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Substitutional Inheritance in the Algerian Family Code and Its Comparison with Islamic Sharia

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Abstract:

The Algerian Family Code provides for a special system known as *substitutional inheritance* ("tanzul"), through which grandchildren replace their deceased father in inheriting from their grandfather, under conditions that relate both to testamentary provisions and inheritance rules. This article examines the classification of substitutional inheritance and determines the extent to which it aligns with the provisions of Islamic Sharia, given that the texts of the Family Code are derived from it.

Keywods:ç Substitutional inheritance; *tanzul*; will; succession; *de cujus*; grandchildren; ascendants.

INTRODUCTION

Islamic law mandates that, upon a person's death, their estate be distributed among heirs based on kinship ties and marital status. This distribution follows a strict system with specific rules, one of the most important being the principle of

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exclusion in inheritance (*hajb*), whereby a son excludes a grandson, and the father and mother exclude the grandfather and grandmother. In other words, the closest relative to the *de cujus* inherits. Thus, if a person dies leaving both children and grandchildren, it is the children who inherit, while the grandchildren receive nothing—regardless of whether their father is alive or deceased.

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Grandchildren may be paternal orphans, young, and in financially vulnerable situations. Islamic Sharia therefore encourages making a will in favor of close relatives, particularly these grandchildren—that is, the person allocates a portion of their estate to such cases before their death. This will is a voluntary act left to the discretion of the individual, both in terms of the beneficiaries and the amount bequeathed.

The Algerian Family Code[1] has adopted the inheritance system based on the principles of Islamic Sharia, as well as the testamentary system. However, it has introduced a new mechanism, referred to in some jurisprudence and Arab legislations as the "obligatory will," and designated in the Algerian Family Code as "substitutional inheritance." This system allows grandchildren to receive a share of their grandfather's estate, under certain conditions.

Article 169 of the Family Code states: *(If a person dies leaving descendants of a son who predeceased them or died at the same time, these descendants shall take the place of their father in the succession of the de cujus, according to the conditions defined below).*

This text raises several legal issues, notably:

- How should substitutional inheritance be legally classified: is it a form of will or a specific modality of statutory succession?
- What is the position of Islamic law (Sharia) regarding substitutional inheritance—is it recognized and permitted in another form?
- Is positive law compatible with the provisions of Sharia?
- What is the legal nature of substitutional inheritance?

I. The Legal Classification of Substitutional Inheritance :

Many provisions related to wills apply to substitutional inheritance, and the law also considers substitutional inheritance as one of the mechanisms of succession.

1. Substitutional Inheritance as a Will

Arab legislations that recognize substitutional inheritance refer to it as a "mandatory will" and classify it as a form of will. Similarly, certain rulings of the Algerian Supreme Court have described it as a will.[2] But is it truly a type of will?

To verify this, it is necessary to examine the concept of a will and define its various forms.

1-1. The Concept of a Will

Ibn Arafa defined a will as "an act by which the testator establishes, over the disposable third of their estate, a right that becomes definitive upon their death."[3]. Thus, a will is the donation of a portion of a person's assets after their death,[4] whereby the individual bequeaths movable or immovable property to another person, an association, or a charitable organization—provided that ownership of the donated assets is transferred only after the testator's death.

The Family Code devotes the first chapter of Book IV to wills, defining it in Article 184 as follows: "A will is the act by which a person transfers property free of charge for the time when they will no longer exist."

Thus, a will is a unilateral act whereby a person freely gives their property to another person, on the condition that the effect of this act occurs after the death of the testator, and that it is executed before the distribution of the estate. This distribution is determined by jurisprudence, including a ruling by the Supreme Court, which reasoned: *The estate is legally and lawfully due only after the death of the testator.* It takes precedence over inheritance, as it is extracted before the division of assets among the heirs.[5]

Substitute inheritance, on the other hand, occurs by operation of law, without any expression of will on the part of the testator.

According to Supreme Court jurisprudence, the effects of the will do not take effect during the lifetime of the testator, but only after their death. Therefore, the right of the legatee arises upon the testator's death. This means that the source of the real right bequeathed cannot be considered purely as a legal act of the will alone, but rather as a composite source stemming from both the testator's will and the fact of their death.[6]

The law requires the presence of four essential elements for a will to be valid:

- Consent:

The testator must express their intention to transfer ownership of part of their property to other persons after their death. Since a will is a unilateral act and not a contract, the declaration of the testator alone is sufficient to complete the act and produce its legal effects.

