Khol'â Between The Wife's Will And The Husband's Consent Before And After Consummation In Algerian Judiciary And Islamic Jurisprudence -Practical Issues And A Critical Reading-

الخلع بين إرادة الزوجة ومو افقة الزوج قبل الدخول وبعده في القضاء الجز ائري والفقه الإسلامي -إشكالات تطبيقية وقراءة نقدية-

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Abstract:

The study addresses the issue of Khol'â, which the law has recognized as a means to dissolve the marital bond through the unilateral will of the wife, apart from the possibility granted to the woman to request divorce if its conditions are met. The study also examined the rulings related to cases of Khol'â before and after consummation in the Algerian judicial system and Islamic jurisprudence.

The study concluded that the Algerian judiciary, regarding the right to request Khol'â, went through two stages: the first considered that the matter was contingent upon the husband's consent, while in the second stage it was made dependent solely on the wife's will. As for Khol'â before consummation, many substantive courts consider it unacceptable, arguing that it constitutes a violation of the law and Sharia! This is unacceptable because the reasons for rejection are not based on any legal text and contradict the provisions of Islamic jurisprudence, which permits its occurrence.

Keywords: Divorce by compensation "khol'â"; Consummation of marriage; Mutual consent of spouses; Termination of the marital bond.

ملخص:

تتناول هذه الدراسة مسألة الخلع، الذي أقره القانون كوسيلة لفك الرابطة الزوجية بناءً على طلب الزوجة وحدها، بعيدا عن التطليق الممنوح لها إذا ما توافرت شروطه. وقد تطرقت الدراسة إلى الأحكام المتعلقة بحالات الخلع قبل الدخول وبعده في القضاء الجزائري وكذلك الفقه الإسلامي، وخلصت الدراسة إلى أن القضاء الجزائري، مرّ بمرحلتين: الأولى اعتبر الخلع مقرونا بموافقة الزوج، بينما في المرحلة الثانية أصبح بإرادة الزوجة وحدها. أما بالنسبة للخلع قبل الدخول، فتراه العديد من محاكم الموضوع غير مقبول، بحجة أنه يشكل مخالفة للقانون والشريعة، وهذا أمر غير مقبول؛ لأن أسباب الرفض لا تستند إلى أي نص قانوني، وتتنافى آراء الفقهاء الذين يجيزون وقوعه دون خلاف بينهم.

الكلمات المفتاحية: الخلع؛ الدخول بالزوجة؛ تراضي الزوجين؛ إنهاء الرابطة الزوجية.

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Introduction:

Marriage is one of the most sacred contracts; that is why it is called the solemn pact because it is intended to perpetuate the life shared between the two spouses. This permanence is supposed to be based on good coexistence between the couples, on affection and cooperation between them. If living together becomes unbearable, it is up to the spouses to dissolve this marital bond in the manner stated and explained in the Quran and the Sunnah and approved by the Algerian legislator in the Family Code.

It granted the husband the right to divorce by his sole will (*talâq*), and it also gave the wife the possibility to request a divorce (*tatlîq*) if her conditions were met, which the legislator mentioned in Article 53 of the Family Code[1], as well as the possibility of terminating the marital bond by mutual consent of both spouses.

On the other hand, it granted the woman the right to request a divorce by compensation (*khol'â*) if the husband has not repudiated her, or if the cases for the woman's request for divorce are lacking, or if there is no dissolution of the marriage by mutual consent.

This right has gone through stages and legislative and judicial perceptions, as it passed through two phases legislatively: the first consisted of giving the woman the possibility to request *khol'â* before the court, but it was not clear and unequivocal in its terms and meanings.

This created several perceptions among judges: some considered it a license granted by the legislator to women, and some considered it a right for them, and consequently their decisions differed.

In the second phase, it became clearer, giving the woman the possibility to request *khol'â*, making the matter dependent solely on her will, not on the husband's will, which means that *khol'â* is not subject to the husband's consent, but rather to the woman's sole desire, and the judge must respond to her request.

However, this clarity was not sufficient for the judiciary regarding *khol'â* before marriage, that is, in cases where the marriage has not yet been consummated, as many lower court judges insist that divorce by compensation is only possible after the marriage has been consummated. But otherwise, it is not, according to them, due to its non-compliance with the law or because it contravenes the provisions of the *Shari'ah*, and this is in accordance with the decisions – mostly unpublished – rendered by the judges of the Supreme Court.

That is why we wanted to examine this subject to better understand and properly evaluate what has just been rendered by the magistrates in general, and the judges of the Supreme Court in particular.

Is khol'â really a right belonging exclusively to the woman, or is it conditioned on the husband's agreement for it to take place? Is khol'â really not valid before the consummation of the marriage because it is contrary to the law or because it violates the provisions of the Shari'ah?

Section I. Khol'â between the Wife's Right and the Husband's Consent

There is no doubt that one of the most important objectives of marriage is to achieve affection and kindness, but this goal is not always reached, so that the couple's life together is not harmonious, which leads to transforming this affection and compassion into hatred and resentment. This can be envisaged even before the couple comes together under the same roof, and on this occasion, the ideal solution – in the eyes of one or both spouses – is separation.

If the wife chooses to separate from her husband and finds no other means than divorce by compensation (*khol'â*), and decides to turn to the courts to file her grievance, will her appeal be considered if attempts at reconciliation do not dissuade her from her decision, or is her request insufficient as long as the husband has not formally expressed his agreement?

This question arises from the fact that, under the previous Family Code, and before it was amended in accordance with ordinance no. 05-02, there was no clear enough text to determine whether the judgment of *khol'â* required the husband to accept what the wife offered him as compensation or not.

For this reason, magistrates are divided between those who require his consent and those who exclude it, just as the *fuqahâ'* differed in this regard(2), unlike the amended Family Code, where it has become an exclusive right belonging to her, and neither the husband nor the judge has any power over it.

A. Khol'â and the husband's consent

Some magistrates—applying the text of article (222) of the Family Code(3), which refers to the provisions of the *Shari'ah*—have followed the example of the majority of Muslim jurists (*fuqahâ'*) who considered the offer and acceptance as distinctive elements of *khol'â*. Therefore, they have obliged the woman to obtain the husband's consent to request it; if he did not agree, there is no divorce by compensation between them. Among these decisions, we can mention:

The Supreme Court ruling of 06/11/1984, which states the following(4):

It is legally established that *khol'â* is considered a consensual contract. The judge is not allowed to rule on his own initiative, as issuing judgments contrary to this principle is a violation of the principles of *Shari'ah* concerning *khol'â*.

It appears from the judgment under appeal and the contested ruling that the lower court judges ruled on the *khol'â* by determining the amount without any agreement on this matter between the two spouses, and the husband was not satisfied with the amount of *khol'â* granted, while the wife, at the Court level, requested that it be annulled. Consequently, the magistrates, by issuing their judgment automatically, violated the rules of *Shari'ah*.

This ruling explicitly indicated that *khol'â* is a consensual contract in which there must be an offer with a corresponding acceptance. It is, in fact, a principle of Muslim law (Shari'ah), whereas it is one of the principles of Islamic jurisprudence (*fiqh*) and not the principles of Shari'ah. If what they mentioned were true, there would be no disagreement on this matter, because strictly speaking, *Shari'ah* refers to what Allah has prescribed through two revelations: The Quran and the Sunnah, while Islamic jurisprudence (*fiqh*) is the understanding by jurists (*fuqahâ'*) of the texts of the Quran

and the Sunnah. All of this undoubtedly has a difference that has a significant impact on the determination of decisions.

It also emerges from the ruling that the husband agreed in principle to the *khol'â*, but in fact, it is a rejection of the amount of compensation, and there is a difference between the absence of consent regarding the *khol'â* itself and dissatisfaction with the amount of the latter.

