helvaci, 2017, pp. 71, 72). In fact, fraud is the legal action of a person by which they deliberately and knowingly employ deception by using unlawful means to ensure the conclusion of a contract (Dauti, Berisha, Vokshi and Aliu, 2013, p. 62).

In Kosovo's civil law books, apart from a brief reflection made in a single commentary on the Law on Obligational Relationships (Dauti, Berisha, Vokshi and Aliu, 2013, p. 62), there is no single phrase of scientific character written about fraud. Moreover, the authors of the texts for Kosovo's Law on Obligations have not treated the phenomenon of fraud or other defects in consent that may arise when concluding contracts at all[5]. Despite this being the case, the issue of defects in the signing of contracts, and thus fraud, still addresses some texts on civil law published in Albania, including commentaries on the Civil Code of the country published recently. In line with this, according to the scientific approach reflected in literature published in the Albanian language, fraud comprises the intention of giving the other party an unclear picture to help conclude a concrete contract that is detrimental to that party (Dauti, Berisha, Vokshi and Aliu, 2013, p. 62). In fact, according to Albanian civil law, fraud is a lie used by one party[6] to mislead another party[7] that in the absence of that state would not have entered into such a contract. In reflecting on relevant legal solutions, civil law books (extremely poor in this aspect) in Kosovo consider that there is fraud even in cases in which it is committed by a third party. In such cases, fraud is considered to exist only if the other contracting party benefits from such fraud and when he or she knew or ought to have known about the fraud at the time of concluding the contract (Kondili, 2008, p. 254).

From all the above, it can be concluded that fraud in contractual relations should be implied as a specific defect in consent that consists of fraudulent actions by one of the contracting parties that (Charles, 2013, pp. 104, 105), aware of the fact that they may be active (through presentation or coherent repetition of false facts) or passive (through omission by silence about facts), or they are aware or should be aware of fraudulent acts committed by a third party at the time the contract is concluded, causes mistake to the other contracting party, or does not undertake action to avoid the mistake (keeps him or her in error) – whereby it may incur damage.

[4] Fraud is considered to occur, for example, if a gold-plate copper bracelet is sold as if it was the quality of pure gold, by proclaiming it as a good price.
[5] In relation to this, see two texts of the law on obligations written by authors of Kosovo: Alishani, Alajdin, E drejta e detyrimeve, Prishtinë, 2002 dhe Dauti, Nerxhivane, E drejta e detyrimeve, Pjesa e përgjithshme, Prishtinë, 2016.
[6] Apart from contracting parties, there can also be another party involved, if they have an interest with regard to a unilateral legal transaction – for example, testamentary heirs.
[7] In fact, fraud is a result of a premeditated action, whereby one of the contracting parties induces the other party to conclude a contract though mistake.

## 2. Elements of fraud

For fraud to occur as a defect in consent when concluding contracts, it is necessary for it to contain certain basic elements. Authors refer to different types and numbers of fraud elements, and the following elements of fraud will be elaborated below: fraudulent conduct, the purpose of fraud and causal relationships.[8]

### 2.1. Fraudulent conduct

This is one of the key elements with regard to the existence of fraud in obligation contracts. It is considered to have been fulfilled in any case in which a contracting party entering into a contract (with content binding by the contract) is served with fraudulent acts, such as misleading or keeping the other contracting party misled. Fraud, as a rule, occurs through the actions of the fraud. Deceptive actions can be active (through acting), but also passive (through inaction, avoidance or keeping silent) (Eren, 1991, p. 480 / Bilgili and Demirkapi, 2016, p. 66 / Kilicoglu, 2010, p. 167). Fraudulent acts are generally carried out by one of the contracting parties, but they can also be conducted by third parties. Reasons for the annulment of a contract due to fraudulent acts committed by a third person are that the contracting party whom this person deceived in his favour he already knew or, according to the circumstances, has had reason to know about the fraud. In contrast, if the contracting party did not know or could not have known about fraud by a third party, the contract cannot be annulled for the reason of fraud (Gulerci and Kilinc, 2011, p. 116 / Ozkaya, 2014, p. 186). An action is considered fraud if someone makes a false statement knowing that it is inaccurate or does not care about whether it is correct or not (Cheshire and Fifoot, 1946, p. 156 / Salmond and Williams, 1945, pp. 244, 245). Such a situation is considered to occur, *for example, in a case where a seller sells an inexperienced buyer a car that has been involved in an accident, disguising the damage, while he or she declares to the other party that the vehicle was never part of any accident*. It can thus be freely stated that no fraud exists in cases in which a vendor sells a vehicle to a buyer without telling them anything about an accident, but the buyer was an auto mechanic for many years and has noticed some scratches in the car that he realised could only have been caused by an accident. *So even though the seller knew that through passive conduct, he or she attempted to deceive the buyer, in such a case there is no fraud, as it can be assumed that such a buyer could easily have known that the car was damaged due to an accident, since it contained scratches that could only be caused by accidents.* In this case, it can be deemed that if the buyer knew about the car accident, the contract cannot be considered to have been concluded as a result of fraudulent conduct – and as a result, the contract cannot be annulled due to fraud (Kilicoglu, 2010, p. 169 / Karahasan, 2003, p. 110). Therefore, in such a case even a *"false statement given as a result of negligence does not mean fraud"* (Treitel, 1995, p. 145). Conversely, in cases in which one contracting party unintentionally makes a deception, and learns about the real facts before acting, they will be guilty of fraud if they fail to take any action to correct the situation and thus allow it to act under the influence of fraud (Salmond and Williams, 1945, p. 247).

