

Received: 25/01/2024

Published:26./01/.2024

The crime of breach of trust

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Abstract:

The crime of breach of trust is among the crimes against funds, which directly targets the transaction that occurs between the victim and the offender, as this crime is meant to be the violation of a person's right to the property of another person by breach of trust deposited in him, so that delivery must take place as a temporary possession based on a contract of trust, which is approved by the Algerian legislator original and complementary penalties, and this is due to the special nature of such transactions that fall on it This kind of crime.

Keywords:

Treason, honesty, offender, victim, crime.

Introduction:

The legislator has dedicated numerous provisions to ensure the protection of assets against assault, due to their significant importance in criminal policy. Assets represent a part of property rights, and diminishing these rights leads to the deprivation of a fundamental right of the victim.

The crime of breach of trust is considered one of the serious crimes related to trust and credit. It represents a betrayal of the trust bestowed by the person whose property is assaulted upon the trustee. This crime is characterized by a feature not

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found in other financial crimes, namely the possession of the asset in the hands of the perpetrator, through a contract specified by the legislator in the penal code.

What is the concept of the crime of breach of trust? What are its elements? And what are the forms of contracts that fall within its scope?

To answer these questions, the study adopts an analytical and descriptive approach, dividing the research into two sections, each section comprising two parts, as follows:

The first section is dedicated to elucidating the nature of the crime of breach of trust in terms of its definition linguistically and terminologically (the first part), and identifying the elements of this crime, including the legal element, the material element, and the moral element (the second part).

Meanwhile, the second section is devoted to detailing the subject matter of the crime of breach of trust and its criminal prosecution. This includes explaining the contracts that fall within the scope of this crime (the first part), followed by discussing how the crime of breach of trust is prosecuted and the consequent penalties, through an analysis of Articles 376 and subsequent of the Penal Code (the second part).

Section One: The Nature of the Crime of Breach of Trust:

In this section, we delve into the linguistic and terminological definitions of the crime of breach of trust, as well as clarifying its three components: the legal, material, and moral elements, in accordance with the provisions of the penal code.

Part One: Definition of Breach of Trust:

Before addressing the terminological definition of the crime of breach of trust, it is essential to detail and define both aspects of this term through their linguistic meanings, as follows:

Subsection One: Linguistic Definition:

a. Breach (Betrayal):

It is the opposite of trust. To betray (in Arabic: خان) implies deceit and breach of trust. The term encompasses the meanings of denial of a entrusted responsibility, lack of fidelity, violation of a promise, negligence in trust, and failure to safeguard it. Various forms of the word indicate a person who is unfaithful or treacherous¹.

b. Trust:

Trust is the opposite of betrayal. The root of 'security' (أمن) is the tranquility of the soul and the removal of fear. Trust, derived from 'to secure' (أمن with a kasra), indicates a state of being trustworthy. Subsequently, this root was metaphorically used for tangible items, leading to the interpretation that a deposit or similar is a trust (أمانة), with its plural being trusts (أمانات). Thus, trust is the term for what a person is secured with². As the Almighty says: {And you betray your trusts} (وَتَخُونُوا) (أماناتكم)³, meaning what you have been entrusted with. And His saying: {Indeed, We offered the Trust to the heavens and the earth} (إنا عرضنا الأمانة على السموات والأرض)⁴.

Subsection Two: Terminological Definition:

"It is the violation of another person's property rights through the betrayal of trust that was placed in the violator."⁵

It is also defined as: "The dissipation of movable property delivered to someone based on a contract of trust or similar agreement, or pursuant to a legal or judicial ruling, or under incidental trust, intending to harm the owner."⁶

Additionally, it is described as: "A situation where an individual is entrusted with or given movable property belonging to another for a specific purpose, and then mismanages it by using it or dealing with it in bad faith or for the benefit of another, in a manner contrary to the purpose for which it was entrusted or delivered, as legally determined or as explicitly or implicitly instructed by the one who entrusted and delivered it."⁷

Second Part: Elements of the Crime of Breach of Trust:

In this section, we discuss the elements defined by the legislator that constitute the crime of breach of trust, as follows:

Subsection One: The Legal Element:

The Algerian legislator has addressed the substance of the crime of breach of trust within the Penal Code⁸, as outlined in Articles 376, 377, 378, and 379.