Article 186 of the Algerian Family Code requires that the testator be of sound mind. This condition aligns with the general rules provided in Article 40 of the Algerian Civil Code, which states:*"Any adult person enjoying full mental faculties and who has not been declared legally incompetent is fully capable of exercising their civil rights."*

In addition, Article 42 of the Algerian Civil Code stipulates: *A person lacking discernment due to young age, mental weakness, or insanity does not have the capacity to exercise civil rights.*

Article 101 of the Algerian Family Code also stipulates: *Any adult person affected by insanity, feeblemindedness, or prodigality, or subject to any of these conditions, is prohibited.*

The text lists the conditions that warrant prohibition, specifically cases of mental derangement. Therefore, if a person in one of these conditions establishes a will, that act is deemed null and void. This is clarified in Article 107 of the Family Code, which states: *All acts performed by a person under interdiction after the judgment of interdiction are considered null. Acts performed prior to the judgment are also null if the causes of the interdiction were obvious and notarized at the time of their execution.*

However, Article 85 of the Family Code in Arabic states that the acts of a person affected by insanity, feeblemindedness, or prodigality are *inexecutable*, meaning they are valid but produce no legal effects. This contradicts, on one hand, the content of Article 107, and on the other hand, the same text in French, which stipulates: *Acts of a person affected by insanity, feeblemindedness, or prodigality, performed under the influence of one of these states, are null.*

The law also requires that the testator be at least nineteen years old. This condition is consistent with the general rules set forth in Article 40, paragraph 2, of the Civil Code, which states: *"Legal majority is set at 19 completed years,"* making the acts of such a person valid, even if they are to their detriment—meaning a reduction of their financial disclosure capacity as a voluntary act.

Thus, the wording of Article 186 of the Family Code appears to lack significance, as it introduces nothing new but rather repeats general legal principles.

As for the legatee, the law does not require them to accept the will at the moment of its drafting. As previously mentioned, a will is a unilateral act, not a contract. Article 197 allows for the *express or tacit acceptance of the legacy to take place after the testator's death*. The law grants the legatee the right to accept or refuse the will once it has been established—that is, following the death of the testator.

The law also permits a will to be made in favor of any natural or legal person. Article 187 of the Family Code states: *A will made in favor of a conceived child is valid and takes effect only if the child is born alive and viable.*

However, Article 189 excludes wills in favor of heirs: *A will made in favor of an heir only takes effect if the co-heirs consent to it after the testator's death.*

This text effectively makes the prohibition a complementary rule that co-heirs may override, thereby allowing an heir to benefit from the will in addition to their share of the inheritance.

Article 188 of the Family Code adds another provision, stating:

A legatee who is guilty of the intentional homicide of the testator is deprived of the legacy.

Consequently, involuntary homicide or homicide committed in legitimate self-defense does not prevent the legatee from receiving the inheritance through the will.

- On the Object of the Will:

Referring to Articles 92 and 93 of the Algerian Civil Code, the object concerns the money or property being bequeathed. It must exist at the time of the act or be likely to exist in the future, and it must be possible.

According to Article 94 of the same code, the object must also be designated in a way that eliminates any uncertainty or must at least be capable of being designated. Article 190 of the Family Code stipulates that a will may concern *"any property of which the testator is the owner or is expected to acquire before death, either in full ownership or usufruct."*

Thus, the law requires that the object of the will must be property belonging to the testator during their lifetime—whether movable or immovable. According to general legal principles, it must be a tangible thing and must not violate public order or morality.

Per Article 190 of the Family Code, the testator may bequeath any asset they own or are expected to acquire before their death, whether in full ownership or usufruct—that is, the legatee may use or benefit from the property for a limited period, as governed by Article 844, paragraph 2 of the Civil Code, which states: *"Usufruct may be bequeathed to successive persons, provided they are alive at the time of the bequest; it may also be bequeathed to a child who is simply conce*ived."

In the absence of a specified duration for usufruct, Article 196 of the Family Code provides that: *A legacy of usufruct with an indeterminate duration is deemed to be for life and terminates upon the death of the legatee.*

This text mirrors Article 852 of the Civil Code, which states:

The right of usufruct ends upon the expiration of the fixed term. In the absence of a fixed term, it is presumed to last for the lifetime of the usufructuary. It is extinguished, in any case, upon the death of the usufructuary, even before the expiration of any set term.

