

# The obligatory bequest (*al-Tanzīl*) in Algerian Family Law

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**Abstract---**The system of *al-tanzīl* (obligatory bequest or substitution) in Algerian Family Law constitutes a distinctive legal mechanism that operates at the intersection of the rules governing wills and inheritance. Under this system, the law substitutes for the will of the testator (the grandfather or grandmother). Accordingly, non-inheriting grandchildren are granted a share of the estate equivalent to the portion their father or mother would have received had they been alive, provided that this share does not exceed one-third of the estate. This share is distributed according to the rule that a male is entitled to a portion equal to that of two females. The *tanzīl* is classified as an obligatory bequest that takes priority over voluntary wills. What distinguishes this system is its unique legislative character, as it has no equivalent among other legally recognized bequests, since the Algerian legislator has restricted its application exclusively to grandchildren, regardless of their financial circumstances or the existence of other individuals who may also be excluded from inheritance.

**Keywords---** *Tanzīl*, Grandchildren, Obligatory Bequest, Inheritance, Divergence between Islamic Jurisprudence and Positive Law.

### Introduction

The Algerian legislator introduced the institution of *al-tanzīl* (obligatory substitution or bequest) in Chapter Seven of Book Three, entitled "Inheritance," of Law No. 84-11 dated 9 Ramadan 1404 AH, corresponding to 9 June 1984, which constitutes the Family Code.<sup>1</sup> Some Islamic countries have referred to it as the "obligatory bequest" because the bequest under this system is compulsory and executed by force of law, irrespective of the deceased's wishes. This stands in contrast to the general principle that bequests are voluntary. Such a bequest is made in favor of the descendants of a person who died—actually or constructively—during the lifetime of one of his or her parents, or when both parents died simultaneously.<sup>2</sup>

The Algerian legislator addressed the provisions of *al-tanzīl* without providing a formal definition, in Articles 169 to 172. These provisions have remained unchanged following the amendment of the Family Code on 25 February 2005.

As can be deduced from Article 169 of the Family Code, *al-tanzīl* means placing the grandchildren who have been deprived of inheritance due to the existence of blocking heirs in the position of their deceased parent within the estate of their grandfather or grandmother, to a specified extent and subject to particular conditions. This system was developed by Islamic jurisprudence to address the problem faced by grandchildren whose father or mother dies during the lifetime of their grandfather or grandmother, or dies together with them.<sup>3</sup> It operates by substituting the will of

<sup>1</sup> Official Gazette, no. 24, June 12, (12 Ramadan 1404 AH / June 12, 1984).

<sup>2</sup> Muhammad Abu Zahra, *Rulings on Estates and Inheritance* (Cairo: Dar al-Fikr al-Arabi, n.d.), 244.

<sup>3</sup> Hasan Shahin, "Mandatory Bequest in Algerian Family Law," *Police Journal*, no. 35 (1987): 66.

the legislator for that of the deceased parent who did not express his or her intention during their lifetime.<sup>4</sup>

Who, then, are the grandchildren entitled under Article 169 of the Family Code, and what is the position of jurisprudence and the judiciary regarding *al-tanzīl*?

To address this issue, the study is divided into two parts. The first identifies the beneficiaries of *al-tanzīl*, while the second examines the stance of Islamic jurisprudence and the courts toward it.

### **1. The Beneficiaries of al-Tanzīl under Article 169 of the Algerian Family Code**

Article 169 of the Algerian Family Code provides: "If a person dies leaving grandchildren whose parent (mawrith) predeceased him or died simultaneously with him, such grandchildren shall be placed in the position of their parent in the estate, subject to the following conditions."

From this article, it is necessary to determine who is meant by the "grandchildren" referred to and what conditions and quantum must be satisfied for them to be substituted in the position of their deceased parent.

#### **1.1. The Meaning of "Grandchildren"**

Article 169 of the Algerian Family Code does not explicitly define the grandchildren to whom *al-tanzīl* applies. It does not clarify whether the provision is limited to the children of a son (descendants through males, or *awlād al-zuhūr*) or also includes the children of a daughter (descendants through females, or *awlād al-buṭūn*), nor does it specify whether it applies to all degrees of descendants or is restricted to a particular class.

Scholars differ on this matter. Some restrict *al-tanzīl* to the children of a son, while others include the children of a daughter alongside those of a son.