Firstly, Article 376 states that anyone who embezzles or dissipates, with ill intent, trade papers, money, goods, financial documents, receipts, or any other documents that contain or prove an obligation or exoneration, which were delivered to him solely for the purpose of endorsement, deposit, agency, pawn, gratuitous loan, or to perform a paid or unpaid job, with the condition of their return, presentation, or use for a specific task, to the detriment of their owners or those who hold or possess them, is considered to have committed the crime of breach of

trust and shall be punished with imprisonment from three months to three years and a fine from 500 to 20,000 DZD.

Additionally, the offender may also be sentenced to deprivation of one or more rights listed in Article 14 and prohibition of residence for at least one year and up to five years, without prejudice to the provisions of Articles 158 and 159 relating to the theft of money, trade papers, documents, and their seizure from public depositories.

Secondly, Article 377 applies the exemptions and restrictions for initiating public prosecution established in Articles 368 and 369 to the misdemeanor of breach of trust as stipulated in Article 376.

Thirdly, Article 378 allows for the imprisonment to be extended up to ten years and a fine up to 200,000 dinars if the breach of trust:

- Is committed by someone who resorts to the public for their own account or as a director, manager, or agent of a company or commercial or industrial enterprise concerning money or securities delivered for deposit, agency, or pawn.
- Involves a broker, intermediary, professional advisor, or contract drafter concerning the price of real estate sales, commercial goods, subscription value in shares or quotas of real estate companies, or their purchase or sale price, or the price of a rental assignment, if such assignment is legally acknowledged. The provisions of the second paragraph of Article 376 may also be applied.

Fourthly, Article 379 states that if the breach of trust is committed by a person holding a public or judicial office during

or in connection with their duties, the punishment shall be temporary imprisonment from five to ten years.

Subsection Two: The Material Element:

This element is realized when the offender performs any act that clearly indicates the diversion of money, object, or document under his possession or custody, or any act indicating their dissipation and destruction. The material element is the criminal activity or physical behavior that causes harm to others. In the case of breach of trust, this element is realized through the following behaviors:

Firstly, Embezzlement, Dissipation, or Usage:

a. Embezzlement:

This refers to any action whereby the actor removes the entrusted money from his possession wholly or partially and transfers it to another person's possession, whether by selling, gifting, exchanging, or exercising any real right derived from ownership. This occurs through any act resulting in the transfer of money from the actor's possession to someone else by any means⁹.

b. Dissipation:

This is the removal of money from the possessor's custody by disposing of it in any way that transfers ownership, such as sale, gift, exchange, etc. Dissipation requires an act that makes it impossible to fulfill the obligation to return it to the owner. It is the most evident behavior in the crime of breach of trust, as the offender, after intending to own the item, disposes of it. Therefore, dissipation is less challenging to prove due to the apparent behavior indicating bad intent or negligence.

Dissipation differs from destruction, as the latter involves causing unlawful loss to another by damaging or reducing the value of their property¹⁰.

c. Usage:

The legal text refers to usage, the act whereby the accused uses the item in a manner only permissible for the owner. Merely using the money or item contrary to the contract's terms is insufficient. It includes deliberate misuse that amounts to destruction. However, one is only punishable for usage if it is coupled with the intent to own. It is not distinct from the meaning of embezzlement, which encompasses both dissipation and usage, as both inherently involve retaining the item with the intention of owning it, constituting a form of embezzlement¹¹.

Secondly, The Object of the Crime:

The object of the crime refers to the physical item targeted by the criminal behavior of the offender, which is intended for protection by the legislator. Considering that the crime of breach of trust is a financial crime that affects ownership and is characterized by the possession of the item by the offender, whether entrusted¹² or assigned for management knowingly and willingly, the offender transgresses upon another's property by violating the trust and confidence placed in them.

Thirdly, Delivery of the Item:

For the crime of breach of trust to occur, the money must be delivered from the victim to the offender. The offender's seizure of money without delivery constitutes theft, not breach of trust. Thus, breach of trust occurs only when the entrusted

money is delivered to the offender, making delivery essential for the crime's establishment. It is inconceivable for the trustee to use or dispose of the item unless it was in their possession before committing the crime¹³.