Article 185 of the Family Code sets a cap on testamentary dispositions, stating: *Testamentary provisions may not exceed one-third of the estate.*
However, the second paragraph permits exceeding this limit if the heirs agree, stating: *"The portion of the estate exceeding one-third of the testator's property may only be executed if the heirs consent to it."*

- On the Cause:

The cause refers to the underlying *motive or purpose* the testator seeks to achieve, and it must be lawful. Article 97 of the Civil Code stipulates: *"An act is void when undertaken without cause or for a cause contrary to public order or morality."*

Article 98 of the Civil Code adds: *"Every obligation is presumed to have a lawful cause unless proven otherwise. The cause expressed in the contract is presumed to be true unless there is evidence to the contrary. If proof is provided that the stated cause is simulated, the burden of proof lies with the party claiming a different lawful cause."*

The cause behind a will is generally the *intent to make a donation with a specific goal*—such as doing good, promoting science, recognizing a legal status, or for personal reasons like family ties.

-On Formalities:

Article 191 of the Family Code provides: *A will is rendered valid by:*
1° A declaration by the testator before a notary, who draws up an authentic act;
2° A judicial ruling noted in the margin of the original property deed in cases of force majeure.

The result is that a will is a formal act in which merely expressing intent—that is, consent—is not sufficient; it must be executed by a notary. The use of the term "validation" in this text is inappropriate, as the context indicates it refers to a fundamental constitutive element; this is evidenced by the fact

that the exception pertains to cases of force majeure, which requires obtaining a court ruling.

Judicial decisions have been issued to confirm this, including a ruling by the Supreme Court in which the case was summarized as follows: an individual named (B B) made an oral bequest to someone in the presence of witnesses. Upon the testator's death, the legatee demanded the execution of the will, but the heirs refused. When the legatee filed a legal claim, the court ruled to exclude the will. Upon appealing to the Supreme Court, the appeal was rejected, and the decision of the lower court was upheld on the grounds that a will must be formally executed. The judges excluded the oral testament because it had not been properly declared before a notary; this was considered a correct application of the law.[7]

In cases of force majeure, the concerned party must prove the testator's true intent by any means of evidence permitted under jurisprudence.[8]

A question arises concerning the publicity of a will, especially when it involves immovable property: *Is it necessary?* The general legal rule stipulates that for ownership of real estate to be transferred, a notarized deed alone is not sufficient—registration of the act is also required to effect the transfer of property.

This publicity has a constitutive effect, as explicitly stipulated in Article 324 bis of the Civil Code; this means that the publicity has a constitutive effect, as clearly indicated in the text of Article 324 bis1 of the Civil Code (In addition to acts which the law imperatively subjects to authentic form, acts involving the transfer of real estate or real rights, businesses or industries, or any of their components, the transfer of shares or company interests, rural leases, commercial leases, and the management of businesses or industrial establishments must, under penalty of nullity, be drawn up in authentic form...).

However, this rule has an exception related to death. Article 15 of Ordinance No. 75-74[9] states: (Any right of ownership or any other real right relating to real estate is enforceable against third parties only by virtue of and from the

date of its publication in the land registry. However, transfers due to death take effect as of the date of the death of the holder of the real rights.

Death automatically results in the transfer of ownership even before the act of publicity, and this occurs in two cases : inheritance and testament.

Thus, the will is valid and produces its legal effects as soon as the notarial act is drawn up, without the need for publicity; and ownership of the property is transferred to the legatee upon the death of the testator, unless the legatee rejects it.

However, certain court rulings have taken a different position, deciding that: the will is valid once it is drawn up before a notary, but that publicity is required after the death in order to transfer ownership. These rulings are based on Article 16 of Ordinance No. 75-74, which states : (Voluntary acts and agreements aimed at establishing, transferring, declaring, modifying, or extinguishing a real right produce effect—even between the parties—only from the date of their publication in the property register.)

In fact, this provision constitutes the general rule and aligns with the wording of Article 234 bis of the Civil Code. As previously mentioned, an exception is made in Article 15 of the same ordinance, revealing that the judicial decision in question was incorrect.