##### **1.1.1. The View Restricting al-Tanzīl to Descendants through Males (*awlād al-zuhūr*), Excluding Descendants through Females (*awlād al-buṭūn*)**

Proponents of this view maintain that *al-tanzīl* should be limited to the children of a son who died—actually or constructively—during the lifetime of his father or mother, or who died simultaneously with them, whether male or female, and regardless of generational distance, provided that no female intervenes between them and their grandfather or grandmother. According to this opinion, the children of a daughter—whether male or female—have no right whatsoever (for example, the son of a daughter's son or the daughter of a daughter's daughter).<sup>5</sup>

This school of thought also argues that the linguistic meaning of "grandchildren" (*aḥfād*) differs from its technical meaning in Islamic law, which has led to

<sup>4</sup> Salih Jijik (Notary), *Police Journal*, no. 1 (November 1987): 25.

<sup>5</sup> Muhammad ibn Muhammad ibn Qasim al-Tawil, *The Obligatory Bequest in Islamic Jurisprudence*, 1st ed. (publisher not identified, 2009), 81.

considerable confusion among legal practitioners and others. Linguistically, the term "aḥfād" refers to the offspring of both sons and daughters equally. In legal terminology, however, "ḥafadah" refers specifically to the descendants of a son, excluding those of a daughter.<sup>6</sup> Anyone who interprets the text literally might assume that grandchildren through daughters inherit alongside grandchildren through sons—an understanding that contradicts the general rules of Islamic inheritance, since the children of daughters (male or female) are classified as *dhawū al-arḥām* (uterine relatives), as stated in Article 168 of the same Code. To avoid such ambiguity, this view recommends adding the legal clarification "from his son" despite the clarity of the French version of the law: *Les descendants d'un fils décédé avant ou en même temps qu'elle...*<sup>7</sup> The French text explicitly confirms the legislator's intention to restrict *al-tanzīl* to the descendants of male children, excluding those through female lines—i.e., *awlād al-zuhūr* and not *awlād al-butūn*. This right applies no matter how distant the degree, unless a female intervenes between the descendant and his or her ascendant.<sup>8</sup>

Furthermore, the purpose of imposing this bequest is to enable grandchildren to inherit alongside the children of the deceased. Labeling it an "obligatory bequest" is merely a formal cover and a misnomer, because legal interpretation focuses on substance rather than form, and on realities rather than names.<sup>9</sup> It was therefore a wise decision by the Algerian legislator to use the term *al-tanzīl* (substitution) instead of "obligatory bequest."

This hereditary character is further confirmed by the placement of *al-tanzīl* in Chapter Seven of Book Three, entitled "Inheritance," and by the distribution of the deceased parent's share among the grandchildren according to the rule "to the male, a portion equal to that of two females," with each branch blocking its own line of ascent.

Proponents of this view specify those who must be substituted in the position of their parent in the estate of the grandfather or grandmother as follows:

- The descendants of a male child who died an actual death during the lifetime of his father or mother.
- The descendants of a male child who died a constructive death during the lifetime of his ascendant, i.e., who was declared missing and whose death was judicially presumed by the court. In such cases, their descendants are entitled to *al-tanzīl* because the court's judgment treats the person as having

<sup>6</sup> Salih Jijik (Notary), *Police Journal*, no. 1 (November 1987): 25.

<sup>7</sup> National Chamber of Notaries, "Proposals," *Police Journal*, no. 1 (May-June 2001): 33.

<sup>8</sup> Muhammad ibn Salim, Attorney General at the Supreme Court, "Mandatory Bequest in Light of Algerian Family Law," *StarTimes Forums, Legal Affairs Archive*, September 16, 2008, accessed via the internet.

<sup>9</sup> Al-Tawil, *The Obligatory Bequest in Islamic Jurisprudence*, 82.

died during the lifetime of the ascendant, even if actual death had not occurred.

- The descendants of a male child who died simultaneously with his father or mother in the same incident (such as a traffic accident, drowning, fire, war, or any other cause), where it is unknown who died first. In this situation, the parent's prior death would normally deprive the grandchildren of any share. *Al-tanzīl* is therefore applied as compensation for what they would have inherited had their parent survived long enough to inherit. In all these cases, the grandchildren are placed in the position of their parent in the estate, and their shares are distributed according to the rule "to the male, a portion equal to that of two females."<sup>10</sup>

### 1.1.2. The View Extending *al-Tanzīl* to Both Descendants through Males and through Females

This is the approach adopted by the Egyptian legislator in Article 76 of the Law of Wills, which grants the obligatory bequest to the children of a son (however distant) and to the children of a daughter in the first degree only—both males and females. Some scholars have welcomed the equalization of the children of a daughter with those of a son, even in lower degrees.