Subsection Three: The Moral Element:

Merely using or disposing of the entrusted money contrary to the trust's requirements is insufficient for the crime of breach of trust; there must be criminal intent, meaning the offender's will is directed towards committing the criminal act and they are aware of it. Hence, like other crimes, the crime of breach of trust requires criminal intent. The offender's knowledge must be directed towards using or disposing of money under their deficient possession based on one of the trust contracts¹⁴.

As with other intentional crimes, the perpetrator's will must be free from defects, deliberately intending to harm the victim. This harm arises from the intention to deceive, motivating the criminal act. This crime also requires specific criminal intent, namely the accused's bad intent and deliberate aim to acquire the entrusted money or item to harm its owner.

Section Two: The Subject of Breach of Trust and Criminal Prosecution:

After detailing in the previous section the linguistic and terminological meaning of the crime of breach of trust, and analyzing its three elements, we now turn to explaining the contracts that constitute the subject of the crime of breach of trust, as stipulated exclusively in Article 376 of the Penal Code.

Part One: Contracts Involving Breach of Trust:

This section clarifies and defines each of the contracts that can be subject to the crime of breach of trust, focusing on three essential elements: definition, characteristics, and forms of the crime of breach of trust in each contract.

Subsection One: Lease Contract:

a. Definition:

Under the old law, the legislator did not provide a definition for the lease contract, merely stating that "the lease is concluded between the lessor and the lessee." However, following the 2007 amendment¹⁵, specifically the first paragraph of Article 467, the contract is now defined as: "Lease is a contract enabling the lessor to allow the lessee to benefit from the property for a specified period in return for a known rental fee."¹⁶

b. Characteristics:

It creates personal obligations: It obliges the lessor to enable the lessee to enjoy the leased property rather than just allowing its use, indicating that the legislator has expanded the scope of the lessor's obligations in exchange for the rental fee paid by the lessee.¹⁷

It requires formality: If the required form for a lease contract is not met, it results in nullity, especially for free management lease contracts of commercial premises, which the legislator mandates in Article 203 of the Commercial Law to be formalized under penalty of nullity. This is echoed in Supreme Court Decision No. 36164 dated June 26, 1985, published in the Judicial Magazine, 1989, Issue 3, Page 116, stating, "It is legally established that the free management lease contract must be drafted in a formal format and published within fifteen days from its date," as confirmed by Article 324 bis 1 of the Civil Code.¹⁸

The lease contract is also characterized as one involving the use of property, a consensual contract binding for both parties, a contract of exchange, a continuing contract, and it only creates personal obligations and rights. The meaning of a lease contract in the context of breach of trust does not differ from its meaning in civil law.

c. Forms:

The crime of breach of trust in a lease contract can occur whether through seizing the leased property and treating it as one's own, causing damage to it, neglecting its care leading to its destruction, using it for unintended purposes, using tools or materials leading to its collapse, or violating any lease condition resulting in damage to the leased property, thereby causing harm to the lessor and making the lessee liable for the damages caused.¹⁹

Subsection Two: Deposit Contract:

a. Definition:

Article 590 of the Civil Code defines a deposit as "a contract whereby the depositor delivers a movable item to the depositary to keep it for a period and to return it in kind." Therefore, a deposit contract is primarily a contract of safekeeping and trust, where the received property is a trust in the possession of the recipient, who is liable for its loss only due to negligence in its preservation.²⁰

As per Article 4 of Order No. 04-03, "Deposits and other similar recoverable amounts as defined in this order are any creditor balance resulting from remaining funds in an account or funds in transit due to regular banking operations that must be repaid according to the applicable legal and contractual conditions, especially in the field of clearing."²¹

Deposits are also defined as "anything that individuals or entities place in banks temporarily, whether short-term or long-term, for safekeeping or investment, typically in the form of legal currency, although they can sometimes take other forms."²²

b. Characteristics:

The subject of the deposit can be money or another movable item, and the depositary in a deposit contract is obliged to preserve the deposited item and return it in kind, otherwise considered a breach of trust. Article 598 of the Civil Code stipulates that the depositary must obtain permission from the depositor to use the deposited money. Moreover, set-off is not allowed as per Article 299 of the Civil Code.²³

A deposit contract is consensual, as per the general rules of obligations, embracing the principle of "will autonomy," which leads to contractual freedom and the sufficiency of consent for contract formation.²⁴

Commercial transaction: In line with Paragraph 13 of Article 02 of the Commercial Law, which considers all banking operations as commercial in nature for the bank, cash bank deposits are always considered commercial transactions for the bank.²⁵

c. Forms:

It is accepted that a deposit contract involves three elements: delivery of a movable item to the depositary, the obligation to preserve it, and the obligation to return it to the depositor in its original form.