According to Islamic jurists, four essential elements must be present for a will (*wasiyyah*) to be valid:

- The Testator:

The testator is the person who creates the will—that is, the one who wishes to transfer ownership after their death; they must be eligible to make a donation, unless the will is intended as an act of devotion to God. Most jurists believe it can be made by a person who has reached the age of discernment.[10] The testator must be the full owner of the property concerned and must not be indebted to the point that their debts absorb all their assets.[11]

- The Legatee:

The legatee is the individual or entity who receives the bequeathed property following the testator's death. Under Sharia jurisprudence, the legatee must be clearly identified, either by name or description, be eligible to own property, and must not be someone engaged in reprehensible acts.

Islamic jurists are divided on the permissibility of making a bequest to a non-Muslim.[12] The same applies to a person whose death is known to the testator; in such a case, the bequest will be used to settle the beneficiary's debts or, failing that, will be received by their heirs.[13]

- Assets that may be the subject of a bequest:

The subject of the bequest is anything transferred gratuitously after the testator's death. Jurists require it to be an existing property at the time of death, or a usufruct, and that it must not be used for illicit purposes. It must also not exceed one-third of the estate—if it does, then the heirs' consent is required.

- The Formula (Expression):

This refers to how the testator expresses their will. Islamic law does not require any specific or ritualistic formula ; it is sufficient for the testator to manifest their intent—whether by saying something like *"I bequeath to so-and-so"*, writing it, or using any intelligible sign.

As for the posthumous acceptance by the legatee, some jurists argue it is essential if the beneficiary is a specific, named individual, while others do not consider it necessary. The majority opinion holds that such acceptance is *not an essential element*.

When it comes to non-specific beneficiaries, such as *the poor*, acceptance is not required at all.[14]

1-2. Types of Wills

2- There are different types of wills:

3- The first type is known as a voluntary will, as it is established by the unilateral intention of the testator. A person may transfer a

portion of their property—within the limit of one-third of the estate. If they wish to give beyond this portion, the approval of the heirs is required, as stated in Article 185 : *"Testamentary dispositions may not exceed one-third of the estate. The portion exceeding one-third may only be executed with the consent of the heirs."*

4- The second type is referred to as a presumptive will. In reality, it is another legal act, which may be a sale or a donation. However, the law grants it the status of a will and treats it as such. The main reason for this lies in Article 776 of the Civil Code, which states :[15] "Any legal act carried out by a person during their final illness with the intent of making a gift is presumed to be a testamentary disposition and must be governed by the rules of wills, regardless of the designation given to the act.

Thus, if someone performs a legal act near death—whether for compensation or gratuitous—the law and courts disregard the label the parties gave to the act and apply the rules governing wills.

The third type concerns organ donation, which falls under health legislation, specifically Chapter IV: (*Provisions concerning the removal and transplantation of human organs, tissues, and cells).*

2. Substitutive Inheritance Is Inheritance

The Family Code incorporates the provisions on substitutive inheritance in Book Three relating to succession. Article 169 stipulates: *"...descendants must take the place of their ascendant in the line of succession to the deceased,"* which clearly means that they are recognized as part of the heirs. This raises the question : *Is substitutive inheritance truly inheritance?*

2-1. The Concept of Inheritance

Inheritance is defined as the transfer of all property left by the deceased, after the settlement of debts, to their heirs in accordance with Islamic law (Sharia).[16]

Jurisprudence further defines it as : *what the deceased*

has left behind in terms of property acquired during their lifetime by any legitimate means of ownership.[17]

Consequently, succession is opened by actual or presumed natural death; the latter established by judicial ruling. To qualify as an heir, the following conditions must be met :

- Being alive—or at least conceived—at the time the estate is opened;
- Being connected to the deceased by a relationship that grants heir status;
- Not being disqualified from inheritance.

2-2. Provisions Related to Inheritance

The general principle is that a person may not dispose of their future estate while still alive. Article 92, paragraph 2 of the Civil Code states :*"... any agreement concerning the inheritance of a living person is void, even if made with their consent."* However, the text provides for exceptions (*except as provided by law.*).

It is clear that a will constitutes one such legal exception. In contrast, substitutive inheritance (*Tanzul*) is not established by the will of the deceased, but rather by operation of law, *independent of the testator's intent*. This raises the doctrinal question : *Does that make it true inheritance?*

Article 180 of the Family Code, which governs the distribution of the estate, states :
(The following are to be deducted from the estate:
1° *funeral and burial expenses within permissible limits;*
2° *duly established debts owed by the deceased;*
3° *assets subject to a valid legacy.).*

The value of the inheritance then depends on the number and category of heirs, specifically their degree of kinship with the deceased. There are three main categories of heirs:

- Reserved heirs (fard heirs)
- Universal heirs (aceb)
- Heirs by uterine kinship or cognates (dhaoui el arham).