### 2.2. Purpose of fraud

This element of fraud in obligation contracts is considered to exist when one of the contracting parties intentionally and willingly uses a false statement to mislead the other party in relation to one or more elements of the contract. If there is a lack of intention or of any essential element, then we are not dealing with fraud. Intention to deceive is

[8] Some authors consider the phenomenon of fraud and its elements in various ways, such as false statements, fraudulent parties shall be known for false statements, the purpose of fraud, and fraud as a determinant in forming contracts.

defined as an act committed by the offender that may be direct and may also be indirect *"dolus eventualis"* (Antalya, 2016, p. 239). Based on such a division, we can say that both direct and indirect intentions define fraud.

To be defined as fraud, the party committing it should be acting in order to deceive the other party. It can thus be concluded that we consider a situation as fraud if one of the contracting parties deliberately misleads the other. This means that a false statement made as a result of negligence would not be considered fraud (Onen, 1999, p. 62 / Eren, 2013, p. 399 / Esener and Gudongu, 2017, p. 156 / Akman, Burcuoglu and Altop, 1993, p. 447). The purpose of fraud is to achieve two effects – namely, *"one of the contracting parties falls into error"* and *"the deceived party concludes the contract"* (Kursat, 2003, p. 27). From this, we can say that in such cases, one contracting party is aware and has the desire to put the other party in error, and as a result to push them into signing the contract. According to doctrine and practical cases, intent of the party is sufficient to consider the existence of fraud in contractual relations. Fraud can be committed in a number of ways, but to affect the voidable of a contract, it must be based on a purpose. Deceitful intent in a sales contract may therefore occur in the following way: *"The buyer contracts the purchase of the house from the seller being put under the deceit by the latter, who told him that the roof of the house was repaired and that it was fine, but the buyer noticed several renovations. This means that the seller had not deliberately informed the buyer that the roof still leaked and that the repair had not been able to stop the water leakage at the house, in order just to attract the buyer to sign the sales contract."* Meanwhile, water leaked into the house when there was heavy rain, so the buyer claimed that the seller was guilty of fraud. In this case, the seller's fraud action arises in his statement that *"the roof was repaired"*, which was reinforced by the statement that *"the roof was in good condition"*. The result of this false statement was that the vendor deliberately presented an inaccurate picture of the state of the roof, a factor that led to the buyer's deception and made him or her a damaged party in such a contract. In the same case, if the buyer had asked about the roof's condition and the seller did not respond, it would still amount to fraud – but this time based on mere silence or inaction. In some cases, it is not enough just to deceive, but trust in the other contracting party is also required (Kayar, 2008, p. 54). From this perspective, we conclude that in some cases of fraud, the deceived party must trust the defrauding party with regard to a false statement made for the purpose of concluding the contract. In other words, the party must believe that the deceiving party is stating the truth and thus enter into a contractual relationship in good faith.

