

THE CRIME OF FRAUDULENT BANKRUPTCY**Melek YARDIMCIOĞLU**

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ABSTRACT

Bankruptcy is a fact that any person or institution who continue to work actively can face. The person or persons who are aware of this fact take bankruptcy case into consideration while doing planning. Person or persons who have the possibility to face bankruptcy, follow different methods according to their sector and try to get rid of this situation.

Bankruptcy is not a crime according to the law. However, in the case of suspicious situations emerging from bankruptcy, it constitutes a crime. Fraudulent bankruptcy which can be considered a suspicious situation is counted as crime in the Turkish criminal law. Bankruptcy crimes include acts of company owners towards creditors and debtors, and to the economical system as a whole.

Fraudulent bankruptcy crimes are regulated by the Turkish Criminal Law (TCL) and Bankruptcy and Enforcement Law (BEL). The enforcement for bankruptcy crimes are regulated by the Turkish Criminal Law, and legal basis for fraudulent bankruptcy is established in the Bankruptcy and Enforcement Law.

In this study, general structure of fraudulent bankruptcy crime is investigated, differences between the law no 5237 and the law no 765 in Turkish Criminal Law are explained, factors of fraudulent bankruptcy are addressed, and among these factors, specifically the law no 161 (Turkish Criminal Law) and the law no 311 (Enforcement Law) are explained.

Key Words: Bankruptcy, Fraudulent Bankruptcy, Turkish Criminal Law, Bankruptcy and Enforcement Law

1. INTRODUCTION

In line with the current developments in economic and business life, different types of crime have emerged. Crimes against the property of individuals are especially on the rise. These types of crimes have been regulated before with the previous laws; however, they have not been fully focused on before. In recent years, corruption emerging in the business life has led the companies on the brink of bankruptcy to take advantage of these bankruptcies.

Fraudulent bankruptcy committed by individuals or companies are counted as crimes as regulated by the articles of Turkish Criminal Law, Bankruptcy and Enforcement Law. Generally, fraudulent bankruptcy is known as taking advantage of bankruptcy by way of taking fraudulent actions in order to reduce the assets.

Since TCL law no 765 did not respond to the needs of the current system, a much detailed TCL law no 5237 (T.C. Laws, 12.10.2004) was later implemented. It can be observed that the TCL law no 5237 has a much simpler language, and the existing crime types are also kept intact. Due to the simplification of the language, names of some crime types have changed, there are some differences in the description of some of the crimes. TCL law no 765 only includes sanctions against the crime of fraudulent bankruptcy; and Bankruptcy and Enforcement Law no 2004 (BEL) (T.C. Laws, 19.06.1932) states which acts constitute the crime of fraudulent bankruptcy. It can also be observed

that the TCL 5237 also contains the reasons of and sanctions for the crime of fraudulent bankruptcy. Although there are similarities between TCL 5237 and BEL 2004, according to some points of view, BEL is more detailed in terms of content.

In this study, fraudulent bankruptcy crime is discussed comprehensively within the scope of TCL and BEL, and comparisons are made between the articles of TCL 5237 and Bankruptcy and Enforcement Law. Finally, the subject of sanctions against fraudulent bankruptcy is also addressed.

2. FRAUDULENT BANKRUPTCY CRIME

2.1. In General

Fraudulent bankruptcy is the act committed by the insolvent who bankrupt or is about to go bankrupt, which involves manipulating the bankruptcy by way of a series of fraudulent actions or legal proceedings in order to put the creditors' claims at loss or take advantage of some personal gains; or performing fraudulent actions before or after the bankruptcy in order to put the creditors' claims at loss or take advantage of some personal gains (Kızılarıslan et al., 2006).

Fraudulent bankruptcy crime is mentioned in the Article 161 of TCL law no 5237 as "The person who commits acts of fraudulence in order to impair the assets is to be sentenced to jail for three to eight years in the case a bankruptcy is ordered before or after these fraudulent acts. In order for the fraudulent bankruptcy to occur, the following conditions should hold:

- a) Smuggling, hiding or causing the values to be diminished of the assets which are the guarantee for the creditors' claims,
- b) Hiding or destroying books, registries or any documents in order to prevent the discovery of the acts towards smuggling the assets,
- c) Preparing documents causing increase of debts, where in reality there is no claim and debt relation and acting as though there is one,
- d) Showing the assets less than they are by way of sham bookkeeping or preparing fake balance sheets."

The origin for the fraudulent bankruptcy crime is stated as "actions against impairment of the assets of the company (fixed assets or current assets)".

The text of the article comprises of one paragraph and fraudulent actions comprising the fraudulent bankruptcy crime are listed under four subparagraphs. The sanctions against the crime are also stated in the same paragraph. In the Article 162, the crime of reckless bankruptcy is drawn up as follows:

"(1) The person who causes bankruptcy by way of not showing the necessary care and attention demanded from being a tradesman, is to be sentenced to jail for two months to one year, in the case of a bankruptcy decision is given.