There is another Supreme Court ruling issued on 21/11/1988, which states the following(5):

It is established in the jurisprudential and judicial field that the husband's acceptance of the *khol'â* is a mandatory matter, or the judge does not have the power to assess the situation otherwise than the spouses have done but without the husband's agreement. Thus, issuing a judgment in violation of this principle breaches the provisions of jurisprudence.

Considering that, in the case of the present matter, it was established that the person against whom the appeal was made requested the divorce (*tatlîq*) and had no cause to invoke it. From this point of view, she showed that she was willing to divorce her husband by compensation without finding his acceptance. Thus, issuing a judgment to divorce the person against whom the appeal was made on the basis of the *khol'â* is contrary to the rules of jurisprudence concerning the divorce by compensation.

This ruling was more precise in terms of terminology, indicating that the husband's acceptance was decided by "jurisprudence" and not by "*Shari'ah*." It stipulated that issuing a judgment of divorce by compensation (*khol'â*) without the husband's consent is contrary to the rules of jurisprudence and not a violation of the provisions of Muslim law (*Shari'ah*), although the rules of jurisprudence have a different domain; the husband's acceptance of *khol'â* does not fall under the rules of jurisprudence in the strict sense. But ultimately, this ruling concluded that issuing a decision on *khol'â* with the husband's refusal is erroneous and cannot be recognized.

In addition to the two previous rulings, another ruling dated 23/04/1991(6) stated that it is legally and judicially established that the validity of *khol'â* requires the husband's acceptance and cannot in any case be imposed on him by the judge. Therefore, issuing a judgment contrary to this principle constitutes a violation of the provisions of divorce by compensation and an error in the application of the law.

This ruling, although its reasoning is vague because it only mentioned the violation of the provisions of *khol'â* and considered it an error in the application of the law, recorded a very important issue, namely the fact that the judge could not impose *khol'â* on the husband. This means that it depended on the husband, and this generalization is not valid because it could compromise the judge's ability to impose his decision, even if it becomes clear to him that the husband's refusal was solely intended to harm his wife, and also that the ruling considers the husband as the master of repudiation (*talâq*) and divorce by compensation (*khol'â*) together, which is certainly not what the law relating to *khol'â* aimed for.

That is why several rulings from the Supreme Court—before the amendment of the Family Code in 2005—contradict the aforementioned rulings, which we cite in the following section.

B. Khol'â as an exclusive right of the Wife

Contrary to judges who considered *khol'â* as a consensual contract between the two spouses, and that it only took place if the husband accepted it and could not be forced to consent, the magistrates of the Supreme Court have issued several rulings stating that *khol'â* is a right belonging exclusively to the woman, and that the husband has no part in this matter.

Among these rulings, we mention the following:

In the ruling issued on 07/21/1992(7), the Supreme Court indicated that:

In accordance with what is established by law, a wife can separate from her husband upon payment of an agreed sum mutually agreed upon between them. If no agreement has been reached regarding the counterpart of the *khol'â*, the judge decides on the payment of compensation, the amount of which shall not exceed the value of the parity dowry (sadaq *el mithl*) at the date of the judgment.

The article mentioned in the Family Code allows the wife to separate from her husband in exchange for a price to be paid without specifying the type; both parties may also agree on the type and amount of the sum. In the event that the spouses do not agree, the judge will intervene to determine it, provided that it does not exceed the value of the parity dowry at the date of the judgment, without paying attention to the husband's refusal of the *khol'â* requested by the wife, because this opens the door for the husband to blackmail (*ibtizâz*) and legally prohibited abuse.

Consequently, the lower court judges—in the case of the present matter—when they decided to divorce the wife by compensation without the husband's consent, applied the law correctly...

This ruling indicated that khol'â is authorized for a woman, allowing her to end the marital relationship between her and her husband, which is normal given the provisions of the Family Code. On the other hand, it revealed a particularly important fact, that of seeing the husband's refusal to accept the *khol'â* itself rendered worthless, or in the absence of an agreement concluded on the amount of compensation. If the impossibility of reaching an agreement is limited to the amount of the *khol'â*, the solution was that the wife gives him an amount not exceeding the value of the parity dowry (*sadaq el mithl*) at the date of the judgment rendered on the matter. But if the lack of agreement is related to the origin of the *khol'â*, then the husband's declaration is not taken into consideration and the judgment on the *khol'â* that must be respected should be pronounced, and of course, he is compensated for an amount not exceeding the parity dowry as we indicated previously.

This can be explained by the fact that since the wife has the right to request the *khol'â* from her husband, she should receive a favorable response to her request, just as the husband is positively responded to in his request for divorce (*talâq*) by his sole individual will. If her request is rejected and a decision is made for him and not for her, considering that the husband's right or word is stronger than the wife's right or request, this will lead to an arbitrary use of this right by the husband against his wife, either by blackmailing her by demanding a high and burdensome compensation for the *khol'â*, or by keeping her as a wife by not accepting the divorce by compensation in a way that is prejudicial to her(8).

In order to avoid this prejudice and not to serve as an excuse, the judges of the Supreme Court decided in this ruling to give effect to the wife's request for *khol'â* despite the husband's refusal.

However, Dr. Abd el-Aziz Saad argues the opposite[9], when he says that *khol'â* is a consensual contract and that the husband cannot be forced by the judge to accept it, but it is up to him to formally express his agreement - in fact, this point of view is that of the majority of *fuqahâ'* - and that issuing a judgment contrary to this has no basis in *shari'ah* or law and is merely an arbitrary and biased decision, and it is also a violation of the principle of contractual freedom on which *khol'â* is founded, and is contrary to the essential purposes of Islamic Law!

We believe that the words of Dr. Abd el-Aziz Saad are exaggerated and excessive. Indeed, the claim that such a decision has no basis in *shari'ah* or law is not recognized, because the Prophet, may God's prayers and peace be upon him, in the incident of the *khol'â* of Thabit ibn Qais did not ask him if he would accept to return the garden, rather, the question was addressed only to the woman: would you return his garden? When she answered: Yes, it was up to the Prophet to tell the husband: "accept the garden and divorce her[10], thus it is an order from him and not a question for him[11], in addition to the fact that this is a doctrinal dispute, as is known.

Moreover, even the *fuqahâ'* who stated that the husband must accept the *khol'â*, allowed this type of divorce if continuing the marital relationship was harmful to the woman; and, according to the Hanafites, coercion does not affect verbal acts, such as marriage, divorce, *Dhihar*[12], and *Liâan*[13]... when they occur properly, unlike actual behaviors, and this is because no one can use another's tongue to speak otherwise than what their heart thinks and without being forced or under compulsion, so every person is truly free when speaking and exempt from any coercion[14], and everything that is true with joking is also valid with coercion[15].

As for the Shafiites, they distinguish between rightful coercion and undue and unreasonable coercion, indicating that any verbal act obtained unjustly by coercion is considered null and void, whether it be apostasy, sale, leasing, and other transactions, marriage, *khol'â*, divorce, manumission, etc. As for what has been done under rightful coercion, it is valid[16].

The Hanbalites generally do not differ from the Shafiites on this matter. Ibn Qudamah specified: "But if he beat her for abandoning the marital home and prevented her from exercising her right, her divorce by compensation will not be forbidden for that..." [17]. And Al-Mardawi said: "...As for the husband, the correct viewpoint in the rite is that it would be desirable for him to respond to it; and this is what our companions have followed.

The words of Sheikh Taqi al-Din differ, according to which it is obligatory to respond to it, and he obliged some virtuous leaders of El-Cham, inhabitants of El Qods[18], to apply it"[19].