### 2.3. Causal relationships

The elements cited above such as fraud conduct and fraud purpose are not enough to amount to fraud as defined by Article 36 of the TCO and Article 49 of the LORK. The occurrence of fraud as a defect in consent is also enabled by a third element – the causal relationship. In this case, the deceitful act must be a mandatory condition of the contract "*condictio sine qua non*", and a causal relationship must also be found between the fraud and the concluded contract (Antalya, 2016, p. 239). Fraudulent conduct by a contracting party should have a decisive effect on the contract's formulation. *"This means that if the fraud did not exist, the deceived party would not have entered the contractual relationships"* (Luarasi, 2009, p. 144 / Bilgili and Demirkapi, 2016, p. 66). A causal link exists when a fraudulent party would not conclude the contract or would conclude it on other terms if there was no fraud at the time the contract was concluded (Senol, 2013, p. 83). Consequently, the deceived party, as if there was no fraud or fraudulent conduct, would either not conclude the contract *"dolus causam dans"* or would conclude it under better conditions *"dolus incidens"*. All of this dictates the emergence of the *"causal relationship"* element (Tuhr, 1983, p. 269 / Antalya, 2016, pp. 239, 240). This can be illustrated in a scenario whereby, for instance, person A wants to buy a new house while person B renovates an old house and sells it at a price as if it were a new house for €500,000. If person A would not have concluded the contract if they knew the house was old, this is a case of *"dolus causam*

*dans"*. But if person A would buy the house even if there was no fraud, but for a much lower value, then *"dolus incidens"* would exist. In both these cases, person A could undoubtedly seek to annul the concluded contract. On the other hand, if the deceived person would conclude the legal arrangement even if there was no deception with the same conditions from which there is no causal relationship, then fraud is not considered to exist (Akinci, 2003, p. 110 / Birsen, 1954, p. 93 / Akman, Burcuoglu and Altop, 1993, p. 447). From all the above, we can conclude that if there is no causal relationship between the fraudulent act and the signed contract, then it cannot be said to be fraudulent – and as a consequence, a contract based on fraud cannot be annulled. It is also worth mentioning that fraudulent action and conclusion of the contract must be manifested in parallel ways. This is due to the fact that there can be no fraud after a contract is concluded and for fraud to exist, it should take place before or during conclusion of the contract. This means that after the contract has been concluded, a party cannot reverse the fraud it has committed because it already exists (Kursat, 2003, p. 34).

Analysing the legal solutions included in the TCO (Article 36) and LORK (Article 49), it can be concluded that the solutions in both of these legal acts address in a clear and particular way the elements of fraud, the intention to deceive and the causal relationship between fraud and the conclusion of a contract. These elements are therefore foreseen in the doctrines of both countries, based on the provisions in the civil legislation of Turkey and Kosovo. Nevertheless, we consider that in relation to all three of these elements of fraud, the TCO and LORK do not have any legal gaps, meaning there is no room for doubt on whether they establish the essential elements of the existence of fraud. These elements are therefore recognised from both legislations.

## 3. Types and classifications of fraud

Fraud as a defect in consent when concluding contracts may appear in a variety of types. This factor determines the need to address the matter in civil law theory, which classifies and divides the types of fraud. In the following part of this paper, modest efforts will be made to elaborate some of the more specific types and classifications of fraud as a harmful phenomenon that may arise when concluding contracts. The main types and classifications of fraud are considered to include: fraud by a fraudulent entity; fraud by the manner of fraudulent conduct; fraud in relation to the effects and importance of facts; fraud by purpose; reciprocal and unilateral fraud; and fraud by type of contract.

### 3.1. Fraud in relation to the entity committing the fraud

This type of fraud classification has its support base in the capacity of the entity (person) that causes the fraud. In line with the legal solutions of Turkey and Kosovo, as well as those of other countries, this results in two main types of entity that may commit fraud in a contractual relationship. One is a contracting party; the other is a third person.

#### 3.1.1. Fraud caused by the contracting party

The contracting parties are mainly subject to contracts concluded by fraud. Any person who has no legal obstacle to entering into a contractual relationship with other persons may have the capacity of a contracting party. Given that contracting parties conclude contracts to fulfil their interests, sometimes it is normal to looking forward to them to the fraud phenomenon. This perspective has been carefully identified by lawmakers in Turkey and Kosovo. Under the TCO and LORK, the fact that the subject of fraud may in the first instance be the contracting party is