According to Article 331 of BEL: "The person who perform the fraudulent actions listed below before or after bankruptcy with the intention and deliberation to put the creditors at loss is deemed as fraudulent bankrupt and is sentenced to punishment in accordance with the Turkish Criminal Law:

1. If the person smuggles, hides or destroys the assets partially or wholly, which are guarantees for the collective claims of the creditors;
2. If the person produces sham receipts or acknowledges false debts in writing at the loss of creditors;
3. If the person conducts prearranged sales, transactions or donations;

4. If the person recognizes a dowry which was not stated in the marriage contract as though it exists and the wife tries to take advantage of this contract against her husband's creditors;
5. If the person puts the creditors at loss by way of acknowledging sham debts or making fictitious transactions and contracts;
6. Even though it is known that the amount of debts exceeds the amount of claims, if the person wastes the current assets by selling the important valuable goods or the products of the factory at prices which are exceedingly lower than the market prices at the time of the sale and lower than the values it costs to produce or purchase the goods;
7. If the person provides special advantages to the creditor out of the scope of contract of bankruptcy;
8. If the person shows the assets as more or less than the actual by way of sham bookkeeping and false balance sheets (Amendment: 6/6/1985-3222/38 md.).

In the first subparagraph, Article 522 of Turkish Criminal Law is applied depending on the values of the goods. If the persons committing the act stated in the first subparagraph are from the household of the insolvent, they are also punished as the insolvent. Even though it is beyond the scope of the complicity clauses of Turkish Criminal Law, the accomplices are mentioned as such: "The person who, partially or wholly smuggles or hides the assets of the insolvent, comes to prearranged possession of the assets, persons who complies or intervenes to such actions or person who partially or wholly registers fictitious claims to by application to the bankruptcy estate, or person who engages in business transactions in his name or by using alias in order to reduce the paying capability of the insolvent, all with the purpose of reducing the assets of the insolvent is subject to the same punishments."

2.2. Transition from TCL no 765 to TCL no 5237

In the tenth book of the TCL no 765 which was accepted in 01/03/1926 and was in effect until 1 June 2005 when TCL no 5237 was accepted, the subject "Crimes Against Property" was mentioned under the third section with the title "Fraud and Bankruptcy". Accordingly, sentence for fraudulent bankruptcy was stated in Article 506 as "Fraudulent insolvents are to be sentenced to two to five years of jail".

In the TCL no 765 only the sanctions against the fraudulent bankruptcy crime was determined, but there was no explanation to which acts would constitute this crime. Acts counted as fraudulent bankruptcy, although incomplete, were listed in Article 311 of BEL. Then, in time, it has become apparent that the laws which do not clearly explain the fraudulent bankruptcy crime do not respond to the needs, and a new set of laws were required. In this respect several laws drafts were created. These drafts finally bore their fruits and in 1 June 2005, TCL no 5237 was implemented with the Article 161 stating the conditions and forms of fraudulent bankruptcy.

Since fraudulent bankruptcy is defined as a type of crime in the Article 311 of BEL but referred to TCL no 765 for the sanctions against the crime, they acted in parallel to each other. However, Article 161 of the new TCL has now defined fraudulent bankruptcy crime with some of its elements and presented some of the factors about the nature of fraudulent bankruptcy. In contrast to TCL no 765, Article 161 of TCL has clearly determined the acts with which the fraudulent bankruptcy crime can be committed.

2.3. The Protected Legal Value

All crimes protect one or more legal values. "Crimes are human behaviors which are either the clear and deliberate violation of legal values which are necessary to be protected in order for a society to continue functioning or at least inconsiderate act directed towards rules which protect these legal

values". When rules of law are examined, one always finds a value emerging from the base of this rule (Özgenç, 2005:199-200).

Legal value, which can also be described as the legal subject of the crime, expresses the legal entities or interests violated by the committed act or crime (Artuk et al., 2010:305).

The protected legal value is one of the fundamental subjects in Turkish criminal law. Therefore, the protected legal value is essential in the context of judicial decisions and legislation (Bacaksız, 2011:88). Defining the elements of crime becomes easier once the legal value is determined (Dohmen et al., 2003:205).

In the crime of fraudulent bankruptcy, the most important priority should be protecting the creditors against the debtor who commits fraudulent bankruptcy. However, not only the creditors, but also the trust, which is essential for the institutions and individuals in economic and business life should also be put under protection (Yavuz, 2014:154).

The protected legal value can be expressed as preventing the assets of the debtor which are the collective guarantee for all the creditors, to be reduced by fraudulent transactions and behaviors, preventing economic relations, business activities related to these guarantees to come to harm, ensuring that the national economy functions regularly and healthily (Erman, 1993: 185; Muşul, 1998: 42; Soyaslan, 2010: 429); in other words, it is the trust that should be prominent in business relations (Özgenç, 2002: 109).

Based on these explanations, although fraudulent bankruptcy crime is placed under the crimes against property in the TCL no 5237, it can be expressed that the clauses about fraudulent bankruptcy crime mostly aim to protect the trust dominant in the business and economic life, and the interests of creditors of the insolvent or the state or the society are the legal values that should be protected (Yılmaz, 2011:47).