However, the Algerian legislator did not explicitly restrict *al-tanzīl* in the relevant articles to descendants through males only. The general term "aḥfād" (grandchildren) suggests that it includes both the children of sons and the children of daughters. This legislative intent can be inferred from Article 171 of the Family Code, which states: "These grandchildren shall not be entitled to *al-tanzīl* if they are heirs of the ascendant, whether grandfather or grandmother..." Here, the legislator explicitly uses the term "ascendant" (aṣl) to refer to both grandfather and grandmother. Since the term applies to indirect ascendants, it must a fortiori apply to the direct ascendant—the mother. In both linguistic and Islamic legal usage, a person's "aṣl" includes both father and mother.

Similarly, Article 172, which interprets the general terms used in Articles 169, 170, and 171, provides: "The grandchildren shall not have inherited from their father or mother an amount less than the share their parent would have received from his or her father or mother." This too serves as evidence of the legislator's intention to include both sons' and daughters' children under the term "aḥfād."<sup>11</sup>

### 1.2. Conditions for the Obligation of *al-Tanzīl* and Its Quantum

The legislator did not overlook the need to establish both the conditions and the quantum of *al-tanzīl* to ensure its proper application.

<sup>10</sup> Hasan Shahin, "Mandatory Bequest in Algerian Family Law," *Police Journal*, no. 35 (1987): 68.

<sup>11</sup> Ahmad Daghish, *Mandatory Bequest in Algerian Family Law*, 2nd ed. (Algiers: Dar Houma, 2010).

### 1.2.1. Conditions for the Obligation of *al-Tanzīl*

For the grandchildren to be entitled to be placed in the position of their deceased parent, the following conditions must be met:

- The first condition is set forth in Article 171 of the Family Code: "These grandchildren shall not be entitled [to *al-tanzīl*] if they are heirs of the ascendant, whether grandfather or grandmother..." This is because *al-tanzīl* serves as compensation for the share of inheritance lost by the branch due to being excluded by other heirs. For example, if the deceased leaves behind a daughter, a son's daughter, and a full brother, the son's daughter is not entitled to *al-tanzīl* because she inherits one-sixth of the estate as a fixed share (*farḍ*).
- The second condition, also provided in Article 171, states: "...or if a bequest has been made in their favor..." This means that the ascendant (grandfather or grandmother) must not have already bequeathed to the branch the exact amount they would have been entitled to under *al-tanzīl*. In such a case, the bequest becomes mandatory upon the testator's death without requiring acceptance. If the testator bequeathed more than the amount due under *al-tanzīl*, the excess is treated as a voluntary bequest.
- The third condition, stipulated in Article 171, provides: "...or if he has given them, during his lifetime and without consideration, an amount equal to what they would be entitled to under this bequest..." This requires that the ascendant must not have transferred to the branch, during his or her lifetime and without compensation, an amount equivalent to the share due under *al-tanzīl* through any other legal act, such as a gift or a fictitious sale. If the ascendant gave them less than their entitled share, the grandchildren must still be granted *al-tanzīl* for the remainder needed to complete their portion.
- The fourth condition is found in Article 172 of the Family Code: "The grandchildren must not have inherited from their father or mother an amount equal to or greater than the share their parent would have received from his or her father or mother." If they inherited less than this amount, they must be granted *al-tanzīl* to make up the difference.
- The fifth condition is derived from Article 135 of the Family Code, which disqualifies a person from inheritance in the following cases:
  - The intentional killer of the deceased, whether as the principal perpetrator or as an accomplice;
  - A false witness whose testimony led to a death sentence and its execution;
  - Anyone who knew of the killing or its planning but failed to inform the competent authorities.

Furthermore, Article 222 of the Family Code adds any other conditions not explicitly mentioned in the law but addressed by the rules of Islamic Sharia.

### 1.2.2. The Quantum of *al-Tanzil*

Article 170 of the Family Code states: "The grandchildren's shares shall be equal to the portion their parent would have received had he or she been alive, provided that this does not exceed one-third of the estate."