Breach of trust in a deposit contract occurs if the depositary exploits the presence of an item in their possession to seize it, infringing upon the depositor's ownership and denying their rights over it. If the depositary unjustifiably denies the existence

of items transferred to them, uses the deposit without explicit or implicit permission from the depositor, or refuses to return it to the owner without valid reason, they are considered to have committed the crime of breach of trust and are thus subject to punishment.²⁶

Subsection Three: Agency Contract:

a. Definition:

It is "a civil contract whereby one person delegates another to execute a legally valid and delegable matter, or it is appointing someone else in their stead for a legally permissible and specific transaction." Everything a person can do themselves can be delegated, which is the rule for what contracts can involve agency. What one cannot do themselves cannot be delegated.²⁷

The Algerian legislator defines agency as "a contract whereby one person delegates another to act on behalf of and in the name of the principal." The emphasis in the definition on "delegating another to act" means that the principal delegates the agent to act on their behalf and in their name.²⁸

b. Characteristics:

The law sets conditions for the subject of the agency, identical to those stipulated in the books of jurisprudence. These conditions include specificity, where the subject of the contract must be determined in quantity and type to avoid ambiguity, legality in not contradicting public order or morals, and feasibility in not being impossible. The ownership of the principal in the subject is a condition for the principal as stated in the law.²⁹

c. Forms:

Forms of embezzlement and dissipation committed by agents include dissipating the item received under an agency contract or the price of an item they were tasked to sell by the principal, or money received from the tenant for the account of their principals. An agent who receives money to purchase a specific item but buys it for a lower price and keeps the difference for themselves is considered to have dissipated the difference between what they received and what they spent; the principle being that the agent acts to preserve the principal's interest, and the benefit should revert to the latter.³⁰

Subsection Four: Pawn Contract:

a. Definition:

A possessory pawn is a contract made to guarantee a debt owed by the debtor, acting as a pawnor and collateral guarantor, as per the Civil Code, which states: "A possessory pawn is a contract obliging a person, as a guarantee for a debt owed by them or another, to deliver to the creditor or to a third party appointed by the contracting parties an item that establishes for the creditor a real right allowing them to hold the item until the debt is satisfied, and to take precedence over ordinary creditors and those ranking after in receiving their right from its price."³¹

b. Characteristics:

If the pawned real estate is destroyed or damaged, the pawn creditor's right transfers to the value of this property, whether it be compensation received by the debtor from a third party who damaged the property, insurance money received by the debtor from an insurance company, or compensation for expropriation of the pawned property for public benefit received by the pawning debtor. The official pawn is a guarantee for any obligation, regardless of its nature and description, is indivisible, and only arises on specified real estate or estates to guarantee

precisely defined debt or debts, with formality required for the official pawn.³²

A possessory pawn pertains to both real estate and movables, but the scope of breach of trust in the case of a pawn is limited to movable pawns, although a real estate pawnor commits breach of trust if they embezzle or dissipate the real estate, especially if parts of it are removed and become movables.

c. Forms:

If the creditor disposes of the pawned movable in their possession, dissipating or embezzling it, they are deemed to have committed the crime of breach of trust; they are obliged to preserve the movable and return it to the debtor at the agreed time if the debt is paid. If the debtor fails to fulfill their obligations, the creditor may dispose of the movable by sale to collect the debt amount from the sale price.³³

Subsection Five: Contract of Gratuitous Use (Commodatum):

a. Definition:

Article 538 of the Civil Code defines a contract of gratuitous use as "a contract whereby the lender commits to deliver a non-consumable item to the borrower for use, without compensation, for a specified period or for a specific purpose, on the condition that it will be returned after use."³⁴

b. Characteristics:

It is a consensual contract, binding on both parties (as per Article 539 of the Civil Code, along with other obligations), and

falls under the category of gratuitous contracts (as stipulated in Article 538 of the Civil Code)³⁵.

c. Examples:

An instance of this would be someone borrowing a friend's car for a specific purpose, then renting it out to others, or disposing of it through sale or further lending. Also included are acts of squandering or deliberately damaging it with the intent to harm the owner, or withholding the car for oneself after the agreed period and refusing to return it without just cause, which would be considered a betrayal of trust³⁶.