3. ELEMENTS OF FRAUDULENT BANKRUPTCY CRIME

3.1. Material Elements of the Crime

3.1.1.The Act

Act is defined as "an executive or negligent human behavior which is directed to a purpose, which depends on the will and wish of the individual, and which affects the outside world" (Artuk, vd., 2010).

In the Article 161 of TCL, fraudulent actions in order to reduce assets are stated as the acts which constitute the fraudulent bankruptcy crime. However, it has been stated in the law that not all fraudulent actions constitute this crime, and the limited number of acts (numerus clausus) which constitute this crime are listed under four subparagraphs. Therefore it can be inferred that the crime is considered as a crime with alternative actions, and any of these actions imply the existence of fraudulent activity and constitute the basis for the fraudulent bankruptcy crime (Yaşar et al., 2010).

3.1.2.Committing of One or More Elements Listed in Article 161 of TCL under Four Subparagraphs

Paragraph 1 of Article 161 of TCL states that the fraudulent bankruptcy is a crime with alternative actions, and these alternative actions are listed in the subparagraphs a, b, c and d.

a- Smuggling, hiding or causing the values to be diminished of the assets which are the guarantee for the creditors' claims (TCL A 161/(1)-a)

The act of smuggling, hiding or causing the values to be diminished of the assets which are the guarantee for the creditors' claims as stated in the Article 161/1-a of TCL is stated in the Article 311 of BEL as referred from the Article 506 of outdated TCL no 765 as "If the person partially or wholly smuggles, hides or destroys the assets which are the collective guarantee of the creditors..." (Işıka, 2013:612).

This statement indicates that the this act, which is credits as one of the alternative actions deemed as fraudulent activity also includes several alternatives within itself. Accordingly; smuggling, hiding or reducing the value of the assets are each separately considered as fraudulent actions. The assets which are smuggled, hidden or values reduces constitute the subject of the alternative action, and they do not necessarily have to be put in the pledge of the creditors, because the assets of the debtor by themselves already act as guarantee for the claims of the creditors (Yavuz, 2014:155).

The common subject matter for all three acts mentioned in the Subparagraph a of Paragraph 1 of Article 161 is concealing the truth.

Concept of Guarantee: It has been emphasized in TCL that the acts constituting the fraudulent bankruptcy should be committed on the values of the assets that act as the guarantee for the claims of the creditors.

Legally, guarantee has the same meaning as pledge. Therefore it cannot be possible to put a claim under guarantee unless it is held in pledge. Accordingly, BEL uses the expression "which are collective guarantee of the creditors' claims" for these assets. In TCL, the term guarantee is used instead of pledge. In this case, the question of whether the assets subject to the fraudulent bankruptcy need to be put under guarantee with a pledge emerges (Bacaksız, 2011:105). This whole matter implies that the legislator refers to the assets that can be counted in the bankruptcy estate rather than the assets under pledge.

Smuggling: Taking away the assets that are to be seized due to bankruptcy to another secret place is defined as smuggling. It has been expressed in the doctrine that "If the debtor donates the property which is part of the assets which are collective guarantee of the creditors' claims to a third party, or sells the property at a lower value, or sells with the appropriate value but does not include this value to the assets, the act is smuggling" (Muşul et al., 1998).

Smuggling of property may take place materially or legally (Bakıcı, 2008:868). The act of taking the goods of the company by the owner to a storage where no one knows is a material example; and the act of pretending to sell the property which is a part of the assets of the bankrupting company to a front company is a legal example of smuggling the assets (Yılmaz, 2011:56).

Taking all these cases in consideration, it has been assumed that smuggling of the assets may most probably take place for the movable property. The property may be handed to a trusted third party, as well as be sold at a lower price for the purpose of smuggling. Moreover, transferring of the property to other companies or handing over to front or fake companies should also be considered as smuggling of the property. In addition, actions which prevent creditors from reaching the property should also be considered as smuggling the property.

Hiding: What hiding refers to is all kinds of behavior concealing any part of the assets from being seen from the creditor (Bacaksız, 2011:106). In other words, concealing the assets which act as the guarantee for debts in an unknown and hence unreachable place is described as hiding of the assets. There are some cases where smuggling is performed together with hiding. Specifically, declaring that the guarantee assets do not exist, producing sham documents, showing the creditors fake storages and sites are hiding acts of such. Finding of the hidden assets by the creditors or government officials removes this act of hiding assets.

Reducing the Value: Causing the values of the assets which are guarantees for the creditors' claims to reduce is also considered as one of the fraudulent acts. In the doctrine, this act is expressed as reducing the value of an asset to lower than the economic value (Özbek, 2008).

In the case of causing the value of the assets to be reduced, the debtor is preventing the creditors from obtaining their claims by way of acts causing the economic value of the assets to be diminished or render them completely valueless. Acts causing the values of the asset to be reduced such as damaging or neglecting the maintenance of the assets, removing parts, removing the conditions for the intended use of the assets, causing the assets to be spoiled by not disposing of them in due time can also constitute the crime of fraudulent bankruptcy (Bakıcı, 2008:610).

b-Hiding or destroying books, registries or any documents in order to prevent the discovery of the acts towards smuggling the assets (TCL A.161/(1)-b)

Another alternative act related to the fraudulent bankruptcy crime mentioned in Article 161 of TCL is the act of hiding or destroying books, registries or any documents in order to prevent the discovery of the acts towards smuggling the assets. This act is observed to be stated as actions constituting fraudulent bankruptcy crime in BEL.