For example:

• When there are two or more daughters and no sons of the

deceased, they are entitled to two-thirds of the estate. • The widow receives one-fourth of the estate in the absence of descendants, and one-eighth if there are descendants.

In contrast, substitutive inheritance follows a single rule of distribution : a male heir receives a share twice that of a female heir.

Moreover, inheritance is governed by a series of rules and principles, notably that of "exclusion in matters of succession" (ḥajb). According to Article 159 of the Family Code, this refers to *the full or partial disqualification of an heir from inheritance rights*. However, substitutive inheritance does not adhere to the rules of exclusion applied in standard inheritance, which reinforces the argument that substitutive inheritance is not truly inheritance, but rather a separate legal mechanism.

II. Provisions Related to Substitutive Inheritance

Substitutive inheritance consists of placing the grandchildren of a person in the place of their parent in the inheritance of their grandfather or grandmother.[18] This occurs when a person dies leaving children alive and at least one of their parents alive. Upon the subsequent death of that parent, the grandchildren inherit in the place of their deceased parent in the estate of the grandparent.

This is also how the Supreme Court defines it : substitutive inheritance occurs between ascendants and descendants, by placing the descendant in the position of the deceased child, so that the grandchildren receive their parent's share of the estate—within the limits established by Article 169 and following of the Family Code.[19]

This is called substitutive inheritance (tanzul) because the children "step into" the legal position of their parent.[20]

The Family Code has established the provisions relating to substitutive inheritance as follows :

1. Scope of application of Substitutive Inheritance

The parties involved in substitutive inheritance are the ancestor (typically the grandparents or the deceased's father) and the grandchildren as beneficiaries, which defines the

personal scope of application. In addition, the value of the substitutive share is determined by law.

1-1. Personal Scope of Application

Article 169 of the Family Code states : *"If a person dies leaving behind descendants who had predeceased them or died simultaneously, those descendants shall take the place of their parent in the line of succession to the deceased."*

A. The Ascendants :

The phrase *"if a person dies"* clearly includes grandparents, whether grandfather or grandmother, and this has been consistently upheld in jurisprudence—leaving no ambiguity.

However, ambiguity arises with respect to the parent who dies before the deceased, leaving children behind. The Arabic version of Article 169 uses the word *"descendants"* (أحفاد), while the French version refers specifically to *"descendants of a son"*—thereby limiting substitutive inheritance to the male line and excluding daughters' children.

This has prompted debate: Some jurists argue that the French version is more precise, because the term *"grandson"* traditionally refers only to the son's children, and not to the daughter's children. The latter are referred to using a different term in Arabic (*al-sibt* - السبط). These scholars support their reasoning with Article 168 of the Family Code, which classifies "cognates of the first category" as : *"the daughters' children of the deceased and the children of the daughters of the son, regardless of degree."*[21]

According to jurisprudence, the following can be observed: Certain rulings have not distinguished between the children of a son and those of a daughter. For instance, in a decision by the Supreme Court, it was held that under the Family Code enacted on 09/06/1984, and specifically Article 169, grandchildren take the place of their ascendants by force of law. In the case in question, since the grandmother passed away in 1987—after the Family Code came into effect—the appellant, who was the son of her daughter, was recognized as her grandson and entitled to a share of her estate through substitutive inheritance.[22]

In another Supreme Court decision, it was ruled that the term *"ascendant"* in Article 169 includes both the father and the mother, rejecting the claim that it refers only to the father. This is further supported by the first paragraph of Article 172.[23]

However, relying solely on Article 172 is insufficient, as it does not explicitly clarify whether the term *"grandchildren"* includes both the children of sons and daughters. The text imposes a condition on benefiting from substitutive inheritance: *"Grandsons and granddaughters may not take the place of their parent in the succession of the deceased if they have already inherited from their father or mother a share equal to the one that their parent would have received from their own parent."*

Thus, jurists are divided on the definition of "ascendant", while the majority of jurisprudence considers that it includes both sons and daughters.