therefore addressed in the first paragraphs of Article 36 (TCO) and 49 (LORK). In line with legal remedies provided in these paragraphs, a contract is deemed to be fraudulent when a contracting party misleads or keeps in error the other party so that they enter into a contract that is harmful to him or her. The parties that conclude contractual relations according to such practice are the contracting parties themselves, but the process does not necessarily include only them. In the interest of the contracting parties, a contract may also be concluded by their representatives, the bodies (responsible authorities) of legal persons and the assistants (deputies) of the parties, so they may also be brought into the defrauding situation (Kursat, 2003, p. 37). The entities cited may enter into a legal arrangement on the name and account of others, and there is no problem if a legal arrangement is concluded by representatives of the contracting parties. Such legal remedies are legitimate, but all rights and obligations that derive from such legal arrangements belong to the contracting parties (Tekinay, 1992, pp. 242 – 246 / Zevkliler, 1992, pp. 249 – 253). If any mistake, fraud or duress is encountered in legal arrangements concluded through the form of representation, then the consequences of defects in consent affect the representatives too (Akyol, 2009, p. 220 / Kursat, 2003, p. 19). Based on the fact that representatives can enter into a legal arrangement, the legal consequences that may stem from fraud are mainly borne by the contracting party whose representative has deceived, but also the representative himself. The representative mainly carries the consequences of fraud in cases where he or she represents the party with absolute inability to act. This is because he/she has absolute authority with regard to all legal remedies in the name of the party he/she represents (Serozan, 2017, p. 434). Unlike real persons, who perform legal affairs personally or through their representatives or deputies, legal entities conduct all legal affairs (such as gaining rights, entering into debt and taking over responsibilities) through their internal bodies (responsible authorities) (Serozan, 2017, p. 504). From this we can conclude that through legal authorities, a legal person experiences consequences that can derive from legal affairs.

### 3.1.2. Fraud caused by a third person

Although when it comes to fraud, the entity that causes it is mainly perceived to be among the contracting parties, there is no doubt that fraud arising in the conclusion of contracts may also result from other persons. In this case, these are perceived as third persons that, in the case of fraud, may be guided by personal interests or the interests of others, but also combined interests[9]. If a contracting party is induced to enter into a contract through the wilful fraud of a third party, the deceived party is not bound by that contract if the other contracting party knew or should have known about the fraud at the time when the contract was concluded. The fact that fraud can also be caused by third parties is a well-known matter that is also addressed from a legal perspective. This approach is specified in paragraph 2 of Article 36 in the TCO, and paragraph 3 of Article 49 in the LORK. These two legal remedies clarify that fraud in the conclusion of contracts can also be committed by a third person.

There is no distinction between the TCO and LORK in terms of addressing fraud committed by one of the contracting parties or a third party. However, the existence of fraud committed by a third party is related to the fact of knowing or being able to know from the contracting party favoured by the fraud about fraud committed at the time of the contract's conclusion (Akyol, 2008, p. 133 / Nomer, 2015, p. 71 / Akinturk, 2012, p. 50). This means that if the contracting party knew or might have known about the fraud committed by a third party, that determines the existence of fraud committed by the contracting party through mere silence or inaction (Antalya, 2016, p. 238/

[9] Combined interests may exist, for example, in cases in which an apartment was sold in effect of fraud (with, for example, the fact that the building would be destroyed hidden). In this case, apart from the seller, a third person (e.g. the selling agent) would also benefit from this. Of course, the third person should have known about this fact previously, but chose to remain silent according to the buyer.