It should be noted that the books, registries and documents listed in Article 161 of TCL should be such that they authenticate the bankrupt individual's assets and liabilities. (Özgenç, 2010:341). Because the act of preventing the discovery of smuggling the assets may only be possible through documents that authenticate the assets and liabilities. Through these documents, the movement of the assets of the business owner can be tracked over time.

According to the article, the authenticity of the related books, registries and documents becomes essential in the case of the debtor performing acts to smuggle the assets. Thus, without the fraudulent actions of the debtor related to smuggle the assets, concealment or destruction of the related books, registries and documents is not sufficient by itself to constitute the crime of fraudulent bankruptcy. If the debtor concealed or destroyed the related documents in order to prevent the discovery of the smuggled assets, then it is possible for the existence of the crime (Kazancı, 2006:161).

Commercial books are kept in order to determine the economic and financial status, debt and credit relations, and the results obtained at the end of each business year for the business enterprise. According to Article 66 and consecutive articles of Turkish Trade Law no 6102 (T.C. Laws, 14.02.2011) (TTL), business owners are obligated to keep some books. Article 66/1 of TTL listed the books to be kept by stating "All business owners are obligated to keep the books in Turkish as the scope and importance of their business demand, especially the books listed below, without prejudice to the provisions of other laws, in order to determine the economical and financial status, debt and credit relations, and the results obtained at the end of each business year for the business enterprise"(Yılmaz, 2011:59).

According to the provisions of Article 66 of TTL, business owners are obligated to keep general journal, general ledger, inventory ledger and decision book in Turkish. If the business owners are real persons, then they are obligated to keep general journal, general ledger, inventory ledger, operating ledger and other books that are not specified but necessary for the business. If the business owners are corporate persons, then they are obligated to keep decision book instead of operating ledger. Aside from these books, books such as receivables book, cash book can be kept by the businesses upon their own accord (Arkan, 2007:106).

Document is defined as "all kinds of writing that communicates events, of which the declaration of intent in the contents hold legal values and which are kept by known persons" in the doctrine. The doctrine also expresses that in order for a declaration of intent to be considered as a document, it

should also possess several properties. In short, the document should be in writing, should have a legally meaningful content and finally the person who prepared the document should be identifiable (Gökçen, 2010:44).

It is without doubt that the acts stated in the Subparagraph b of Article 161 should be performed with the purpose of preventing the discovery of actions for smuggling the assets. Therefore, for purposes beyond this scope, in the cases of concealment or destruction of company books, registries or documents, the crime will not be committed. For example, in the case of concealment or changing of the related books or documents for the purpose of tax evasion, although the act will constitute a crime within the scope of the tax regulations, it will not constitute a crime of fraudulent bankruptcy.

c-Preparing documents causing increase of debts, where in reality there is no claim and debt relation and acting as though there is one (TCK A.161/(1)-c)

Acts mentioned in Article 311/2 and 5 of BEL are also presented in Article 161/c of TCL. The legislators formulated these two acts as “preparing documents causing increase of debts, where in reality there is no claim and debt relation and acting as though there is one” which is also apparent in the title.

Up to this point, all the mentioned alternative acts described actions performed on the assets. This particular alternative act affects the liabilities (Weyamd, 2006:62). The alternative acts stated in this subparagraph of the article are in fact actions that can be considered as forgery of documents (Özgenç, 2010:112).

In general, in order to smuggle the assets and avoid paying the debts, the perpetrators draw up bills and bonds at very high values for their relatives and especially trusted persons or make protocols or contracts that incur debts. In time, these relatives or trusted persons commence execution proceedings with these bills, bonds and documents which are in fact fictitious, and cause these assets to be sold under seizure, and hence prevent real creditors from collecting their receivables. In the end, although the possession of these assets is on the relatives or trusted persons, the real owner of the assets is the perpetrator (Görgün, 1972: 440).

d-Showing the assets less than they are by way of sham bookkeeping or preparing fake balance sheets (TCL A.161/(1)-d)

All business owners are obligated to keep regular books, make regular accounting records and keep balance sheets. According to the Subparagraph d of Paragraph 1 of Article 161 of TCL, showing the assets of the company less than it is by way of sham accounting records or by preparing fake balance sheets by the business owner who is about to go bankrupt is considered as fraudulent act.

In this article, the legislators emphasize on two different concepts: sham and fraud. Being sham expresses that the prepared document does not represent the truth. In this respect, in the case of preparing the records about the financial status beyond the balance sheet to be showing the perpetrator’s assets less than they actually are, the crime is considered to be committed. In addition to preparing a document that does not actually exist, changing the contents of an existing document can be considered within the context of fraud. When the perpetrators change the contents of the balance sheet or prepare a balance sheet that is not real, they are considered to commit the crime. It should be noted that in the case of showing the assets more than they are does not constitute the crime of fraudulent bankruptcy (Bacaksız, 2011:121-122).