Subsection Six: Contract to Perform a Task:

This refers to a contract where a person receives an item to carry out a physical task for the benefit of the item's owner or someone else. The task may be for compensation, constituting a contract for services or employment. It is a consensual, reciprocal, and successive execution contract subject to the general rules of contracts. The absence or invalidity of one or more conditions leads to its nullity but without retroactive effect.³⁷

Part Two: Prosecution and Penalty:

In this part, we analyze Article 376 of the Penal Code, which addresses the criminalization and punishment of breach of trust. We clarify the penalties imposed on those who commit this crime and the limitations that may affect the initiation of public prosecution for this crime, as follows:

Subsection One: The Penalty³⁸:

The penalty for the crime of breach of trust includes several provisions:

First, Article 376: The perpetrator of breach of trust is punishable by imprisonment from three months to three years and a fine ranging from 500 to 20,000 DZD. Additionally, the perpetrator can be deprived of one or more rights stated in Article 14 and banned from residing for at least one year and up to five years. All this is without prejudice to Articles 158 and 159 concerning the theft of money, trade papers, documents, and their seizure from public depositories.

Second, Article 377: Applies the exemptions and restrictions related to initiating public prosecution established in Articles 368 and 369 to the misdemeanor of breach of trust stated in Article 376.

Third, Article 378: The term of imprisonment can be up to ten years and the fine up to 200,000 DZD if the breach of trust is committed:

- By a person soliciting the public for their own account or as a director, manager, or representative of a company or commercial or industrial project concerning money or securities as a deposit, agency, or pawn.
- By a broker, intermediary, professional advisor, or contract drafter concerning the price of real estate sales, commercial goods, subscription value in shares or quotas for real estate companies, or their purchase or sale price, or the price of a lease transfer, if such transfer is legally recognized. The provisions of the second paragraph of Article 376 may also be applied.

Fourth, Article 379: If the breach of trust is committed by someone holding a public or judicial office while performing

their duties or in connection with them, the punishment is temporary imprisonment from five to ten years.

From these articles, we deduce that the Algerian legislator categorized the penalty for breach of trust into three types: two primary penalties (imprisonment and fine), and a supplementary one, as explained below:

1. Primary Penalties:

This includes imprisonment from three months to three years, and a monetary fine from 500 to 20,000 DZD, in cases without aggravating circumstances. If mitigating circumstances are present, the penalty can be reduced to one day in prison and a fine of five dinars. The imprisonment may be replaced by a fine according to Article 53 of the Penal Code.

2. Supplementary Penalties:

These consist of deprivation of national rights and prohibition of residence for at least one year and up to five years. These are optional penalties, the same as those established for the crime of theft.

a. Aggravating Circumstances³⁹:

The Algerian legislator considered several personal circumstances related to individuals with specific attributes that involve dealing with people who entrusted them; as specified in Article 378 of the Penal Code, along with two circumstances related to the means used and the victim's status. The aggravating circumstances are as follows:

Firstly, a circumstance related to the perpetrator's status:

The Algerian legislator specified three different cases where the punishment is intensified based on the perpetrator's status:

1. If the perpetrator is a broker, intermediary, professional advisor, or contract drafter concerning the price of real estate sales, commercial goods, subscription value in shares or quotas for real estate companies, or their purchase or sale price, or the price of a lease transfer legally recognized: the maximum penalty in imprisonment and fine is applicable, with imprisonment up to ten years and a fine of 200,000 DZD.

2. If the perpetrator is a public trustee and commits destruction, defacement, dissipation, or violent extraction of papers, records, contracts, or securities stored in archives, clerk's offices, or public depositories, or delivered to him in this capacity: he is punished with imprisonment from ten to twenty years, turning the crime into a felony.