Eren, 1991, p. 483). In such cases, fraud committed by the third person, is kept silent by the contracting party in order to deceive the party with which it wishes to conclude a contract. On the other hand, if a party was unaware or, due to the circumstances, could not have known about the fraud of a third person, then the contract could not be annulled due to fraud committed by a third party (Kilicoglu, 2010, p. 168 / Reisoglu, 2012, p. 126 / Akinci, 2003, p. 111 / Senyuz, 2012, p. 55 / Akinturk, 2012, p. 58). If the contracting party is informed of a fraud committed by a third party after conclusion of the contract, this does not provide a sufficient basis for its annulment. However, in this case the deceived party fulfils the conditions to give it rights through the legal provisions for mistake (TCO articles 30-35 and LORK articles 46-48). In addition, even if such a contract has caused damage to the deceived party, the contracting party may seek compensation from the third person (Zevkiler, Ertas, Havutucu, Aydogdu and Cumalioglu, 2013 p. 183). As noted above, the circle of people who may have the right to act as a third person causing fraud can be wide, and in civil law literature it is sometimes difficult to give numbers. This capacity may be borne by the successor or predecessor of the contracting party, any of their friends, and so on. Of course, as stated above, a representative or assistant of the contracting party and the bodies (responsible authorities) of the legal person do not possess the rights of a third person (Reisoglu, 2012, p. 126 / Karahasan, 2003, p. 336). This certainly does not mean that such parties cannot be subject to fraud, but such fraud will be considered as having been committed directly by the contracting party, with reference to TCO 36/ I \ 1 and LORK 49/1. It can therefore be stated that the representatives of legal persons act as their authorised persons, and therefore these persons do not fall into the category of third persons but are recognised as direct parties – and this applies to fraud. If an illegal act has been caused through fraud by a third person, the deceived party may seek compensation for damages caused by entering into contract (Esener and Gudongu, 2017, p. 161 / Eren, 2013, pp. 400, 401). The party enjoys this right as referred to in Article 49 of the TCO and Article 136 of the LORK. The conditions relating to fraud from a third person are: (1) the party's fraud must make a mistake in motive; (2) this mistake should be a result of the third person's conduct; (3) the fraud of the third person must be intentional; (4) such fraudulent conduct must lead to the conclusion of the contract; and (5) a party that is not prey to fraud should have known or might have known about fraud at the time of entering into a contractual relationship (Helvaci, 2017, p. 72). These conditions derive from Article 36/2 of the TCO and Article 49/3 of the LORK. Fraud by a third person can be more easily understood by citing a practical case that reflects this type of fraud in a simple way. *For instance, persons (A) and (B) decide to enter into a contract, but (B) concludes this contract as a result of fraud by the third person (C).* Namely, the deceived person is (B), who was deceived by (C) and not (A). The question is whether the contract is avoidable in this case. If person (A) knew or could have known about the fraud being committed to (B) by the third person (C), then the contract may be voidable; otherwise, the contract continues to be valid (Akman, Burcuoglu and Altop, 1993, p. 448).

### 3.2. Fraud as a result of fraudulent conduct

The basis of this criterion for classifying fraud is whether the deception relates to a false statement of facts or their concealment (Green, 2005, p. 4). These two types of fraud result from the context of legal solutions through which Turkish and Kosovan lawmakers address fraud as a defect in consent in the conclusion of contracts. From what was detailed above, we consider that a rogue action can occur in an active manner, but can also be passive. That is why it is divided into active fraud and passive fraud (Karahasan, 2003, p. 335).

### 3.2.1. Active fraudulent behaviour

This type of fraud occurs in cases in which a contracting party or a third party puts the other party in fraud with regard to any element of the contract's subject matter through a false statement of facts. However, to be considered fraud from a third party, one of the contracting party awareness or even without his/her knowledge in cases of gratuitous contracts. This type of fraud is related to the fact that the conclusion of the contract is a result of the fraud caused by one of the contracting parties or the third person to the other contracting party. Here, the party committing the fraud makes this clear through their actions or statements, or with any kind of active behaviour[10]. This type of fraud therefore occurs at the time of signing the contract or earlier, with false statements given about something that does not exist, but is presented as if it existed or the opposite. So in this case, fraud occurs in an active manner (Oguzman and Oz, 2000, p. 94). As is known, fraud is mostly caused as a result of misrepresentation of the facts. Meanwhile, forms of false declaration of facts are, for example, that they may be exaggerated or false facts may be presented. Fraud that occurs through an active action (false statement of facts) can be presented when, *for instance, reducing the number of kilometres racked up by a car from 200,000 to 100,000 kilometres for selling purposes.*

### 3.2.2. Passive fraudulent behavior

This type of fraud exists when a contracting party or third party, in the event of entering into a contract, misleads the other contracting party with respect to any element of the contract's subject matter through the avoidance of action or concealment of facts (silence). To be considered fraud from a third party, this must be known to one of the contracting parties and in the case of gratuitous contracts it can occur without their knowledge. Of course, not every type of inaction or silence can be considered fraud. This can be considered fraud only if the deceived party would not have signed a contract if they had known about the hidden facts beforehand. Based on legal statements, good faith and sources of contract, a contracting party that therefore conceals issues (facts) that should have been told to the other party causes fraud by being silent in this case (Ozkaya, 2014, p. 197). Lawmakers in Turkey and Kosovo have not stated anything about the number of hidden facts, meaning that fraud in entering into contracts can also exist in cases for which concealment is associated with just an individual fact[11]. Clearly, it is a court matter to evaluate, depending on the case, the existence or not of fraud based on revelation of the facts and on their number and importance. As is known in cases of concluding legal transactions, giving accurate information is very important. This is particularly true in the case of contracts such as business, construction, work and service contracts, and contracts with a continuous debt (such as a lease contract) (Antalya, 2016, p. 328). Because of the nature of these types of contract, cases of concealment of essential facts are frequent – and, that is, fraud. This finding is grounded in practical cases and determined by the principled rule that parties in the case of such contracts should not be silent about facts relevant to the conclusion of a contract – and, on the contrary, must declare them; *for instance, a lessee (B) did not present the fact to the lessor (A) that in the apartment he or she took for rental, they would be living with their kids. Person (A) would not have leased the apartment if he/she had known about the kids, using as justification the consequences of expensive damage to furniture.*