In this subparagraph of the article, a regulation comprising of alternative acts such as the ones stated in the previous subparagraphs exists. In this respect, in the case of showing the assets less than they are by way of sham accounting records or issuing of fake balance sheet, the perpetrator is deemed to

commit the crime stated in the subparagraph. According to the Subparagraph 8 of Article 311 of BEL, “showing the assets more and less than they actually are by way of sham bookkeeping and fake balance sheets” is considered as a fraudulent act. The main difference and deficiency between the regulation in the TCL and regulation in the Bankruptcy and Enforcement Law is that the perpetrator showing the assets more than they actually are does not count as one of the fraudulent acts (Yılmaz, 2011:64).

Showing the Assets Less than They Actually Are by Way of Sham Accounting Records:

The main issue here is the act of showing the assets of the company less than they actually are by cooking up the numbers in the accounting records of the company. The changes made in the accounting records in order to conceal the truth should have the purpose of showing that the company is making loss, the current assets are scarce and do not compensate for debts and hence the assets are less than they actually are.

Showing the Assets Less than They Actually Are by Way of Issuing Fake Balance Sheet:

Balance sheet is the table that indicates movable and immovable property of the company and a balanced breakdown of the equity capital and liabilities used to acquire them at the end of a certain period of time. In this subparagraph, the second alternative act is the issuing of fake balance sheet that the company is obligated to produce with the purpose of just showing the assets less than they actually are.

3.1.3. Actualizing of one of the Elements Listed as Eight Subparagraphs in Article 311 of BEL

Acts and transactions that constitute the crime of fraudulent bankruptcy are listed under eight subparagraphs in Article 311 of BEL. They are as follows:

a-Smuggling, hiding or destroying the assets partially or wholly, which are guarantees for the collective claims of the creditors (BEL A. 311/(1)-1)

The provision of this subparagraph is also stated in Subparagraph 1 of Paragraph 1 of Article 161 of TCL in the same manner. Accordingly, the provision in this paragraph is stated as “smuggling, hiding or destroying the assets partially or wholly, which are guarantees for the collective claims of the creditors”.

Here, the assets which are guarantees for the collective claims of creditors or assets which are under collective pledge of the creditors refer to the assets of the insolvent. Smuggling, destroying or hiding these assets constitute the crime of fraudulent bankruptcy (Uyar, 2005:316).

b-Producing sham receipts or acknowledging false debts in writing at the loss of creditors (BEL A.311/(1)-2)

This subparagraph contains the provision that the acts of producing sham receipts or acknowledging false debts in writing at the loss of creditors constitute crime of fraudulent bankruptcy. In this context, the debtor is showing the debts that actually do not exist before or after bankruptcy or increases the liabilities by issuing sham receipts (Kızılarlan, 2006:94).

c-Conducting prearranged sales, transactions or donations (BEL A.311/(1)-3)

The term prearranged refers to the act of two parties knowingly conducting a legal transaction that does not reflect truth in order to achieve a different aim.

A large part of the fraudulent bankruptcy crimes are examined under the prearranged transactions such as sale or donations in the Article 311/3 of BEL. With this subparagraph, the law considers

transactions such as prearranged sales or donations and decrees that these kinds of transactions constitute the crime of fraudulent bankruptcy (Yıldız, 2007:200).

All kinds of prearranged transactions are under the provision of Article 311/(1)-3 of BEL. In the case of fraudulent bankruptcy crime, prearranged transactions are conducted in order for the insolvent to smuggle assets from creditors. These transactions can be conducted on all kinds of movable or immovable assets of the insolvent (Öztürk, 2005:448).

d-Recognizing a dowry which was not stated in the marriage contract as though it exists and the wife trying to take advantage of this contract against her husband's creditors (BEL A.311/(1)-4)

In this fraud mentioned in the Subparagraph 311/(1)-4. of BEL, the act is expressed as the debtor acknowledging some of the assets as personal property of his wife, although they are not brought in through marriage; and his wife using this situation against the creditors and attempting to keep these assets from being under liquidation procedure. In this case, it is not necessary that the wife achieves this intent. It is sufficient that she attempts to use this contract against the creditors, despite she knows that the contract is issued as fake. It is apparent that the law does not consider the issuing of the contract sufficient by itself and acknowledges the attempt of using this contract as an element of the crime (Öztürk, 2005 :448)

e-Putting the creditors at loss by way of acknowledging sham debts or making fictitious transactions and contracts (BEL A.311/(1)-5)

In this subparagraph, putting creditors at loss is considered an essential element of the crime of fraudulent bankruptcy. The act of putting creditors at loss can be committed by acknowledging sham debts, prearranged transactions and making fake contracts (Uyar, 1977:650).