This presentation contains a statement and an indication that it is a decision on the part of some Hanbalites that the husband is obliged to respond positively to the wife's request regarding *khol'â*.

In this regard, it has been said in the *Fatawas* of Ibn Taymiya[20] that he was asked "about a woman who hated her husband and requested to be separated from him in exchange for compensation as *khol'â*. She said to him: if you do not leave me, I will kill myself. Then the Wali[21] forced the breaking of the marriage bonds, and she married someone else, and she was solicited again by the first husband since he was forced to separate from her under duress, and as for her, she only wants the second"[22].

Ibn Taymiya's response was: "If the first husband was forced to break the marriage but for a just reason: such as being negligent in his duties towards his wife, or harmful to her by words or acts

without reason, resorting to the dissolution of marital bonds in this case is acceptable, and the second marriage is valid, and she is considered the wife of the latter."

And if he was forced into separation either by beating her or imprisoning her, despite providing his wife with the best possible treatment in their shared life and in the most appropriate manner, this rupture cannot be accepted...".

As for the law, there is no text that denies or confirms what Dr. Abd el-Aziz Saad argued in his reasoning, and his tendency to say that the law is violated is nothing more than giving the texts a meaning that cannot be tolerated.

Regarding the issue of describing the judgment on *khol'â* without the husband's consent as arbitrary and biased, it is based on his view that *khol'â* is a consensual contract. This is not recognized since one can respond that *khol'â* is a right belonging exclusively to the woman, which is in exchange for the man's right to divorce by his unilateral will, as many jurists and scholars have pointed out, led by Ibn Rushd El-Hafid.

So why did Dr. Abd el-Aziz Saad not say the same thing about the husband's divorce of his wife without the judge being able to prevent or oppose his will? Because the bias is to give an absolute right to one party – which here is the husband's right to divorce (*talâq*) – and to take it away from the other party – which here is the woman's right to end the marriage through *khol'â*; as he gives to the former, he must give to the latter, otherwise this would be arbitrary and biased.

As for describing this as contrary to the objectives and purposes of the *Shari'a*, we believe this reasoning to be erroneous, because one of the goals of the *Shari'a* in the marriage contract towards which it aims is to establish affection, gentleness, and harmonious coexistence between the two spouses. When the implementation to achieve these objectives is lacking in the marriage, there is no other option but to dissolve the bond of shared life, which is either the repudiation of the wife by her husband (*talāq*), or divorce at the request of the wife (*tatlīq*), if justified in accordance with the provisions of Article (53) of the Family Code.

If the husband shows no intention of breaking the marriage with his wife by repudiation, and the wife is unable to prove the causes constituting grounds for divorce, then she has no other option but *khul'â*, which, as we have said, contrasts with the man's right to divorce at his own individual will, so as to prevent and avoid harm to him.

There is another Supreme Court ruling, dated 16/03/1999[23], which is close to the previous ruling, but it displayed the description of *khol'â*, where it is written: "*Khol'â* is a license for the wife to use in order to separate from her spouse in exchange for a sum of money that she offers him; consequently, the lower court judges, when they decided that divorce by compensation requested by the wife without the husband's consent is valid, correctly applied the law…".

This ruling, although it stated that divorce by compensation can take place without considering the husband's agreement, gave us a legal description of *khol'â*, where it was considered a legal license[24] that the wife uses if she wants to separate from her husband, provided that she pays him a sum of money that she proposes for him to accept. But if he does not accept or does not agree to the *khol'â* in the first place, the judgment to be rendered will confirm this form of divorce, and the husband must accordingly receive compensation that will not exceed the amount of the parity dowry (*sadaq el mithl*), as previously indicated.

As everyone knows, a license is not a right; it represents a realistic mechanism or an authorization permitted by law concerning one of the public freedoms, such as the freedom to work, to acquire property(25), whereas *khol'â* is not a public freedom, and is therefore not considered a license, but rather a right as we will show later.

Section II: Judicial Prohibition of Khol'â before Consummation between Law and *Shari'ah*

It may happen that a woman requests *khol'â* from her husband before the marriage is consummated and submits the matter to the judge. We note here that the magistrates are almost unanimously agreed that this is not possible, even after the amendment of the Family Code in 2005. The reason for all this is that *khol'â* is primarily based on animosity or hatred, and – according to the judges – this is only possible after a conjugal life, but not before, and their judicial decision to prevent it is based either on it being contrary to the law (A), or that it violates the provisions of the *shari'ah* (B).

A. On *khol'â* before consummation qualified as illegal

Through the only ruling we obtained concerning divorce by compensation before the consummation of marriage rendered by the Supreme Court on June 14, 2006(26), it appears that *khol'â* before the marriage is consummated is not possible due to its violation of the law!

In this ruling it is stated that: "... The judgment contested on appeal violated the law and misapplied it, because the request for *khol'â* cannot be claimed by the wife if the divorce occurs before the marriage is consummated; she may make the request, but only after consummation, and when her conjugal life with her husband reaches a state of hatred and aversion preventing any continuation of cohabitation in a common life...".

This ruling annulled the decision that ruled on the validity of *khol'â*, on the grounds that it is contrary to the law and was misapplied; because - according to the judges of the Supreme Court - even though *khol'â* is a right of the woman, she can only exercise it after consummating the marriage, but not before that. Not only that, but she must live with him for a certain period during which it can be realized that there is aversion towards her husband and hatred for him, and the prevention of the continuation of the marital relationship(27).

This ruling was criticized for not referring to any legal text regarding considering *khol'â* before the consummation of the marriage as illegal. In fact, there is no provision in the Family Code that prohibits it, on the contrary, there is what contradicts it, given that the Algerian legislator established that the dissolution of marriage between the two spouses results either from divorce (*talâq*) - in the general sense of the term - or from the death of one of the two spouses, according to the text of Article (47) of the Family Code(28). Then, divorce by compensation (*khol'â*) was incorporated into the first chapter which includes divorce (*talâq*).

Given that the text of Article (16) of the Family Code(29) speaks of divorce before consummation in its general concept, and of women's right to half of the dowry in due time, divorce is recorded there in the narrow sense of the term (*talâq*), with divorce at the woman's request (*tatlîq*) and divorce by compensation (*khol'â*), and it is not permitted to exclude any of them without justification.

Even if it is admitted that *khol'â* does not fall under Article (16), in the absence of text, and for everything that has not been expressly stated, reference must be made to the provisions of Muslim law pursuant to Article (222) of the Family Code.

Moreover, the *fuqahâ'* of the four schools have ruled on the validity of divorce by compensation before the consummation of marriage, as we will explain below. Therefore, qualifying it as contrary to the law by the judges of the Supreme Court is inappropriate.

The other controversial subject is that the judges of the Supreme Court consider that aversion and hatred between the two spouses can only be realized if the marriage has been consummated and cohabitation has taken place, and a period of time has elapsed during which they have coexisted together sufficiently well to know each other's characters mutually. This cannot be assumed at all, and leads us to say two things:

The first consists of forcing a woman to consummate the marriage even though she is not satisfied with it, and this is, in our opinion, legally unacceptable, even from the point of view of jurisprudence(30) and reason, given that marriage is a contract based on mutual consent, and that one of its objectives is to achieve affection, kindness, and mutual support as required by Article (4) of the Family Code(31). These intentions and aspirations cannot come from a person forced to perform an act she does not want or obliged to fulfill an obligation that the law and Sharia have allowed her to avoid.

The second point is based on the first element, which is the rejection of the judgment on *khol'â* before the consummation of the marriage due to the absence of its conditions—according to the magistrates of the Supreme Court—and if the cause is missing, the result no longer has a purpose, that is to say, wherever there is no cohabitation, there is no aversion or discord. Since these two reactions do not exist, it is not necessary to issue a judgment on *khol'â*.