Types and methods for concealment of facts can be made in a variety of ways, largely depending on the type of contract itself and the way it is concluded, but also other circumstances. In any case, the concealment of facts should

[10] There is no particular form for how active fraud can be performed – it can be oral and in written language.
[11] Cases are always individual when, for example, entering into a contract constitutes by only a deceptive fact – for instance, when a vendor sells a damaged car (but that is well repaired) to a buyer but is silent about a car accident. In this, everything else has thus been correctly reflected.

be related to essential and non-essential facts, although the focus on establishing the existence of fraud should be centred on the first set of facts. Following will be an example that elaborates the issue of fraud through concealment of fact.

### 3.3. Fraud according to the importance of facts

Another classification of the types of fraud is based on the effect it causes as a defect in consent – that is, the importance of the facts via which the fraud is committed. Fraud is divided into two main groups by effect: a) essential fraud (significant) and b) non-essential (secondary) fraud. These two types of fraud do not differ in terms of the consequences they cause, since both types of contract can be annulled. But, of course, essential fraud *"dolus cousam dans"* and the non-essential type *"dolus incidens"* possess some features that vary between them.

#### 3.3.1. Essential fraud

Fraud is considered essential *"dolus cousam dans"* when a party would not have concluded a contract if the fraudulent misrepresentation had not existed (Esener and Gudongu, 2017, p. 158). In fact, fraud is considered to be of essential character in any case in which it reflects its scope to one of the essential elements of the contract's subject matter. As to what constitutes an essential element of the contract, it depends on the nature of its subject matter. *"Despite this fact, essential elements of the contract in each case are: the ability of parties to enter into a contract, concordance of the will of the contract subjects, the suitability of the contract object, the contract form, etc."* (Guric, 2010, p. 123). So, *for example, if the object of the sales contract is a car, its engine is of course an essential element of of the contract.* But relevant facts are often considered to be essential elements too. The way in which the solutions to the respective laws of Turkey and Kosovo have been formulated therefore allow us to understand the fact that the lawmakers of both countries have focused their attention on the case of essential deception as mentioned above. This means that in conformity with the TCO and LORK, essential fraud exists when it is associated with any essential element, if the deceived party knew it would not otherwise enter into the contract. Fraud is considered essential, *for example, when a person (A) wants to buy an original watch produced by Hublot, while person (B) sells only one copy of it, namely a fake watch.* In this case, it is assumed that if person (A) knew the watch was not an original from the manufacturer Hublot, he or she would not have bought it at all – that is, he/she would not have signed a sale-purchase contract with person (B).

#### 3.3.2. Non-essential fraud (secondary)

Fraud is considered non-essential (secondary) *"dolus incidens"* if the defrauded party would still conclude the contract if there were no fraudulent act, but under different conditions (Eren, 2013, p. 400 / Antalya, 2016, p. 331). In fact, this type of fraud is considered to exist in cases in which it manifests extent in one of the non-essential elements of the contract's subject matter. It is normal to consider that all elements of the subject matter that are not essential are treated as non-essential. As it may be, this deals with elements that are secondary, but not insignificant. Given this fact, lawmakers in Turkey and Kosovo have, through relevant laws, made it clear that fraud in relation to contracts may also be of non-essential character. The effects of such fraud in a legal sense may be of the same seriousness as the effects of essential fraud.

The difference between *"dolus cousam dans"* and *"dolus incidens"* lies in the fact that in cases of non-essential fraud and in circumstances when there would be no fraud, would enter into a contract with each other, but, of course,

under other conditions. Such a case may occur when, *for example, person (A) has a car that he/she painted, cleaned and sells the same as new to person (B). Person (B) falls into a fraud by person (A) because he/she buys a $ 40,000 used car by the seller (B).* In this concrete case, it is assumed that even if the buyer (person A) knew that the car was used, he/she still would have bought it, but under other terms (lower price). In this case, it is considered that we are dealing with non-essential fraud.

When dealing with types and classifications of fraud in the solutions provided in the TCO and LORK, it can be concluded that these two legal acts offer provide all the possibilities for considering the types and classifications of fraud cited above. In my opinion, this conclusion is based on the general terminology used by the lawmakers of these two countries in terms of the fraudulent phenomenon in relations between the contracting parties.