By making *al-tanzil* mandatory, the law treats it as compensation for the inheritance share that the grandchildren lost because their parent predeceased the estate owner. The legislator fixed a specific limit to prevent disputes between the grandchildren and the other heirs. Thus, the grandchildren's entitlement is determined by the share their parent would have inherited, but always within the limit of one-third of the estate. This limitation itself indicates that *al-tanzil* is not a pure inheritance right—since the Sharia had deprived them of it—but rather an obligatory bequest granted as compensation for the lost inheritance.

- If the owner of the estate bequeaths to his grandchildren an amount equal to the share of their deceased parent and this bequest equals one-third of the estate, it is executed as it stands. In this case, it is treated as a voluntary bequest that takes effect without the need for acceptance, since the law has made it the primary obligation.
- If the testator bequeaths less than the share due to the deceased branch and the bequest is less than one-third of the estate, the grandchildren's share is completed up to one-third, and the arrangement is then considered an obligatory bequest.
- If the share due to the deceased parent exceeds one-third of the estate, the bequest is obligatory up to the limit of one-third and is executed without requiring acceptance. The excess is treated as a voluntary bequest, which is subject to the rules governing voluntary wills: it is valid only if the heirs approve it; if they reject it, it becomes void; and if some approve and others reject it, it is executed only with respect to those who approved.
- If no bequest was made in their favor, the grandchildren are entitled to a share equal to that of their parent, provided it does not exceed one-third of the estate. If the calculated share is greater than one-third, they receive only one-third, with no right to the excess. This is because the deceased did not make any bequest, so the portion exceeding one-third cannot be made conditional upon the heirs' approval.

This rule also applies when the deceased bequeaths to some of the entitled grandchildren but not to others. In such a case, those who were not mentioned receive their full share from the remaining portion of the one-third, if sufficient. If the remainder is insufficient, their share is completed from the amounts bequeathed to the others.<sup>12</sup>

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<sup>12</sup> Article 77 of the Egyptian Law of Testamentary Dispositions, no. 71 of 1946. There is no equivalent provision in the Algerian Family Code.

The *al-tanzīl* (obligatory bequest) takes precedence over all voluntary bequests in execution. If a person for whom *al-tanzīl* is due was not mentioned in any bequest, while others received voluntary bequests, the beneficiaries of *al-tanzīl* receive their share from the remaining one-third. If that is insufficient, it is taken from the amounts bequeathed to others. Whatever remains of the one-third after satisfying the obligatory bequest is allocated to the voluntary bequest(s). If there is only one voluntary bequest, it receives the remainder; if there are multiple, they are distributed proportionally among them.<sup>13</sup> The shares under *al-tanzīl* are distributed according to the rule "to the male, a portion equal to that of two females."

## 2. The Position of Jurisprudence and the Judiciary on *al-Tanzīl*

*Al-tanzīl* cannot be considered a pure bequest, nor can it be regarded as genuine inheritance. Rather, it is a hybrid combining elements of both.

It resembles inheritance in that it exists even if the deceased did not create it, unlike a voluntary bequest which requires the testator's initiative. It also does not require acceptance and is not invalidated by rejection, whereas a bequest depends on the acceptance of the legatee or his heirs and is nullified by rejection. Moreover, *al-tanzīl* is distributed according to inheritance rules, even if the testator stipulated a different method of division.

However, it differs from inheritance in terms of entitlement: a gratuitous gift given by the grandfather or grandmother during their lifetime can preclude *al-tanzīl*, whereas no such gift can preclude true inheritance. Each ascendant blocks only his or her own branch, unlike inheritance where an ascendant may block not only his own descendants but also more distant branches of others. Furthermore, *al-tanzīl* is imposed as compensation for the inheritance lost by the grandchildren due to their parent's death before inheriting, while inheritance arises originally and independently, not as compensation for a lost right.

*Al-tanzīl* resembles a bequest in terms of its quantum (limited to one-third of the estate) and its priority (it takes precedence over inheritance and over all voluntary bequests). It differs from a voluntary bequest in that the legislator made it obligatory even in the absence of any bequest by the deceased, and in the manner of distributing its amount, which follows the rules governing the division of the estate itself.

### 2.1. The Position of Islamic Jurisprudence on *al-Tanzīl*

To determine the jurisprudential position on *al-tanzīl*, it is necessary to examine its Sharia origin, the stance of the Ministry of Religious Affairs and Endowments, and the criticisms directed against it.

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<sup>13</sup> Articles 78 and 79 of the Egyptian Law of Testamentary Dispositions. There is no equivalent provision in the Algerian Family Code.