What we believe to be correct in this matter is that the approach adopted by the magistrates of the Supreme Court and family affairs judges in general(32),—through this ruling—is truly inadequate, because aversion and hatred can be experienced with the impossibility of cohabiting together before the consummation of the marriage, as can happen after it has been consummated;

The simplest example is when a woman hears from someone she trusts about the man who has entered into a marriage contract with her and that has not yet been consummated, something that makes her flee from her husband rather than be attracted to him, or she may hear or see for herself something that changes her perception regarding his questionable morality, such as being a drunkard or someone who uses or sells drugs, or commits abnormal acts, or that he has committed an offense - not affecting the family's honor - and has been imprisoned because of it, or that he has hidden from her a disease that may affect her or her children later, and if she had known she would not have accepted the marriage, or that the husband promised her - orally - to provide housing before the wedding ceremony, but he was unable to obtain it...

The wife wants to break off with him by resorting to *khol'â*, because the husband refuses divorce if she asks him to end the marital bond, but he rather wants to start the wedding ceremonies and consummate it, and the court will not respond to the divorce request (*tatlîq*) for harm based on the text of article (53) of the family code, because its conditions are not met in such cases, and the judge will not respond to her request to annul the contract for error as established by the Civil Code.

Indeed, the marriage contract is not like other civil contracts, and it has conditions that cannot be found in such situations, nor will it respond to the annulment of the contract or declare its nullity on the grounds that the required conditions have not been met(33).

It goes without saying that divorce by compensation (*khol'â*) itself is unrelated to the question of whether the marriage has been consummated or not, but is essentially connected to the will of the wife, just as repudiation (*talâq*) is related to the will of the husband, since for her it is a legitimate right, in return for the right of the husband(34).

It is in this sense that Article 54/1 of the Family Code specifies accordingly that "The wife may separate from her husband, without his consent, upon payment of a sum as *khol'â*." In other words, the wife has the right to break the marital bond between her and her husband regardless of whether he consents or not, provided that she redeems herself with a sum of money, just as if the husband divorces his wife of his own unilateral will, he must pay her a sum of money as compensation for the harm caused.

The widely held doctrinal opinion among the *fuqahâ'* is that the husband must give his consent to the *khol'â* request made by the wife based on the Prophet's order, peace and blessings be upon him, to Thabit Bin Qais: "Accept the garden" (35) which are only orientations and reforms of the Prophet for the husband and not a binding and obligatory order(36) is not a recognized fact; because the Prophet asked the woman in an interrogative and optional form, saying: "Do you want to return his garden to him?" She answered yes, while he did not ask her husband by saying: "Do you accept the garden?" rather he told her: "Accept the garden." In other words, he obliged her to divorce by *khol'â*. The question here is taken for what it is, so it is for the offer, as long as there is nothing that distracts it from this meaning.

Indeed, those who said that this is only for orientation and reform did not mention what diverts the semantics of the offer to orientation and reform(37).

Moreover, many *fuqahâ'* have decided that the separation between spouses is not limited to the will of the spouse, but it can be done without his permission or consent, such as being separated due to discord by the judge, because *khol'â* is valid just as divorce (*talâq*) is valid for the one who has permission to do it, and the divorce pronounced by the judge is also valid(38), as is the case for the two arbitrators, and this is the view of Imam Malek(39),in accordance with the tradition transmitted by the companions and their successors:

"A man and a woman came to Ali, may Allah be pleased with him, each accompanied by a group of people."

So Ali, may Allah be pleased with him, gave them the order to send for an arbitrator from the husband's family and another from the wife's family, then he said to the two arbitrators: "Do you know what you must do? If you think you can reconcile them, reconcile them, and if you see that it is better to separate them, separate them."

The woman said: I adhere to the Book of God regarding the obligations and rights concerning me, and the man said: as for separation, no.

Then Ali declared: you have lied, by God, until you acknowledge as she has acknowledged"(40).

Imam Malik compared the two arbitrators to authority (to power), because the envoys mentioned in the verse of the Holy Quran, "If you fear a rupture between the two spouses, send for an arbitrator from the husband's family and an arbitrator from the wife's family"(41), are two judges who rule on what they see and not as representatives of the couple. Among those who affirmed this, in addition to Imam Malik, are Omar ibn al-Khattab, Uthman ibn Affan, Ali ibn Abi Talib, Ibn Abbas, An-Nakha'i, Al-Shaabi, Sa'id ibn Jubayr, Al-Awza'i, Ishaq, Ibn al-Mundhir, and this is the view of Shafi'i(42).

In this regard, Ibn Rushd al-Hafid explicitly stated: "...according to jurisprudence, redemption is a right for the woman in exchange for what the man has as the right of repudiation, because while divorce (*talâq*) has been made available to the man when he feels antipathy towards the woman, *khol'â* has been given to the woman when she feels a certain animosity towards the man." (43).

In other words, when Ibn Rushd mentioned the five jurisprudential opinions on *khol'â*, he concluded that a proper understanding requires it to be left to the woman's will, just as divorce depends on the man's will, and that neither of them needs the other's consent for its occurrence and execution; because if we said that *khol'â* must be subject to the husband's consent, otherwise it would not take place, in that case, we would have granted the husband two rights: repudiation (*talâq*) and *khol'â*, and we would have deprived the woman of the right of *khol'â*, leaving her only divorce (*tatlîq*) on grounds of harm, and we would have allowed the husband to abuse what he is entitled to and facilitated his recourse to its abusive use.

And the text (Article 54/1 of the Family Code), as we see here, uses the expression: the wife may resort to *khol'â* (*tukhali'â nafssahaa*), (the right to divorce her husband), and this is the same expression as in the old text, that is, before the 2005 amendment. And this expression is different from the expression: the wife may request *khol'â* (*tatloubou el khoi'â*). Indeed, if the text contained this expression, it would be possible for us to find a justification for the judges' argument, according to which it is not up to a woman to receive a response to her request for *khol'â*, unless the husband accepts this request, according to the expression that appeared in the old text of article 54 of the Family Code.

That being said, we can admit that both texts – the old and the new – contain the same expression(44),and that the new text added the expression "without the spouse's consent" to avoid creating confusion in the minds of the judges, confusion which has opened the way to all kinds of interpretations repeatedly(45).

In short, one cannot help but say that *khol'â* is a right belonging to the wife; she exercises it when she finds herself in a situation that does not allow her to establish a family based on affection, kindness, and mutual support, whether before or after the consummation of the marriage, and that the judges have no right to refuse her request, because the reasons for the divorce request by compensation are psychological and not physical, the judge has no right to intervene regarding the psychological aspect of the person.

B. Is *Khol'â* before Consummation Contrary to *Shari'ah*?

Most family court judges invoke their refusal of divorce by compensation (*khol'â*) before the consummation of the marriage on the grounds that it is incompatible with the provisions of Muslim

law (*shari'ah*). They base their decisions in light of the jurisprudence established by the Supreme Court in this regard.

In fact, an attempt was made to obtain a ruling published by the Supreme Court on this issue, that is, one that declared *khol'â* before the consummation of the marriage invalid because it is contrary to the provisions of the *shari'ah*, but it was not found. We sought the help of certain judges, but we did not obtain it, and we even asked the officials of the Supreme Court archives, but our request was rejected!

However, we found a judgment at the M'Chedallah court in the Wilaya of Bouira, dated April 26, 2017, referring to this issue, stating that: "Given that it is established jurisprudentially and judicially that the request for *khol'â* is permitted for the wife after the marriage has been consummated, when their conjugal life reaches a state of hatred and aversion with which it is impossible to continue living together, and when it has been proven to the court that the conjugal life of the two spouses has not yet been realized, because the petitioner has not consummated her marriage, then her request for *khol'â* is unfounded because it is in violation of the law and the *shari'a*, it must be rejected."