3. If the perpetrator holds a public or judicial office: the punishment is temporary imprisonment from five to ten years. This aggravating circumstance converts the breach of trust from a misdemeanor to a felony.

Secondly, a circumstance related to the means used: Article 378 of the Penal Code in its first paragraph states that if the perpetrator resorts to the public, the punishment can be up to ten years and a fine from five hundred to twenty thousand Algerian dinars.

Thirdly, a circumstance related to the victim's status: If the victim is the state or one of its public institutions, the perpetrator is punished with imprisonment from two to ten years in the

cases stated in Articles 352, 353, and 354, except as provided in Article 370 of the Penal Code.

b. Mitigating Excuses⁴⁰:

Article 377 refers to the legal excuses and refers to Articles 368 and 369 concerning exemptions and restrictions for initiating public prosecution established for theft. Accordingly, no punishment is imposed for breach of trust committed by ancestors against their descendants, descendants against their ancestors, or one spouse against the other. A complaint from the injured party is required for crimes between relatives and in-laws up to the fourth degree.

Subsection Two: Restrictions on Initiating Public Prosecution⁴¹:

Article 377 refers to Article 369, which states that criminal proceedings for breach of trust among relatives, in-laws, and up to the fourth degree cannot be initiated except upon a complaint from the injured party, and withdrawal of the complaint terminates the criminal prosecution.

Conclusion:

With the proliferation of trust and betrayal situations, and the expansion of the areas of breach of trust, it is undoubted that trust encompasses everything that must be preserved and properly returned to its rightful owners. Trust is a broadly meaningful word that encompasses all the relationships a person establishes in life. Thus, trust has multiple meanings and interpretations. Breach of trust was not considered an independent crime in past legislations; it was categorized under theft or fraud, particularly concerning money and movable

properties. Modern laws criminalize breach of trust by imposing deterrent penalties on the betrayers, a trend followed by the Algerian legislator in its amendments regarding the criminalization and punishment of breach of trust.

The Penal Code stipulates the crime of breach of trust in Article 376 and subsequent articles, forming the legal element. The material element, being the essence of the crime, is realized through three behaviors: embezzlement, dissipation, and usage; committed intentionally by the perpetrator to harm the victim. These criminal behaviors manifest in the breach of trust's refusal to return the item that was entrusted to them under one of the contracts exclusively listed in Article 376 of the Penal Code. The moral element of the crime of breach of trust is represented in the general intent, comprising knowledge and will unmarred by any defects in consent; and the specific intent, which includes the intention of ownership, depriving the true owner of their property, and causing harm to them.

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²³ Aicha Manari, "The Legal System of Cash Bank Deposits," Master's Thesis, Setif 2 University, Department of Law, Algeria, 2013/2014, p. 45.

²⁴ Mohamed Farhi, "Provisions of the Deposit Contract in the Algerian Banking System," Master's Thesis, University of Oran, Department of Law, Algeria, 2012/2013, p. 23.

²⁵ *Ibid*, p. 23.

²⁶ Ait Mahdi, Naïma, op. cit, p.181

²⁷ Marwan Abu Fadda, "The Agency Contract and its Applications in Islamic Banks," *Islamic University Journal (Series of Humanities Studies)*, Vol. 17, No. 2, 2009, p. 7.

²⁸ Article 571 of the Civil Code

²⁹ Ashraf Rasmi Anis Omar, "Commercial Agency in Islamic Jurisprudence and Law," Master's Thesis, An-Najah National University, Graduate College, Palestine, 2001/2012, p. 27.

³⁰ Ait Mahdi, Naïma, *op. cit.*, p.182.

³¹ Article 948 of the Civil Code.

³² Abdelhalim Bouchekoua, "Mortgage as a Loan Guarantee: Its Advantages and Disadvantages," *Oases Journal for Research and Studies*, Issue 6, 2009, pp. 241-242.

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³⁴ Decree No. 75-58 dated September 26, 1975, Official Gazette No. 78 issued on September 30, 1975, containing the Civil Code

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³⁶ Ait Mahdi, Naïma, *op. cit.*, p.185.

³⁷ *Ibid*, p.186.

³⁸ Penal Code

³⁹ Penal Code

⁴⁰ Penal Code

⁴¹ Penal Code