Finally, Article 169 of the Family Code stipulates that the parent (whose children would inherit by substitution) must have died before or simultaneously with the grandparent. This gives rise to three possible scenarios :

- If a person dies *naturally* before their father or mother and leaves behind children, those children benefit from substitutive inheritance and take their parent's place in the inheritance of their grandfather.
- If a person is declared *legally dead*—that is, a judgment has been issued confirming their death—their children inherit from their grandfather through substitutive inheritance, but only *after* that legal judgment is rendered.
- If a person dies *simultaneously* with their father—for example, in an accident—and it is impossible to determine who died first, that person is not entitled to inherit from their father, but their children do inherit from the grandfather through the mechanism of substitutive inheritance.

B. Beneficiaries:

Grandchildren are entitled to a substituted inheritance, whether they are boys or girls—that is, the children of the son or the daughter—excluding other family members. This has been upheld in case law, including a Supreme Court decision stating

that the term "grandchildren" refers specifically to the children of the son or the daughter.[24]

Therefore, if a grandfather names another family member as the beneficiary under substituted inheritance, it is considered a will, not a substituted inheritance. This has been confirmed in case law, including a Supreme Court ruling on a petition to overturn a decision that had annulled a substituted inheritance contract made in favor of a nephew. The Supreme Court decided that such a substituted inheritance is in fact a will equivalent to an heir's share, which is permissible.[25]

The question then arises : if grandchildren benefit from substituted inheritance through their grandfather, can they also benefit from substituted inheritance through their grandmother ?

Case law has ruled that benefiting from substituted inheritance through their grandfather does not preclude grandchildren from benefiting similarly through their grandmother.[26]

1–2. Value of the Share

Article 170 states : *"The share granted to the grandsons and granddaughters of the deceased is equal to what would have been granted to their parent if they were still alive ; however, it shall not exceed one-third of the estate."*

Therefore, the grandchildren's share is equivalent to that of their ascendant, but the law imposes a limit: it must not exceed one-third of the inheritance. This reinforces the idea that substituted inheritance is not considered inheritance in the legal sense.[27] Even though the grandchildren's share mirrors what their parent would have received, it is capped.

By contrast, Article 172 provides that if the grandfather bequeaths a lesser amount to all or any of the grandchildren, they must enter the inheritance in place of their parent in a proportion that completes the share to which they are entitled.

2. Gratuitous Benefit

The rules governing substituted inheritance include conditions about prior enjoyment of the estate by the grandfather and the inheritance from the parents.

2–1. Benefit from the Grandfather

Article 171 states : *"Grandsons and granddaughters may not enter the estate of the deceased in place of their parent if they are already heirs of their ascendant—be it grandfather or grandmother—and this ascendant has made them a bequest or donation during their lifetime without compensation, of a value equal to the one due to them by way of legacy. If a lesser value is bequeathed to all or any of them, they must participate in the estate in proportion to complete the share due to them or one among them."*

The law prohibits those who have benefited from their grandfather either through inheritance or testamentary disposition ; that is to say, through an optional wil ; from receiving a substituted inheritance. However, some court decisions have allowed both the will and substituted inheritance to coexist. One Supreme Court ruling stated that if a grandson who receives a substituted inheritance is also granted an optional will, the optional will takes precedence, and he is not deemed a legal heir in that case. He does not require the approval of other heirs. This was criticized as a misinterpretation of Article 171 of the Family Code.

Most Supreme Court decisions maintain that someone who benefits from substituted inheritance cannot also receive a testamentary share, as Article 171 explicitly prohibits it[28]: *"Grandsons and granddaughters may not enter the estate of the deceased... if they are heirs of their ascendant... and the latter has made them a bequest..."*.

This confirms that substituted inheritance is legally distinct from inheritance: inheritance may be combined with a will (if the remaining heirs approve), whereas substituted inheritance cannot.

In a separate ruling, the Supreme Court overturned a lower court's decision that held the daughter's son could not inherit due to the traditional rule that "he who inherits through a woman cannot inherit." The Supreme Court clarified that although substituted inheritance shares features with inheritance,

it is not governed by the same rules, and therefore this principle does not apply.[29]

2-2. Inheritance from Parents

Article 172 of the Code Family stipulates that : (*Grandsons and granddaughters cannot inherit in place of their ascendant if they have already inherited from their father or mother a share equal to that which their parent would have received from his or her own father or mother).*

Court rulings have consistently applied this provision. For example, a Supreme Court decision examined an appeal brought by heirs against the grandson, to whom the court had granted the right of substitutional inheritance, without considering the heirs' argument that the grandson already owned two villas inherited from his father. The Supreme Court accepted the appeal, stating that the right of grandchildren to inherit by substitution, in place of their deceased parent, is conditional upon the fact that they have not already inherited from that parent a share equal to or greater than what the parent would have received from their own parent. Therefore, the judges of the court were required to verify this condition.[30]

As a result, if grandchildren inherit from their father or mother, they are not entitled to substitutional inheritance. However, inheritance may allow for children to inherit from both their father and grandfather in certain situations.