### 2.1.1. The Sharia Origin of *al-Tanzīl* and the Position of the Ministry of Religious Affairs and Endowments

The legal origin of *al-tanzīl*, or the obligatory bequest, dates back to a group of jurists among the Successors (*Tābi'ūn*) and subsequent scholars of jurisprudence and Hadith, including Sa'īd ibn al-Musayyib, al-Ḥasan al-Baṣrī, Ṭāwūs, Imam Aḥmad, Dāwūd, al-Ṭabarī, Ishāq ibn Rāhawayh, and Ibn Ḥazm.<sup>14</sup> It has not been established that the four major Imams adopted or mentioned it. These scholars based their opinion on the obligation to make a bequest in favor of close non-heirs who were not provided for, drawing on the Qur'anic verse:

[وَإِذَا حَضَرَ الْقِسْمَةَ أُولُو الْقُرْبَىٰ وَالْيَتَامَىٰ وَالْمَسَاكِينُ فَارْزُقُوهُمْ مِنْهُ وَقُولُوا لَهُمْ قَوْلًا مَعْرُوفًا] الآية 8 - سورة النساء

**"It is prescribed for you, when death approaches any of you and he leaves behind wealth, that he should make a bequest to parents and near relatives in a fair manner—an obligation upon the righteous"** (Qur'an 2:180).<sup>15</sup>

A group of contemporary scholars and jurists maintains that the children of a person who dies during the lifetime of his or her father are the most deserving of relatives to benefit from this bequest from the estate of their grandfather or grandmother. This is because they combine the conditions of orphanhood and exclusion from inheritance, in addition to the prevailing social reality in our time of neglect by relatives in maintaining family ties, showing kindness, and providing affection, care, and support.

Ibn Ḥazm al-Zāhirī, al-Ṭabarī, and Abū Bakr ibn 'Abd al-'Azīz hold that the bequest is obligatory both religiously and judicially for parents and close relatives who do not inherit due to being blocked from inheritance or due to an impediment such as difference of religion. If the deceased did not make any bequest in favor of such relatives, his heirs or the executor must allocate an undetermined amount from the deceased's estate and give it to the non-heir parents and close relatives in a fair manner.<sup>16</sup>

The official Sharia fatwa issued by the Ministry of Religious Affairs and Endowments dated 10 July 2017<sup>17</sup> addressed the question of whether *al-tanzīl* of grandchildren in Islamic Sharia is restricted to the children of a son or extends equally to the children of both sons and daughters. The fatwa stated the following:

- **First:** The grandchildren to whom the rules of inheritance allocate a share in the estate of their grandfather are exclusively the children of a son, however

<sup>14</sup> Explanatory Memorandum to the Egyptian Law of Testamentary Dispositions.

<sup>15</sup> Quran, 2:180.

<sup>16</sup> Mosque of Sharif Ali Nasir, Dar al-Quran al-Karim, Facebook post, December 3, 2013, <https://www.facebook.com>.

<sup>17</sup> Ministry of Religious Affairs and Endowments, Directorate of Religious Guidance and Quranic Education, Legal Opinion on the Mandatory Bequest, Fatwa no. 37, July 10, 2017.

distant, provided that none of the grandfather's sons are alive—whether that son is their father or one of their paternal uncles. If any male son of the grandfather is alive, the grandchildren do not inherit, whether their father is alive or deceased. As for the children of a daughter, they belong to the category of *dhawū al-arḥām* (uterine relatives), who inherit only in the absence of quota-heirs (*aṣḥāb al-furūd*) and agnatic heirs (*‘aṣabāt*).

- **Second:** The judge has the authority to restrict or adapt a Sharia ruling in order to achieve a legitimate Sharia objective. He may therefore apply the obligatory bequest recognized by some jurists. The judge is the primary authority empowered to determine the grandchildren entitled to inheritance through the obligatory bequest, as he is entrusted with adjudicating cases involving shared rights such as estates, and he possesses discretionary power in this regard.

From this fatwa, it can be inferred that Islamic Sharia does not impose *al-tanzīl* as a mandatory rule; rather, it remains a voluntary matter left to the testator. However, in order to achieve the higher objectives of Sharia (*maqāṣid*), the judge is granted the power to determine the deserving grandchildren for the obligatory bequest within the limits of his discretionary authority. We shall examine the judiciary's position on *al-tanzīl* later. Before that, we address the criticisms directed against it.