In the Subparagraph 311/(1)-2 of BEL issuing receipts or acknowledging debts in writing for the purpose of putting the creditors at loss; and in the Subparagraph 3, prearranged sales, transactions or donations were stated as elements constituting the crime of fraudulent bankruptcy. Although Subparagraph 311/(1)-5 of BEL also includes the cases put forth in both these paragraphs, there is a major difference from subparagraphs 2 and 3. For the cases mentioned in subparagraphs 2 and 3, it is sufficient that the fraud transactions are committed in order to be considered as constituting the crime. However, according to subparagraph 5, the constituting of the crime of fraudulent bankruptcy can only happen if the creditors are put at loss due to these fraudulent acts. The crime is considered to be committed only if the creditors are put at a loss (Kızılar, 2006:98).

f-Even though it is known that the amount of debts exceeds the amount of claims, if the person wastes the current assets by selling the important valuable goods or the products of the factory at prices which are exceedingly lower than the market prices at the time of the sale and lower than the values it costs to produce or purchase the goods(BEL A.311/(1)-6)

According to the subparagraph 311/(1)-6 of BEL, the act of wasting the assets by way of selling the important valuable goods or the products of the factory at prices which are exceedingly lower than the market prices at the time of the sale and lower than the values it costs to produce or purchase the goods even though it is known that the amount of debts exceeds the amount of claims, is considered as a fraudulent transaction (Yıldız, 2007:202).

g- Providing special advantages to the creditor out of the scope of contract of bankruptcy (BEL A.311/(1)-7)

Contract of bankruptcy refers to the arrangement under the chair and upon the summons of the authority appointed by the official administration, where the debtor gets the approval of 2/3 of the

creditors by numbers and shares; and the contract may be requested before or after the bankruptcy (Uyar, 1977:650).

By way of contract of bankruptcy, the legislator aims to ensure both to protect the debtor against creditors with bad intentions and to provide a final chance to the debtor to recover from the situation. Upon the acceptance of the contract of bankruptcy, it has obligatory power over all creditors with the exception of assets which are put under pledge to some of the pledgees (İİK.m.303). Upon approval of contract of bankruptcy, all attachments on the assets of the debtor which have yet not been liquidified are released, and all other promises made outside the scope of the contract of bankruptcy are deemed invalid (BEL A.306).

h-If the person shows the assets as more or less than the actual by way of sham bookkeeping and false balance sheets (Amendment: 6/6/1985-3222/38 md.) (BEL A.311/(1)-8)

The insolvent who wants to put the creditors at loss can do so by taking advantage of the informing functions of the business books and balance sheets, by committing some accounting frauds or issuing balance sheets that are fake or do not represent the truth, and hence by showing the assets are less or more than they actually are (Yıldız, 2007:205).

In order to decree for fraudulent bankruptcy through accounting frauds and issuing of fake balance sheets, it is necessary and sufficient that these frauds are performed with the intent to put the creditors at loss. It is not otherwise necessary that the creditors actually suffer losses as a result of these actions.

3.2. Moral Elements of the Crime

Fraudulent bankruptcy is a crime that can be committed intentionally. According to the TCL no 5237, intent is sufficient for the crime to be committed (Önder, 1994:403). The perpetrator knowingly and intentionally committing the acts of reducing the assets constitute as the moral elements of the crime.

Traditionally, the crimes can be committed upon intent, and the concept of intention is also categorized as direct intent and eventual intent. However in cases where the crimes are described in the laws with terms such as “knowingly”, “upon intention”, “despite the intent” etc., the crime in question can only be committed with direct intent (Koca, 2012:153). The crime of fraudulent bankruptcy does not have this notion, and hence it can be said that this crime can be committed with eventual intent.

The Article 311 of BEL includes the expression “**...with the intent of putting the creditors at loss before or after bankruptcy...**” and acknowledges that the fraudulent bankruptcy crime can be committed with special intents; however the Article 161 of TCL uses the expression “**Person who conducts fraud transactions in order to reduce the assets...**”. Therefore, it can be implied that contrary to Article 311 of BEL, Article 161 of TCL accepts general intent as sufficient. Thus, according to Article 161, the condition of creditors suffering loss is sought for. The legislator stipulates this crime as concrete danger crime.

3.3. Perpetrator of the Crime

Perpetrator of majority of types of crimes included in the criminal law can be a person or persons. Since there is a need for a person for whom bankruptcy decision was given in order for the crime of fraudulent bankruptcy to actualize, the perpetrator of this crime can only be the person or persons who are subject to bankruptcy and for whom the bankruptcy decision is given (Artaç, 2005:582). In other words, the perpetrator of the crime of fraudulent bankruptcy can only be the business owner for whom the bankruptcy decision is given; because persons who do not have the title of business owner are not subject to bankruptcy.

According to the justification of Article 161 of TCL, the statement “The perpetrator of this crime can be the debtor who is subject to bankruptcy, namely a business owner. However, in the case of business owner being a legal entity, real persons who are the agents or representatives of the legal entity and who can perform transactions on behalf of the legal entity can be the perpetrators of the crime” indicates clearly that the crime of fraudulent bankruptcy is a special type of crime. However, it is not completely true to say that the perpetrator of the crime can only be the business owner. Taking into consideration the fact that the persons subject to bankruptcy may not be actual business owners but can be considered as business owners as explained in and in accordance with Turkish Trade Law, stating that only business owners are subject to bankruptcy and hence the perpetrator of the crime can only be business owners is not fully correct (Artuk et al., 2010:290). Thus, the perpetrator of the crime of fraudulent bankruptcy is “the real person subject to bankruptcy”. However, in the case of a legal entity being the business owner, persons who are agents or representatives of the legal entity and who can perform transactions on behalf of the legal entity can also be perpetrator of the crime.