CONCLUSION

Through this comparative study of substitutional inheritance in Algerian family law and Islamic Sharia, we observed notable differences between the two systems, which can be summarized as follows:

1.Substitutional inheritance is subject to the conditions of a will regarding the amount—it must not exceed one-third of the estate—and the beneficiary must not be one of the legal heirs, meaning they should not already have a share in the inheritance. It takes effect upon the owner's death.

2.However, substitutional inheritance differs from a will in that a will is a unilateral act made during the owner's lifetime and executed upon the express or implied acceptance of the legatee

after the testator's death. In contrast, substitutional inheritance is decreed by law, without the owner's intent, and is established after the owner's death without requiring acceptance from the grandchildren.

3. The will—under both Islamic Sharia and civil law—relies on four elements, and the obligation arises from the donation made for a specific purpose. Meanwhile, substitutional inheritance arises by force of law.

4. The mental health of the grandfather before death is irrelevant for substitutional inheritance. Even if he was under guardianship or suffered from Alzheimer's, the grandchildren may still inherit by substitution if the legal conditions are met. This contrasts with a will, which, by law, requires the mental capacity of the testator.

5. Substitutional inheritance does not grant grandchildren the choice to accept or refuse, as it is granted by force of law, unlike a will.

6. The object of substitutional inheritance cannot be usufruct, whereas the object of a will may include a usufruct.

7. Furthermore, a will is executed before the distribution of the estate, whereas substitutional inheritance takes place during the distribution of inheritance.

The above demonstrates that substitutional inheritance is not a will.

8. The Family Code includes substitutional inheritance within the provisions relating to inheritance. Like regular inheritance, it is established by law and distributed alongside the estate. The share granted to grandchildren corresponds to what their father would have received had he been alive. However, substitutional inheritance must not exceed one-third of the estate. A legal heir is entitled to inheritance even if they have already received a gift from the deceased, whereas substitutional inheritance requires that the beneficiary has not received any prior gift—therefore, substitutional inheritance is not standard inheritance.

9. Substitutional inheritance is thus a special system distinct from both wills and inheritance. Jurisprudence regards

substitutional inheritance as neither a pure will nor inheritance, but rather as a hybrid regime.

10. Islamic Sharia does not provide for substitutional inheritance, making it a product of positive law that diverges from Sharia principles.

11. Although substitutional inheritance is established by law without the parties' involvement, in practice the beneficiary must resort to the courts to claim their legal rights. This involves proving the legal conditions are met before other heirs and the public prosecutor, in accordance with Article 3 bis of the Family Code, which states : *"The public prosecutor is a principal party in all proceedings aimed at applying the provisions of this law."*.

12. The law permits a will in favor of a fetus, provided the fetus is born alive, which aligns with Islamic Sharia provisions.

13. Testamentary provisions under Islamic jurisprudence are broad and inclusive, unlike the Family Code, which is more restrictive.

14. The rules on substitutional inheritance do not take into account the specific circumstances or characteristics of the beneficiary grandchildren. There is no distinction between minors and adults, or between those who are healthy, ill, or disabled.

15. The law also disregards the financial situation of the grandchildren; substitutional inheritance is granted even to those who are wealthy.

16. The texts governing substitutional inheritance require that grandchildren must not have inherited from either of their parents or from the grandfather, and that they must not have benefited from a will made by the grandfather. By deduction, if the grandchildren receive a gift from someone other than the parents or the grandfather, this does not prevent them from benefiting from substitutional inheritance.

17. Upon examining the texts of the Family Code, it appears that there are numerous contradictions between the Arabic text and its French equivalent, which creates issues of interpretation and application.

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5 Case No. 116375, Decision dated 02/05/1995, Judicial Review, Issue No. 1, Year 1996, p. 108

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8 *See Supreme Court Decision No. 413209 dated 16/01/2008, Supreme Court Magazine, Second Issue, 2008, p. 303.*

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