This judgment summarizes the tendency of magistrates in general, and Supreme Court judges in particular, to consider *khul*'a before consummation of the marriage—not only contrary to the law but also contrary to the *shari'a*.

And since there is no legal text referring to the violation of *khol'â* before consummation of the marriage in Muslim law, this means that the judges undoubtedly relied on Article (222) of the Family Code, which specifies that concerning anything not provided for by this law, reference must be made to the provisions of the *shari'a*, and here begins an interesting point of research on this question.

However, one may wonder: is it really possible that the provisions of the *shari'a* foresee that *khol'â* before consummation of the marriage cannot occur? And did the *fuqahā'* of Muslim law agree on this?

These questions find a strange, even surprising answer, because the *fuqahā'* of the four schools: the *Hanafis*[46], the *Malikis*[47], the *Shafi*'is[48], and the *Hanbalis*[49] have ruled on the validity of *khol'â* before consummation of the marriage. In fact, they simply do not agree on the issue of the return of the dower if it has been received by the woman or not, and the issue of returning the gifts given.

We will mention the statements of the *fuqahâ'* of the *shari'ah* in this regard, starting with the *Malikis*, whose rite we always pride ourselves on following, and whose rules and principles we apply, then citing the words of other scholars.

1. The Maliki View on *Khol'â* before Consummation:

It is indicated in the Mudawana al-kubra (The great code)[50] that Sahnoun asked Ibn al-Qasim about a man who married a woman with a certain dowry that she had actually received, then she separated from him through *khol'â* before consummating the marriage in exchange for a servant, meaning she redeemed herself in exchange for a servant. Does the husband divorced by *khol'â* have to return half of what he gave her as dowry or not? Ibn al-Qasim replied that, in his opinion, the

woman must return the entire dowry, and he cited what Imam Malek responded when "he was asked about a man who married a woman with a specified dowry, she redeemed herself with ten dinars that she must pay him before the marriage is consummated, by which she would be freed from the marital bond, and he complied, then she wanted to follow him with half of the dowry, he said: she is not entitled to that." (51).

Moreover, it is stated elsewhere: "Have you seen a woman who was married with a dowry whose benefit has not yet appeared, and if she separates from him by *khol'â* before the consummation of the marriage in exchange for a sum of money, is it permissible for the husband to appropriate what was taken from her as dowry or should it be returned to her? He replied: I consider it permissible for him, and I do not see that he should return what he has taken..." (52).

In another place: "Have you seen the woman who was divorced by her husband through *khol'â*, does she have the right to the consolation gift (*Mout'â*), whether it has already been granted or not yet, if the separation occurred before the marriage was consummated, will she have the right to the *Mout'â* according to Malek? He answered: Malek said: There is no *Mout'â* for the one who divorced by *khol'â*, nor for the one who is freed or exempted (*Moubari'â*) (53). Ibn al-Qasim declared: This did not differ for us, whether the marriage was consummated or not." (54).

These statements make it clear that *khol'â* can take place before the consummation of the marriage as well as after it has been consummated, and its parallels in the Mudawana and other books of the Maliki rite are numerous, but we will be content with what we have mentioned.

2. The Hanafi View on *Khol'â* before Consummation:

The Hanafis have two opinions on the matter(55):

One of them is that of Abu Hanifa, according to which the woman who has been divorced by *khol'â* before the marriage is consummated, if she had received the dowry, will not return anything to him except what he has done, that is to say what he granted her as a dowry for her to return to him.

The second point of view, which is that of Abu Yusuf and Mohamed ibn al-Hassan al-Chibani, is that the husband has, beyond what he has done, the right to recover half of the dowry.

3. The Shafi'i View on *Khol'â* before Consummation:

The opinion of the Shafi'is is the same as that of Abu Yusuf and Mohamed ibn Al-Hassan of the Hanafi rite; they consider in this case the validity of divorce by compensation before the consummation of marriage, and that the woman must return to the husband half of the dowry, where they said: "If the *khol'â* takes place before the marriage is consummated, then the dowry is divided. In summary, the woman obtains half of the dowry..." (56).

4. The Hanbali View on *Khol'â* before Consummation:

The opinion of the Hanbalis, among other things related to this subject, is in accordance with the statement of the Malikis(57); where the woman who has been divorced by compensation before the marriage is consummated will repay the entire dowry she received or return half of its value if she has not already obtained it.

In this regard, they observed that if the husband "divorced by *khol'â* in exchange for half of his wife's dowry before consummating the marriage, his divorce is valid, and the entire dowry is due to him, half by repudiation (*talâq*) and the other half by *khol'â*..." [58].

In other words, the husband has the right to half of the dowry for the repudiation, because a woman divorced before the consummation of the marriage is entitled to only half of the dowry, and the husband will have the other half; because this is the compensation the husband takes in exchange for *khol'â*. Consequently, the dowry is fixed to him in its entirety.

If we assume that the named dowry was 200,000 dinars, the woman is entitled to 100,000 dinars for the divorce before the consummation of the marriage, given that consummation did not take place, and she returns 100,000 dinars to the husband, then pays him the remaining 100,000 dinars as compensation for *khol'â*, so that she keeps none of the dowry, and the husband recovers the entire dowry.

This, of course, happens if the woman has already received the dowry. But if the dowry has not yet been paid to her, the husband can be freed from this obligation, because repudiation (*talâq*) before the consummation of the marriage leads to the cessation of half of the dowry, and it then belongs to the wife to claim only half, and the second half will cease by what is due to her as divorce compensation (*khol'â*); because half of the dowry is in the husband's hands due to the dissolution of the marriage before consummation, likewise, half of the dowry is owed to the wife because of her request for divorce by *khol'â* from her spouse, so compensation will be appropriate between them[59].

It goes without saying that jurists from the four schools permit *khol'â* before the consummation of marriage with a woman, and that the approach of lower court judges or even Supreme Court judges asserting that according to *shari'ah* it is not allowed is completely unfounded and a blatant violation of Muslim law, as their judgments lack any basis in *shari'ah* and clearly are not rendered in accordance with the law, that is, the applicable provisions in this matter.

Furthermore, we observe that some Arab legislations have explicitly declared that it is permissible to divorce by *khol'â* before the consummation of marriage; such as the Jordanian law in the text of Article (114/a) of the Personal Status Law[60], which states that a wife can request the judge to separate from her husband before the consummation of marriage, and before the spouses can seclude themselves to the point of being in a situation that allows relations (*Khalwa*), provided she is willing to return what she has received of her dowry, and what the husband has spent as marriage expenses, and the husband has the choice to take them in cash or in kind.

If the husband refuses to grant a divorce, the judge will rule on the termination of the contract after ensuring the return of the dowry and expenses.

Several things result from this text:

The first is that *khol'â* before consummation of the marriage is permitted, and it is conceivable that it may occur.

Secondly, the right is granted to the wife and not the husband, meaning the husband's consent is not taken into account.

The third is that the woman returns to the husband what she took from the dowry and what he spent in preparation for the marriage.

However, if we consider *khol'â* as an exclusive right of the woman, meaning she can use it before or after consummation of the marriage, here we would like to emphasize several things:

The first is that a woman should only request *khol'â* in cases of necessity; because it often leads to the ruin of households with consequences for the children, if any, due to a moment of anger from the woman which may be for a trivial and insignificant reason. It is well known that a woman can be very irritable, often complaining about the man, and the resulting effects will have serious repercussions on the family and society.