Apart from the types of fraud cited above, there are also some other types of fraud recognised in the conclusion of contracts[12]. Among the types of fraud that raise concern in the contemporary world, particularly in recent times, are: 1) marketing fraud; 2) internet fraud; and 3) credit card/debit card fraud.

**1) Marketing fraud –** to ensure the sale of their products and services to consumers, manufacturers and sellers do not hesitate to apply different methods of persuasion. One method is clearly the use of advertising. In everyday life, it is not uncommon for advertisements to become the subject of fraud, and thus present a completely different situation from what is actually true. Based on legal remedies, in situations whereby the consumer or buyer is deceived by advertising, he/she has the right to request annulment of the concluded contract (Kursat, 2003, p. 23). Marketing fraud exists, *for example, in cases when it is admittedly false that the bed mattress "DOMEO" has a jelly layer which makes sleeping much more comfortable. The fascinated consumer buys the mattress in question, to find out after a week that the mattress contained no jelly layer at all.* In this case, the customer may request annulment of the concluded contract based on the existence of fraud.

**2) Internet fraud –** in the contemporary world, this type of fraud appears in various forms. Generally, internet fraud is a type of fraud carried out through use of the internet (Infoteh – Jahorina, 2012, p. 562). *For example, the deceiver through the opening of an account proclaims the provision of certain services through the payment of considerable amounts of money, whereby their payments were made by many clients, while he did not deal with the performance thereof.*

**3) Credit card / debit card fraud –** this type of fraud consists of the realisation of fraudulent transactions through stolen credit cards. In recent decades, many internet sales have been concluded via various websites and stores with the use of stolen credit card data. A typical case of this type of fraud can be considered the famous case of banking fraud worth millions of dollars committed by the hacker *"Hamza Bendelladj"* (United State Court of Appeals, No. 16 – 12133).

[12] Due to the nature of this paper, we consider it impossible to elaborate all the classifications and types of fraud.

## 4. Consequences of fraud

Any harmful social phenomenon can have certain consequences, including fraud. The consequences of fraud can consist of contracts being rescinded and rights to compensation for damages. In the right to void the contract, the deceived party gains the right to compensation from the moment that the contract was concluded through the effect of fraud. Meanwhile, in terms of compensation for damages due to fraud as an unlawful act, the deceived party may seek this if it is proved that it has been harmed. We will briefly examine these two rights that emerge on the basis of fraud.

### 4.1. The right to annulment

This right to avoid a contract is accorded by the TCO (Article 39) and LORK (Articles 97, 98 and 102). It can be used by the deceived party, but not by the fraudulent party (Kilicoglu, 2010, p. 170). If the deceived party decides to void the contract, this right must be exercised within one year (Helvaci, 2017, p. 7 / Antalya, 2016, p. 333), and if the party does not use this right within a year, the contract is considered to be approved (Ozkaya, 2014, p. 193). This presciption (one year) begins from the moment that the deceived party learns about the existence of fraud (Oz and Oguzman, 2018, p. 117 / Yildirim, 2017, p. 149) (TCO Article 39 and LORK Article 102). Accordingly, the deceived party has a legal right, within one year from the moment he/she discovers the fraud carried out by the other contractual party or third person, to declare that he/she is not bound by that contract any more. The deceived party thus has the right to avoid the contract on the basis of fraud, but also has the right to reject from this right (Reisoglu, 2012, p. 132 / Yildirim, 2018, pp. 143, 144).

Based on the TCO, the right to annul a contract may be used through a declaration by the deceived party that he/she is not bound by that contract; so apart from the court route, this right also allows a contract to be annulled outside the court process (Kursat, 2003, p. 84 / Ozkaya, 2014, p. 192). Unlike this code, Kosovo's doctrine based on the LORK concludes that annulment of a contract can be carried out only through juridical proceedings (Dauti, Berisha, Vokshi and Aliu, p. 114). Based on this, the contract is deemed to have been approved if the deceived party does not file a claim within one (1) year.

Thus, an important difference between these codes is that the TCO did not foresee any objective prescription period for using the right of annulment. The LORK, in paragraph 2 of Article 102, foresees an objective prescription period whereby the deceived party loses any right to avoid the contract after three (3) years (Dauti, Berisha, Vokshi and Aliu, p. 114). This period starts when the contract is signed. Both of these legislations have foreseen the same subjective term of one year (1) to use this right.