As stated above, the crime of fraudulent bankruptcy is regulated as a special crime. In fact, all economic crimes fall under the category of special crimes. These crimes are usually committed by persons with the title of business owner.

3.4. Subject of the Crime

The directed person or objects constitute the subject of the crime. In the context of fraudulent bankruptcy crime, the subject of the crime is the assets and liabilities that are subject to fraud transactions conducted before or after the bankruptcy, belonging to the real or legal entities that are subject to bankruptcy (Meran, 2009:177).

The crime of fraudulent bankruptcy is regulated in the crimes against property in the TCL no 5237. Since the crime is regulated in this section, values related to the assets constitute the subject of the crime. However, it should also be concluded that since the state of bankruptcy is specific to business owners, a part of the assets may also constitute the subject of this crime.

Taking especially the provisions in Article 161 of TCL into consideration, it can be observed that the subject of the crime of fraudulent bankruptcy is the assets of the debtor subject to bankruptcy; because in order to commit the crime of fraudulent bankruptcy, the perpetrator should engage in fraudulent transactions over the assets. It should be noted that most essential characteristic of the value of the asset subject to the crime is that it should belong to a debtor subject to bankruptcy. Since the fraudulent transactions over the assets of a debtor who is not subject to bankruptcy cannot constitute crime of fraudulent bankruptcy, they will also not constitute the subject of this crime. On the other hand, it is not important whether the assets belong to a real person or legal entity. Moreover, it is not necessary that the subject of crime of fraudulent bankruptcy to constitute all of the assets of the debtor subject to bankruptcy. A part of the assets can also constitute the subject of this crime (Özgenç, 2010:340).

3.5. Actualization of Bankruptcy

The primary condition for the crime of fraudulent bankruptcy to take place is the commercial court of first instance decreeing for the bankruptcy of the perpetrator and the decree being finalized. Therefore, giving the decision of bankruptcy is considered as the “**objective punishability condition**” by the criminal law. The decision of bankruptcy is not an element of the crime, but is a necessary condition for punishability of the perpetrator. It does not matter whether the perpetrator commits the act before or after the bankruptcy. Although the criminal court cannot discuss the legitimacy of the bankruptcy decision, it will decide on its own whether this bankruptcy is negligent

or fraudulent. The court is not bound by the decision of the commercial court for this case (Yaşar et al., 2010).

3.6. Victim of the Crime

The primary victim of the crime of fraudulent bankruptcy is the public. As in all crimes, public can also come to harm from the crime. Besides, the creditor or creditors whose rights and interests are put to loss by way of various fraudulent acts committed before or after the bankruptcy by the debtor for whom the decision of bankruptcy was given are also victims of the crime. One has to be real or legal person in order to be considered as the victim of fraudulent bankruptcy crime. It has been determined that the communities which are not legal entities cannot be considered to be the victim of this crime (Yıldız, 207:212).

3.7. Attempt

Attempt is defined in Article 35 of TCL as “If the person directly and conveniently starts to commit a crime he intends, but however cannot complete the act due to reasons beyond control, the person is held responsible for attempt”.

Fraudulent bankruptcy holds the basic conditions for attempt, due to the fact that it has been regulated as a crime and it is a crime that can be committed upon intent. However, in the context of this crime, the existence of results is a questionable subject, because since going bankrupt is considered as a condition for objective punishment, it is not possible to consider bankruptcy as the result of the crime. According to some views, the types of crimes which include objective punishment conditions are not suitable for attempt, because for these types of crimes, completion of the crime is not sufficient by itself to be able to punish the perpetrator; additionally the punishability conditions should also hold (Artuk et al., 2010,441).

3.8. Complicity

The term complicity refers to the fact that a crime that can be committed by one person to be committed by more than one person.

According to Article 311 of BEL regarding the fraudulent bankruptcy, in the specific clause issued for complicity, it is stated that if the persons committing the acts constituting fraudulent bankruptcy are from the household of the insolvent, they also are to be punished in the same manner as the insolvent. Moreover, persons outside of the household of the insolvent who, for the purpose of reducing the assets of the insolvent, partially or wholly hides or smuggles the movable or immovable assets of the insolvent, seizes them through prearranged transactions, or act as accomplice or act negligent in these actions, or who partially or wholly make sham claims to the bankruptcy estate, or who engages in business activities in his own name or under an alias in order to reduce the ability of the insolvent to pay, are to be sentenced to the same punishment in the same manner. The special complicity situation as expressed by Article 311 of BEL which was indirectly annulled with the new TCL, is not possible to be committed in the case of the crime of fraudulent bankruptcy. According to the general provisions about complicity which are already existent in the TCL, the concepts of perpetrator and partner are applied in the crime of fraudulent bankruptcy (İşika, 2013:621).