### 2.1.2. Criticisms Directed Against *al-Tanzīl* or the Obligatory Bequest

The institution of *al-tanzīl* has faced several criticisms from jurists. The most significant may be summarized as follows:

- *Al-tanzīl* closely resembles inheritance because the purpose of its rules tends toward inheritance. Through this bequest, the law grants the children of a person who dies during the lifetime of his or her parents a fixed inheritance share—the very share their parent would have received had he or she survived—provided it does not exceed one-third of the estate. *Al-tanzīl* is obligatory without requiring any positive act by the deceased; once due, it becomes binding and cannot be refused. In this sense, it resembles inheritance. If it is truly inheritance, then it is absolutely void, because God Himself has divided the rules of inheritance and detailed them in His Book.
- The Qur'anic verse upon which proponents rely to establish the legitimacy of this bequest or *al-tanzīl* has been violated in three respects:
  - **First aspect:** The verse states "if he leaves behind wealth" (*in taraka khayran*). "Wealth" here means substantial property. Scholars differ on its exact amount. Some argue it refers to wealth from which something can be given after the heirs have been sufficiently provided for. This is supported by the Prophet's saying (peace be upon him): "It is better for you to leave your heirs rich than to leave them poor, begging from people" (reported by al-Bukhārī and Muslim).

- **Second aspect:** The verse mentions "and the near relatives" (*wa'l-aqrabīn*). The legislator has restricted *al-tanzīl* exclusively to grandchildren, excluding other non-heir parents and close relatives, even though the verse encompasses all relatives—including grandchildren, siblings and their children, paternal and maternal uncles and their children, and others. Specifying only grandchildren thus contradicts the comprehensive wording of the noble verse.  
Why does the law favor grandchildren while ignoring non-heir grandfathers, grandmothers, and other relatives who may be in greater need due to disability or illness?
- **Third aspect:** The verse does not specify the amount of the bequest. If a man, for example, bequeaths one-sixth to his grandchild, he would have complied with the divine command. However, the law does not stop there; it supplements the share to match what the grandchild's father would have received had he been alive, provided it does not exceed one-third. This constitutes a third violation.
- The text does not require the grandchildren to be in need: The reason behind enacting Article 169 was the legislator's concern that if a father dies during his own father's lifetime, leaving behind young and needy children, and the grandfather then dies, the paternal uncles would take the entire estate, leaving these grandchildren in poverty—whereas their father would have received a share had he been alive. If this was the legislator's intention, why did he not stipulate their poverty as a condition? Instead, the law grants them the right even if they are wealthy. It is possible that the grandchildren are rich while their paternal uncles (the children of the deceased) are poor. In such a case, the uncles would be more deserving of the money, being closer to the deceased and in greater need.
- Attributing the obligatory bequest to Ibn Ḥazm (may God have mercy on him) is misplaced: Ibn Ḥazm did not restrict the bequest to grandchildren alone; he extended it to all non-heir close relatives. Moreover, he did not fix a specific portion of the estate; the amount was left to the discretion of the deceased. If he made no bequest, then his heirs or the executor would determine the appropriate amount to be given to the relatives.<sup>18</sup> This is reinforced by the Qur'anic verse: "And when the relatives, orphans, and the needy are present at the division [of inheritance], provide for them from it and speak to them kind words" (Qur'an 4:8).<sup>19</sup>

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<sup>18</sup> Muhammad Salih al-Munajjid, "The Ruling on the Obligatory Bequest," *Islam Question and Answer*, July 2, 2017, <https://islamqa.info>.

<sup>19</sup> Quran, 4:8.

## 2.2. The Position of the Algerian Judiciary on the Obligation of *al-tanzīl* and the Method of Extracting It from the Estate

The Algerian legislator only recognized *al-tanzīl* with the promulgation of Family Code No. 84-11. Prior to that date, the rules of bequests were governed by Islamic Sharia according to the Maliki school, whose jurists did not recognize *al-tanzīl*, as previously explained. The introduction of Article 169 of the Family Code established *al-tanzīl* following the Hanafi school, which accepts the obligatory bequest, in contrast to the Maliki school previously applied in Algeria.<sup>20</sup>

In Algerian society, it has long been customary for a grandfather to "plant" (*ghars*) or "establish" (*ghirāsa*) his son's children in the position of their deceased father. This practice, commonly referred to by the public as "*al-ghars*" or "*al-ghirāsa*," means that the grandfather places the children of his deceased son in their father's position so that they receive what their father would have received alongside their paternal uncles upon the grandfather's death ("the one who plants").<sup>21</sup> The following section examines the judiciary's position before and after the enactment of the Family Code, as well as the method of calculating and extracting the *al-tanzīl* share from the estate.