Regarding this matter, Islamic law has been both threatening and severe. Thus, the Prophet, may God's prayers and peace be upon him, prohibited a woman from requesting a divorce or *khol'â* without having suffered any harm, meaning without any prejudice against her and without a legitimate legal justification, where he said: "Any woman who divorces her husband through *khol'â* without having suffered harm will not smell the fragrance of Paradise"[(61)].

The second point: it should be emphasized that judges, when ruling on *khol'â*—whether before or after the consummation of the marriage—should be more realistic and objective, since we have noticed in many decisions that the woman claiming divorce by compensation offers the husband a paltry amount, between 10,000 and 20,000 Algerian dinars. In return, she demands much larger sums related to the pension due to legal retirement (the period of iddah or abstinence), alimony, and rent allowance. When the husband refuses to divorce through *khol'â*, or rejects the proposed amount and requests a sum that may be reasonable—or possibly exaggerated—the judge issues the *khol'â* ruling in exchange for an amount lower than the parity dowry at the time of the judgment, which ranges between 10,000 and 50,000 dinars; however, a ruling will be made for an amount that cannot be less than the amount designated for *khol'â* as a pension due to legal retirement (Idda), in addition to sums related to custody rights (Hadhana) and rental allowance. This means that the spouse divorced by *khol'â* — besides being forced to accept this form of dissolution — will become a debtor rather than a creditor[(62)]. This may be one of the reasons why the phenomenon of *khol'â* has worsened in Algeria.

Add to this that *khol'â* is increasingly perceived from a materialistic point of view, and in this regard, it affects not only the spouses and children but also society as a whole; this is because a man will view marriage differently, since if he marries and then divorces, he has lost, and conversely, if the wife obtains a divorce by compensation, he also loses. On the other hand, if a woman is divorced, she wins — materially — and if she is released from her husband by *khol'â*, she also wins. This will inevitably lead to men's reluctance to marry and thus to the spread of singleness among women.

If the integration of divorced women into society proves extremely difficult, and their remarriages are certainly not always easy, how much more so for a woman who has divorced her husband by *khol'â*? How will society perceive her, and who will agree to marry her in the future with the guarantee that he can live with her in complete peace without fear that she will also dissolve the marriage through khol'â?

This clearly shows the necessity to rethink the matter deeply, to provide appropriate answers, and to find suitable solutions through the revision and reexamination of the texts related to *khol'â* on the one hand, and by unifying the judicial perspective on this issue and giving it more attention on the other hand.

Conclusion

Through this study, divorce by compensation (*khol'â*) appears to us as one of the means that results in breaking the marital bond, and in the judicial field, it has gone through two contradictory stages – so to speak – regarding the question of whether the husband's consent is required for it to take place or not.

During the first stage, the trial judges and the Supreme Court judges relied on the opinion of the majority of *fuqahâ'* who generally agreed that *khol'â* was not valid and did not take place unless the husband consented to it. Consequently, little consideration was given to the woman's will, and this continued until the early 1990s.

Afterwards, a change in perspective is observed among the judges regarding *khol'â*, considering that it is not a consensual contract between the two spouses, and the husband's consent is not required, neither for *khol'â* in principle nor for the amount of the *khol'â* compensation; rather, it depends solely on the woman's will, just as it is the man's right to divorce by his own individual will. This was confirmed by the legislator by amending the text of Article (54) of the Family Code in 2005.

We believe that *khol'â* is an exclusive right of a woman, as determined by judges since the early 1990s, and just as the legislator provided for it in 2005, based on the fact that when the *Shari'ah* decided to grant women this right, it did not take into account whether the husband agrees or not, as evidenced by the incident of *khol'â* of Thabit ibn Qais, where the Prophet's question included nothing regarding the husband's opinion or consent, but rather, the question was directed solely to his wife.

As for the occurrence of *khol'â* before the marriage is consummated, judges are almost unanimously agreed that, legally and judicially, such a divorce cannot take place, on the grounds that the justifications for *khol'â* can only be considered after the marriage is consummated and after a conjugal life for a certain period!

The fact is that their opinion is inappropriate because no legal text prohibits it, just as the *fuqahâ'* of Islamic law from the four schools consider that *khol'â* is permitted before the consummation of the marriage, meaning they are unanimous on this matter.

Even though we firmly believe in the validity of divorce by compensation before the marriage is consummated, we nevertheless think it is necessary for the legislator to specify the grounds for *khol'â* and the limits as far as possible. At the very least, it is necessary to provide examples to allow the judge to use them as evidence or as a model, and to indicate how to prove them, such as making an oath a means to prove the justification of *khol'â* in the absence of evidence, since most justifications for divorce by compensation are merely allegations without concrete proof.

We also wish for judges to be more stringent when ruling on *khol'â*, and to hold the woman responsible for the compensation, which must remain in accordance with the text or the seriousness of the case, and not based on the insignificant amount she offers; this can serve as a deterrent for her and others from requesting *khol'â* for trivial reasons.

At the same time, we keep in mind a fundamental principle, namely the actual activation of the reconciliation process, giving it all the necessary time, and organizing repeated reconciliation sessions so that they can bear fruit and restore familiarity between the two parties.

We add to the above a very important issue, which is to raise awareness among women about the major social risks related to *khol'â*, which can also be a serious religious fault.

We believe that reconciliation sessions should be reinforced by a legitimate imam, in order to draw the woman's attention to the fact that *khol'â* without a serious reason, that is without legal justification, has its legitimate warnings, the most serious of which is not entering paradise, and labeling it as hypocrisy; because the imam often enjoys the necessary notoriety in the field of personal status, and many members of Algerian society still refer to him on these issues and listen to him.

Citations:

(1) Article (53) of the Family Code: "It is permitted for the wife to request a divorce for the following reasons:
1–for failure to pay alimony as ordered by judgment unless the wife was aware of her husband's indigence at the time of marriage, subject to articles 78, 79, and 80 of this law,
2–for infirmity preventing the fulfillment of the purpose intended by the marriage,
3–for the husband's refusal to share the marital bed with the wife for more than four (4) months,
4–for the husband's conviction for an offense likely to dishonor the family and make living together and resuming marital life impossible,
5–for absence of more than one (1) year without valid excuse or without alimony,
6–for violation of the provisions of article 8 above,
7–for any seriously reprehensible immoral fault established,
8–for persistent disagreement between the spouses,
9–for violation of the clauses stipulated in the marriage contract,
10–for any legally recognized harm."
(2) M. Ibn Rushd, Bidayat al-mujtahid wa-nihayat al-muqtasid, Dar el-Hadith, Cairo, 2004, vol. 3, p. 90.
(3) Article (222) of the Family Code: "In the absence of a provision in this law, reference shall be made to the provisions of the Shari'a."
(4) Judicial Journal, Documentation Service, no. 3, Algiers,1989, p. 38.
(5) Judicial Journal, Documentation Service, no. 3, Algiers, 1990, p. 72.
(6) Judicial Journal, Documentation Service, no. 2, Algiers, 1993, p.55.
(7) Judicial Journal, Documentation Service, special issue, Algiers, 2001, p.134.
(8) Some honorable judges mentioned to us that there were women who had attempted suicide more than once because the husband refused to accept divorce by compensation, so what affection and leniency remained after that?!
(9) S. Abd el-Aziz, Marriage and Divorce in Algerian Family Law, Dar Houma, Algiers, 1996, p.253.
(10) M. El-Boukhari, El-Djami'à El-Mousned El-Sahih El-Moukhtasser min Oumour Rassoul Allah wa Sounanihi wa Ayamihi, Mohamed. N (Tahqiq), Dar Touq En-Nadjat, Beirut, 1422 AH, vol. 7, p.46.
(11) Essaid Sabeq, Fiqh As-Sunna, Dar Al-Kitab Al-Arabi, Beirut, 1977, vol. 2, p.299.
(12) Dhihar is an act by which a husband declares his wife to be like someone he is forbidden to marry, such as his mother or sister, literally meaning "you are like my mother," and it is mentioned in the Quran (Surah 58 Al-Mujadalah (The Pleading), verses 1 to 4) in reference to Khawla bint Tha'labah.
(13) Li'an is the oath on the Quran sworn by a spouse accused of adultery, and it is mentioned in the Quran (Surah 24 An-Nur (The Light), verses 6 to 9).
(14) A. Al-Kassani, Bada'i' es-sana'i' fi tartibechara'i', Dar Al-Kutub Al-Ilmiya, Beirut, 1986, vol. 7, pp.182-184.
(15) Ibn Najim. Al-Bahr ar-Ra'iq commentary on Kenz ad-Daqa'iq, Dar Al-Kutub El-Arabia El-Kobra, Egypte, N.d, vol.8, p.136; M. Ibn Abidin, Rad al-Muhtar ala ad-Durr al-Mukhtar commentary on Tanwir al-Absar, Adel, M. Ali, A. (Tahqiq), Dar Alem El-Kotob, Riadh, 2003, vol.9, pp.191-192.
(16) Y. Nawawī, al-Majmū‘ sharh al-Muhadhdhab, M. Mohamed (Tahqiq), Maktabat al-Irshad - al-Matbaa al-Arabiya al-Haditha, Djeddah - Cairo, 1982, vol.9, p.186.