3.9. Consolidation

The consolidation of crime refers to the situation where more than one crime is accumulated on one perpetrator (İçel et al., 2007:21).

During the committing of the crime of fraudulent bankruptcy, it is also possible for other crimes to be also committed; and additionally the perpetrator can also commit the crime in a consecutive manner by smuggling parts of assets at different times within the context of execution of the same

crime. In this context, the general provisions for consolidation are also applicable for the crime of fraudulent bankruptcy (Işıka, 2013:621).

3.10. Sanctions

The situations for fraudulent bankruptcy are listed in Article 311 of BEL and Article 161 of TCL no 5237. In Paragraph 1 of Article 311 of BEL, it has been stated that the insolvent for whom the decision of bankruptcy is given, will be sentenced in accordance with Turkish Criminal Law, upon one of the conditions for fraudulent bankruptcy stated in the article; and for the sanctions Turkish Criminal Law is referred.

In the Article 161 of TCL no 5237, the penal sanction for the crime of fraudulent bankruptcy is stated as follows: “The person who engages in fraudulent acts in order to reduce his assets, if bankruptcy is decreed before or after these fraudulent acts, are to be sentenced to jail for three to eight years”. In the Article 167 of the same law, the personal reasons that require reducing of the sentence due to personal impunity are expressed. Accordingly, in the case of the crime of fraudulent bankruptcy to be committed against one of the spouses for which the official divorce was not concluded, a person in the lineal kinship, or to relatives by marriage to the same degree, adopter parent or adopted child, siblings who live in the same household, the relative will not be subject to sentencing. “In the case these crimes are committed against one of the spouses for which the official divorce was concluded, siblings who do not live in the same household; uncles, aunts, nephews, nieces and similar second degree relatives who live in the same residence, the sentence will be given to the relative only upon complaint and this sentence will be reduced by half” is also stated in the article (Yavuz, 2014:157).

3.11. Provision for Effective Remorse

Article 168 of TCL no 5237 which regulates effective remorse states the following provisions:

“(1) After the crimes of theft, property damage, misuse of trust, fraud, fraudulent bankruptcy, negligent bankruptcy, and benefitting without compensation are completed but before prosecution of these crimes begin, in the case of the perpetrator, instigator or accomplice to show remorse in person and elimination of the loss of the victim by way of returning identically, or completely removing the loss by way of indemnity, the sentence is reduces by two thirds.

(2) In the case of effective remorse to be show after the beginning of prosecution but before the sentence is given, the sentence is reduced by half.

(3) The sentence to be given to the person who shows effective remorse for the crime of looting, is reduced up to by half if the situation fits the first clause, and up to one thirds if the situation fits the second clause.

(4) In order for the provisions for effective remorse to be applied, additional consent of the victim is necessary in the case of partial return or indemnity.”

Whether the person or persons can benefit from effective remorse depends on the actualization of the conditions stated in Article 168 of TCL no 5237. The first one is the condition that although the crime has been completed the prosecution has not yet started, and the second one is paying the creditors and providing indemnities (Kızılaslan, 2006:111).

4. DISCUSSION AND CONCLUSION

The crimes of fraudulent bankruptcy which are the main topic of this study, are regulated in Article 161 of Turkish Criminal Law and Article 161 of Bankruptcy and Enforcement Law. Previously crime of fraudulent bankruptcy was regulated under Article 506 of TCL no 765. In the previous regulation, only the sanctions for the crimes were stated in the law, and for the circumstances under which the

crime was committed, BEL no 2004 was referred. These bankruptcy conditions were listed in Article 311 of BEL under eight items. One of the main subjects of criticism among several authors in the doctrine was the fact that although Article 161 of TCL no 5237 brings new regulations for the crime of fraudulent bankruptcy, the Article 311 of BEL was not annulled. It has been expressed that this situation leads to disarray. Specifically, it can be observed that the items a, b, c and d listed under Article 161 of TCL no 5237 also include the conditions stated in Article 311 of BEL. This confusion has not yet been fully corrected.

The crime of fraudulent bankruptcy by rule is constituted from fraudulent transactions that prevent the creditors from accessing the assets. According to the evaluations, it can be seen that with crimes of fraudulent bankruptcy, the legislator in fact aims to protect the interests beyond individuals. Being a business owner is not a compulsory condition for the perpetrator of crimes of fraudulent bankruptcy, the types of perpetrators are explained clearly in Article 161 of TCL.

In this study, especially the Article 161 of Turkish Criminal Law no 5237 and Article 311 of Bankruptcy and Enforcement Law are elaborated, and it is revealed that the clauses listed in Article 161 of Turkish Criminal Law no 5237 already include the clauses listed in Article 311 of BEL. For example, the clause "Smuggling, hiding or destroying the assets partially or wholly, which are guarantees for the collective claims of the creditors" which is included in Article 311/(1)-1 of BEL is also stated in the same manner in Subparagraph 1 of Paragraph 1 of Article 161 of TCL. In this context, the same clause is stated as "Smuggling, hiding or causing reduction in the values of the assets, which are guarantees for the collective claims of the creditors".

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