### 4.2. Compensation for damages

As fraud is considered an unlawful act, the fraudulent person is entitled to reimburse for any damages caused as a result of fraud. This right to compensation for damages is in accordance with Article 39/II of the TCO and Articles 99 and 100 of the LORK. Thus, "the deceived party may accept the contract concluded through fraud and seek compensation for the damage or may avoid the contract and initiate the procedures for compensation of damage at the same time" (Anston and Guest, 1964, p. 216 / Bilgili and Demirkapi, 2016, p. 67). The deceived party may seek compensation for damages, such as when the fraud is the result of the other contracting party, or when it is carried out through a third person. Certainly, the liability of the contracting party for the fraudulent act of a third person is

based on *"culpa in contrahendo"* (fault in contracting) (Helvaci, 2017, p. 73). According to some court decisions, for fraudulent misrepresentation a person can be compensated for "all the actual damage directly flowing from the fraudulent inducement" (Elliott and Quinn, 2011, p. 201). This right to compensation can only be requested in cases in which damage is indeed present, because compensation cannot be claimed if no damage has been caused. Meanwhile, damages cannot be claimed for a misrepresentation that is not fraudulent or negligent (Cavendish, 2004, p. 84).

The use of this right differs between the TCO and LORK. According to the second paragraph in Article 39 of the TCO, ratification of a contract does not exclude the possibility of compensation for damages. Thus, "the deceived party may accept the contract concluded through fraud and seek compensation for the damage or may avoid the contract and initiate the procedures for compensation of damage at the same time" (Anston and Guest, 1964, p. 216 / Bilgili and Demirkapi, 2016, p. 67 / Nomer, 2013, pp. 69, 70). Unlike the TCO, the LORK does not foresee any special provision that provides the deceived party to approve the contract and on the other hand to seek compensation for damage. Another distinction between the two laws is that the LORK decisively states that compensation of damage can be requested only by a person who was unaware of the fact and should not have been aware of the existence of the cause for annulment. The TCO does not have any specific provision for this, except that in Turkish doctrine it is assumed that if the deceived party was aware of or could have known about fraud, then fraud does not exist.

Meanwhile, in Article 99 of the LORK, it is stated that if an avoidable contract has been annulled and the subject of the contract has been accomplished, all things that were objects of the contract must be returned. If returning to the previous situation – a *"restitutio in integrum"* state – is impossible, appropriate cash compensation should be provided (Dauti, Berisha, Vokshi and Aliu, p. 114). Unlike with this law, the TCO does not contain any special paragraph on the restitution of the previous state, except in the first paragraph of Article 39 – where it is stated that *"... or does not want the return of the given items, the contract is considered approved."* Thus, according to the TCO, the returning of the given items is linked with the right of annulment; the request for the return of the given items is considered an indirect declaration of the annulment of a contract.

**Conclusions**

The results of this research have led me to the following conclusions:

1. The legal solutions provided in the TCO and LORK do not reflect any fundamental difference with regard to fraudulent elements. From this point of view, we can conclude that the legislation and doctrines of both countries have determined the fraudulent act, purpose of fraud and causal relationship as constituent elements of fraud.

2. According to the TCO and LORK, as well as the doctrine of these two countries, there is no difference in types of fraud. In both these countries, there is therefore consistency in terms of fraud by a contracting party and a third person, essential and non-essential fraud, and active and passive fraud.

3. There are substantial differences with regard to access to the possibility of fraud-related contract annulment according to the TCO and LORK. Also as stated in the TCO, this right is principally used out of court through a direct or indirect statement by the deceived party that it will not be bound to such a contract; but this right can also

be used through juridical proceedings (court). Unlike the TCO, according to Kosovan doctrine based on the LORK, the use of this right is foreseen only by filing a claim.

4. The TCO does not foresee any objective prescription period for using of the right of the annulment, whereas the LORK has foreseen a period of three (3) years, a deadline after which the party loses its right to annul the contract.

5. There is also a difference between legislation in these countries in terms of compensation for damages. The TCO grants the deceived party the right to compensate the damage even when a contract has been approved, whereas the LORK does not foresee any provision enabling such a right.

6. Finally, in the LORK it is stated that the deceived party may seek compensation for damages only if that party did not know or could not have known the reason for annulment of the contract. On the other hand, the TCO does not foresee any provision on this issue, but Turkish doctrine states that if the deceived party knew or ought to have known about fraud, it cannot be considered fraud.

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