(17) A. Ibn Qudamah, Al Moughni sharh Moukhtassar Al kherqui, T. Abdallah, H. Abdelfettah (Tahqiq), Dar Alem El-Kotob, Riadh, 1997, vol.10, p.273.
(18) "Al-Sham" referred to "Greater Syria," and Al-Quds or Bayt al-Maqdis (Jerusalem).
(19) A. Al-Mardawi, Al-Inssaf fi Ma'rifat ar-Rajih mina al-Khilaf 'ala Madhhab al-Imam Ahmad ibn Hanbal, F. Mohamed (Tahqiq), Dar Ihya Et-Tourath El-Arabi, Beirut, 1956, vol.8, p.382.
(20) Fatawas, plural of fatwa: these are jurisprudential or consultative opinions.
(21) Wali: matrimonial guardian.
(22) A. Ibn Taymiyya, Al-Fatawa al-Kubra, A. Mohamed, A. Mustapha, (Tahqiq), Dar Al-Kutub Al-Ilmiya, Beirut, 1987, vol.3, pp.332-333.
(23) Judicial Journal, special issue, 2001, p.138.
(24) S. Abd el-Aziz, op. cit, p.252.
(25) A. Al-Sanhouri, Masadir al-Haqq fi al-Fiqh al-Islami, Manshurat al-Halabi al-Huquqiya, Beirut, 1998, p.9.
(26) Supreme Court Review, Documentation Service, no.2, Algiers, 2006, p.421.
(27) M. Al-Shawkani, Naïl al-Awtar, Dar al-Hadith, Egypt, 1993, vol.6, p.294; Essaid Sabeq, op. cit, p.299.
(28) Article (47) of the Family Code: "The dissolution of marriage occurs by divorce or the death of one of the spouses."
(29) Article (16) of the Family Code: "The consummation of the marriage or the death of the spouse entitles the wife to the full amount of her dowry. She is entitled to half of the dowry in the case of divorce before consummation."
(30)According to a Supreme Court ruling dated 12/03/2008 (Supreme Court Review, No. 1, 2008, p.275): it is stated that "even after the conclusion of the marriage contract, the judge cannot compel the wife to complete the ceremonies of the consummation of this marriage".
(31) Article (4) of the Family Code (Law No. 84-11, 1984): "Marriage is a consensual contract entered into between a man and a woman in legal form. Among its purposes are to establish a family based on affection, kindness, and mutual support, to morally protect both spouses, and to preserve family bonds."
(32) Most family court judges consider that the conditions for *khol'â* before the consummation of the marriage are not met, mainly the issue of hatred, and we do not know the reasons that motivated them regarding the requirement of these conditions, in the absence of a specific text to define them, as is mentioned for divorce at the wife's request and for well-defined causes (*tatlîq*), and we do not understand how it is inconceivable that a woman who has entered into a marriage contract but has not consummated it cannot hate her husband, as we will show below?!
(33)In practice, we find many family court judges ruling on the separation of spouses who use inappropriate terms they call "the dissolution of the marital bond before the consummation of the marriage," or "the termination of the marital bond before the consummation of the marriage".
The first does not legally exist as a distinct term as a method of separation of spouses, because the dissolution of the marital bond is done by repudiation by the husband's will (*talâq*), or divorce at the wife's request and for well-defined reasons (*tatlîq*), or divorce by compensation (*khol'â*), as can be considered by deciding to annul the contract if consent is lacking, or if the marriage contract contains a clause incompatible with the contract's requirements, or includes one of the impediments to marriage; or by termination before the marriage is consummated, if the condition of the guardian (*wali*) is lacking when obligatory, or the absence of two witnesses or dowry (*sadaq*), or in the case of marriage with prohibited women, in accordance with the provisions of articles: 32-34 of the Family Code. or in the case where the husband has not obtained the judge's authorization to marry a second wife, according to the provisions of article 8 bis 1, or by death, in accordance with the text of article 47 of the same Code.
As for the second term - termination - the legislator provided for it in articles 33/2 and 34, and limited its cases as we mentioned above.
So where do these other cases of termination of marriage before its consummation that judges have required come from?! Therefore, judicial decisions that contain the term "dissolution of the marital bond before the consummation of the marriage" do not include an appropriate and correct legal description, as each term has effects totally or partially different from those of the other.
Among the decisions rendered in this regard is the judgment of the Bouira court No. 19/01281 of March 20, 2019, which declared "the dissolution of the marital bond before the consummation of the marriage."