### 2.2.1. The Judiciary's Position Before and After the Enactment of the Family Code

Prior to the Family Code, *al-tanzīl* was voluntary. This was confirmed by a Supreme Court decision dated 28 September 1993,<sup>22</sup> which stated: "It is established under Sharia that *al-tanzīl* before the enactment of the Family Code was voluntary. When it is proven that the grandfather had performed *al-tanzīl* for his grandchildren, and such placement was established through witness testimony before the enactment of the Notarization Law, then the courts' ruling granting the grandchildren a right in their grandfather's estate according to the share their father would have received is in accordance with the correct application of the law."

This position was also affirmed in another Supreme Court decision dated 2 May 1995,<sup>23</sup> which held: "It is established under Sharia that *al-tanzīl* before the Family Code was voluntary under the Maliki school. After the enactment of the Family Code, *al-tanzīl* became mandatory by operation of law pursuant to Article 169. It is also established that laws apply only prospectively. In the present case, since the appellants' parent died in 1979 before his own father (who died in 1981), and the

<sup>20</sup> File no. 173556, decision of November 25, 1997, Journal of Judicial Precedents of the Chamber of Personal Status, special issue, 326.

<sup>21</sup> Salih Jijik (Notary), Police Journal, no. 1 (November 1987): 25.

<sup>22</sup> File no. 94719, decision of September 28, 1993, Journal of Judicial Precedents of the Chamber of Personal Status, special issue, 318.

<sup>23</sup> File no. 99186, decision of May 2, 1995, Journal of Judicial Precedents of the Chamber of Personal Status, special issue, 323.

appellants were not placed by their grandfather through *al-tanzīl*, the lower courts' ruling denying them any right in their grandfather's estate correctly applied the law."

Before the Family Code, proof of *al-tanzīl* did not require notarization; witness testimony was sufficient. A Supreme Court decision dated 25 November 1997<sup>24</sup> stated: "It is established under Sharia that testimony of relatives is acceptable in a contract of *al-tanzīl* because it is a gratuitous contract that does not require formal documentation."

After the enactment of the Family Code, the judiciary clarified that the provisions of *al-tanzīl* apply based on the date of the grandfather's or grandmother's death, not the death of the grandchildren's parent. A Supreme Court decision dated 17 March 1998<sup>25</sup> ruled: "Legally, the relevant date for applying Article 169 of the Family Code is the date of the grandfather's death, not the date of the father's death. In the present case, since the grandfather died in 1995—after the Family Code—and the father died in 1982—before the Code—the courts correctly granted the grandchildren the right to *al-tanzīl* and thus a share in their grandfather's estate."

The judiciary has not restricted *al-tanzīl* to the children of a son. It has recognized as beneficiaries both the children of sons and the children of daughters. However, no decision was found specifying the degree to which children of daughters may benefit, unlike the Egyptian law. A Supreme Court decision dated 12 September 2013<sup>26</sup> stated: "The term 'their parent' (*aṣlihim*) in Article 169 of the Family Code (requiring that they be placed in the position of their parent in the estate) means the father or the mother. It is not limited to the father, as the appellant mistakenly believes. This is confirmed by the first paragraph of Article 172 of the Family Code. The term 'grandchildren' (*aḥfād*) means the children of the son (the father) or the children of the daughter (the mother)."

Another decision dated 11 April 2013<sup>27</sup> confirmed: "After the enactment of Family Code No. 84-11, the relevant date for *al-tanzīl* is the date of death of the grandfather or grandmother, not the date of death of the parent of the beneficiaries."

From these decisions of the Supreme Court, it is clear that before the enactment of the Family Code, the Algerian judiciary considered the placement of grandchildren in

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<sup>24</sup> File no. 173556, decision of November 25, 1997, Journal of Judicial Precedents of the Chamber of Personal Status, special issue, 325.

<sup>25</sup> File no. 186769, decision of March 17, 1998, Journal of Judicial Precedents of the Chamber of Personal Status, special issue, 328.

<sup>26</sup> File no. 759763, decision of September 12, 2013, Supreme Court Journal, no. 1 (2014): 327.

<sup>27</sup> File no. 739029, decision of April 11, 2013, Supreme Court Journal, no. 1 (2013): 273.

the position of their parent (*al-tanzīl*) to be voluntary, depending entirely on the will of the testator. After the promulgation of the Family Code, however, *al-tanzīl* became mandatory, and the judge is now empowered to place the grandchildren in the position of their deceased parent in the estate of their grandfather or grandmother. Moreover, the judiciary has not restricted the term "grandchildren" (*aḥfād*) to the children of a son only, as some jurists have done. Instead, it has extended the term to include both the children of a son and the children of a daughter.

### 2.2.2. Method of Extracting the Quantum of *al-Tanzīl* from the Estate

The Family Code does not specify the procedural method for calculating the obligatory bequest. It is therefore necessary to derive it from the articles that set out the conditions for *al-tanzīl*. This method can be summarized in three main steps, taking into account several important considerations:

- **First Step:** It is presumed that the child who died during the lifetime of his or her parent was alive and an heir. The estate is therefore distributed as if that child were present, together with all other heirs, in order to determine the share he or she would have received had he or she been alive.
- **Second Step:** This hypothetical share is then deducted from the estate, while taking into account the following conditions:
  - The share must be equal to or less than one-third of the estate.
  - With respect to the grandchildren being placed, the following must be verified: a. That they are not themselves heirs of the grandfather or grandmother; b. That no bequest was made in their favor. If a bequest was made to them or to one of them for less than the entitled amount, *al-tanzīl* must be applied to complete their share or the share of any one of them; c. That the grandfather or grandmother did not, during his or her lifetime and without consideration, give them an amount equal to what they would be entitled to under the obligatory bequest; d. That the grandchildren have not inherited from their father or mother an amount equal to or greater than the share their parent would have received from his or her own father or mother.

Accordingly, if the grandchildren already possess an amount equal to or greater than the share of their deceased parent under any of the above situations, they cannot be placed in the position of that parent. Conversely, if they have received less, they are placed in the position of their parent with respect to the remaining balance. The remainder of the estate then reverts to the living heirs.
- **Third Step:** The remaining portion of the estate—along with any amount added to it from what was deducted from the one-third allocated to the grandchildren, if any—is distributed among the living heirs. The share of the obligatory bequest granted to the

grandchildren is then divided among them according to the rule "to the male, a portion equal to that of two females."

### Conclusion

From the foregoing analysis, it can be concluded that the Algerian legislator has made *al-tanzīl* mandatory under the Family Code. *Al-tanzīl* is a hybrid institution combining elements of both bequest and inheritance. Indeed, the manner in which it has been legislated is closer to inheritance than to a bequest, to the extent that it may appropriately be described as "statutory inheritance." Under this system, the will of the legislator substitutes for that of the testator, granting the grandchildren the share their parent would have been entitled to as inheritance, but limited to one-third of the estate, and distributed among them according to the rule "to the male, a portion equal to that of two females." The obligatory bequest takes precedence over voluntary bequests, and the grandchildren receive this share whether they are rich or poor, and regardless of whether the grandfather left a large or small estate.

What is even more striking is that a financially weak grandchild may actually be disadvantaged by *al-tanzīl*. For instance, if the grandfather bequeathed the entire one-third of the estate to that grandchild, but the grandchild has wealthy siblings, they will share the one-third among themselves. Similarly, poor heirs may be harmed by *al-tanzīl* when the grandchildren are wealthy and the estate is modest. Furthermore, a placed grandchild may receive more than a direct heir. Consider the case of a person who dies leaving behind one daughter, two sons, and one son's daughter. Here, the son's daughter is placed in the position of her father and receives two shares, while each of the two sons also receives two shares, and the direct daughter receives only one share. It is quite possible that the direct daughter is poorer than the placed granddaughter.

In addition, the noble Qur'anic verse that mandated bequests gave priority first to non-heir parents and then to close relatives. The law, however, has overlooked the parents and restricted the category of close relatives exclusively to grandchildren.

Consequently, the legislative technique adopted for *al-tanzīl* has no parallel among the recognized forms of Sharia bequests; it is, in fact, closer to inheritance than to a bequest. It is therefore advisable to leave the decision whether or not to apply *al-tanzīl*—and the determination of the deserving grandchildren or other relatives—to the discretionary power of the judge, as suggested in the fatwa of the Ministry of Religious Affairs and Endowments. This would better achieve the higher objectives of Sharia (*maqāṣid shar'īyya*).

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