As for judicial decisions containing the term "termination of the marital bond before the consummation of the marriage," such as the decision of the Larbaa court of March 30, 1983 (Judicial Journal, No. 3, 1992, p.72), they lack a legal basis and are contrary to what is stated in the Family Code, which defines the cases of termination as mentioned above, and in violation of the Supreme Court ruling rendered on November 3, 1986, which states: "It is established in jurisprudential and judicial practice that a legally valid marriage contract cannot be dissolved even before consummation, except for specific reasons, and the dissolution is not subject to the desire of one of the spouses... (Judicial Journal, No. 2, 1989, p.94).
And in the ruling of June 25, 1984: "... It is also established that the marriage contract will only be dissolved if this marriage is legally defective...". (Judicial Journal, No. 4, 1989, p.99).
And in the ruling delivered on January 18, 2000: "It is legally established that the marriage is dissolved due to breastfeeding." (Judicial Journal, No. 1, 2001, p.261).
(34) Supreme Court Review, No. 1, 2012, p.318.
(35) According to Ibn Abbas - may Allah be pleased with them - he reported "that the wife of Thabet bin Qais came to the Prophet, peace and blessings be upon him, and said to him: 'O Messenger of Allah, I do not blame Thabet bin Qais for morals or religion, but I dislike blasphemy in Islam.' The Prophet asked her: 'Will you return his garden?' She replied: 'Yes.' The Messenger of God said: 'Accept the garden and divorce her". (Al-Bukhari, op. cit., vol. 7, p.46),
(36) A. Al-Asqalani, Fath al Bari sharh sahih al Boukhari, Maktaba Salafia, Al-Madīna al-Munawwara, N.d, vol. 9, p.400.
(37) Al-Shawkani, op. cit., vol. 6, p.294; M. Al-Sanaani, Souboul Es-Salam el-moussila ila Boulough El-Maram, H. Mohamed (Tahqiq), Dar Ibn al-Jawzi, Arabie Saoudite, 1997, vol. 6, p.195; Essaid Sabeq, op. cit., vol. 2, p.299.
(38) M. Al-Buhūtī, Kashshāf al-qinā‘ ‘an Matn al-Iqnā‘, Dar Alam al-Kutub, Riyadh, 1983, vol.5, p.14
(39) M. Ibn Rushd, op. cit, vol.3, p.117; W. Al-Zouhaïli, Al-Fiqh al-islami wa adilatouhou, Dar el-fikr, Beirut, 1985, vol.7, p.528.
(40) - M. El-Chafi’i, Mousned El-Chafi’i, F. Maher (Tahqiq), Société Gharas, Kuwait, 2004, vol.3, p.84; A. El-Bayhaqi, Al-Sunan Al-Koubra, A. Mohamed (Tahqiq), Dar Al-Kutub Al-Ilmiya, Beirut 2003, vol.7, p.498; A. Al-Dāraquṭnī, Essounan, A. Chouaïb, et al (Tahqiq), Mouassassat Er-Rissala, Beirut, 2004, vol.4, p.451.
(41) Surah An-Nisaa (The Women), verse 35.
(42) M. Al-Qurṭubī, al-Jāmi‘ li-aḥkām al-Qur’ān, B. Ahmed, A. Ibrahim (Tahqiq), Dār al-Kutub al-Miṣrīyah, Cairo, 1964, vol.5, p.176; Ibn Qudamah, op.cit, vol.10, p.266; M. Ibn ‘Āshūr, Al-Taḥrīr wa-al-tanwīr, Tunisian publishing house, Tunisia, 1984, vol.5, pp.46-47.
(43) Ibn Rushd, op. cit, vol.3, p.90.
(44)The judiciary preceded legislation by deciding that khol’â does not require the husband's consent, notably: the ruling rendered on 30/07/1996, (Judicial Journal, Documentation Service, no.1, Algeria, 1998, p.120), in which it is stated that "... *khol’â* is a right granted by the Sharia to the wife to break the marital bond if necessary, and not a consensual contract between the two spouses"; and the two rulings rendered on 21/07/1992 and 16/03/1999, mentioned previously.
(45) Judicial Journal, No. 3, 1989, p.38.
(46) M. Al-Shaybānī, Alasl, Muhammad, B (Tahqiq), Dar Ibn Hazm, Beirut, 2012, vol. 4, p. 569).
(47) M. Asbahi, al-Mudawana al-kubra, Saada Press, Egypt, 1323 AH, vol. 2, pp. 339-340.
(48) Y. Nawawī, Rawḍat al-ṭālibīn, Al-Maktab al-Islami, Beirut - Damascus – Amman, 1991, vol. 6, p. 285; A. Rafi'i, Al Aziz Sharh al Wajīz, A. Ali, A Adel (Tahqiq), Dar al-Kutub al-Ilmiyah, Beirut, 1997, vol. 7, p.232.
(49) M. Al-Buhūtī, op. cit., p.147, and p.230.
(50) al-Mudawana al-kubra (The Great Code) is a collection of questions and answers on jurisprudence issues according to the Maliki rite, reported by Sahnoun who collected, classified, and narrated it under the authority of ibn al-Qasim, the latter under the authority of Imam Malek ibn Anas.
(51) Al-Asbahi, op. cit., vol. 2, p.339.
(52) Al-Asbahi, ibid., vol. 2, p. 244.
(53) El-moubari'â is the wife who does not take a dowry and does not give anything in return if she divorces by *khol’â*. (S. Al-Bājī, al-Muntaqá sharḥ Muwaṭṭa’ Mālik, Saada Press, Egypte, 1332 AH, vol. 4, p.68.
(54) Al-Asbahi, op. cit., vol. 2, p.234.

(55) M. Al-Shaybānī, op. cit, vol. 4, p. 569.
(56) Y. Nawawī, Rawḍat al-ṭālibīn, vol. 6, p.285; Al-Rafi'i, op. cit., vol. 7, p.232.
(57) A. Ibn Qudamah, Al-Sharh al Kabir, T. Abdullah, H. Abdul Fattah (Tahqiq), Dar Hajr, Cairo, 1995, vol. 21, p. 214; I. Ibn Mufleh, Mughni ala Mukhtasar al-Kharqi (Riyadh: Dar Alam al-Kutub, 1997), vol. 6, p. 216.
(58) A. Ibn Qudamahh, Ibid; I. Ibn Mufleh, Ibid, vol. 6, pp. 215-216; vol. 5, p. 202; M. Al-Rahiybani, Matalib ūlī al-nuhá fi sharh ghayat al-muntaha, Al-Maktab al-Islami, Damascus – Beirut, 1994, vol. 5, p.202.
(59) Al-Buhūtī, op. cit, vol. 5, p.147.
(60) Jordanian Personal Status Law No. (15) of 2019, dated 15/5/2019. Official Gazette No. 5578, published on 2/6/2019, p. 3194.
(61) The Prophet, may the prayer and peace of God be upon him, also said: "Women who ask for divorce by *khol'â* from their husbands without any reason for it (Al-mokhtalia't) and those who distance themselves from their husbands and disobey them (recalcitrant attitude) (Al-montazia't) are hypocrites." (M. Al-Tirmidhī, Sunan al-Tirmidhī, A. Muhammad (Tahqiq), Maktabat Maʿārif, Riyadh, N.d, p.282; A. Ibn Hanbal, Musnad Imam Ahmed bin Hanbal, A. Shoaib, M. Adel (Tahqiq), Mu'assassat al-Risalah, Beirut, 1997, vol. 15, p.209).
In the interpretation of the second hadith, Ibn al-Arabi said: "Most women lack contentment and patience because they disobey men and distance themselves from their partners so that the Messenger of Allah called the (Al-montazia't) and the (Al-mokhtalia't) hypocrites, and hypocrisy is blasphemy, and this word supports that of the authentic hadith in their relationship with their distancing from their companions." (Ibn Alarabi. Aridat al-Ahwadhi bi-Sharh Sahih al-Tirmidhi, Dar al-Kutub al-Ilmiyah, Beirut, 1997, vol. 5, p.129).
Ibn Hajar stated that the hadiths which speak about intimidating a woman to prevent her from requesting a divorce are based on the fact that there is no reason to do so. (Al-Asqalani, op. cit, vol. 9, pp.402-403).
The Prophet described such women as hypocrites in order to pressure and suppress the behavior of a woman who thus shows hatred toward her spouse, while inwardly she desires something else, such as marrying someone else after a *khol'â* divorce. Therefore, these are reprimands and intimidation aimed at preventing this type of dissolution of marriage.
(62) See, for example, the following decisions rendered by the Saïda court: a judgment dated November 5, 2009, No. 755, where the husband demanded the amount of 400,000 dinars, but the judge ruled to pay the sum of 50,000 dinars; a judgment rendered on November 12, 2009, No. 1334, in which the husband claimed the amount of 150,000 dinars and was granted only 50,000 dinars; a judgment rendered on November 12, 2009, No. 1404, in which the husband demanded the amount of 200,000 dinars, and he also received 50,000 dinars. In a case dated March 4, 2010, in which the judge decided to pay an amount of 10,000 dinars, on the grounds that the husband had not attended the conciliation sessions nor the hearing for the pronouncement of the judgment. Does the sum of 10,000 dinars in 2010 therefore represent the parity dowry?!
Moreover, there is a decision from the Court of Bouira, no. 01846/08, dated November 17, 2008, in which a *khol'â* judgment was rendered for only 1,000 dinars!

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