ISLAMIC LAW AND SOCIETY IN THE SUDAN

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Scholars need the support of many to do their work. Support comes in the form of money, of time and of intangibles, like patience and love.

For the conduct of this research in Khartoum between 1979 and 1980, I am grateful to the National Endowment for the Humanities which provided me with funding for the project during my sabbatical year's leave from Rhode Island College. The actual writing of the book would not have been possible without additional leave time granted by Rhode Island College and the support of the Mellon Foundation and the University of Pennsylvania. During 1981–82 I was a Mellon Post-Doctoral Fellow in Humanities at the University of Pennsylvania resident in the Department of Anthropology in the University Museum. I am deeply appreciative of this time to research and write and gratefully acknowledge the support of my colleagues and the staff in those institutions.

In the Sudan the list of those who aided this research is almost too extensive to enumerate, however certain individuals and institutions must be singled out for mention. First among these are the two individuals to whom the book is dedicated, Sheikh Mohammed al-Gizouli, Grand Qadi of the Sudan from 1973-79, and Justice Najua Kemal Farid, First Class Judge assigned to the Shari'a High Court. It is not an overstatement to say that without their generous sharing of time and knowledge this book would not have been written. Justice Najua is a friend from the earliest days of research in 1970 and her interest in and support of this work from its very conception has been unequivocal and wholehearted. She often took time from her busy schedule to accompany me to court especially for those all-important introductory visits. She assisted with the collection of statistics, with translation of legal materials and with patient explanation of points of law which escaped my immediate grasp. She took the time to question me to be sure of my comprehension, and in the process of our work together our friendship deepended to new levels of human understanding. Typically in the Sudan, this friendship broadened to include both of our families and I dedicate this book not only to Najua but to the memory of those happy days together.

'Moalana' Sheikh al-Gizouli shared willingly with me the wisdom

of his education and experience with the Shari'a as theory and practice in the Sudan. His reputation as one of the most learned men to hold the office of Grand Oadi is justified and can be appreciated in the reading of the Judicial Circulars (Nos. 59-62; Fluehr-Lobban and Hillawi, 1982) which were issued during his term. His scholarly approach to the subject of al-figh as well as his pragmatic approach to real dilemmas in the law are a mark of his judicial career. His view on the land and social problems, with a healthy mixture of real concern for the welfare of people combined with a sense of humor, brought to life the very human side of the law. Sheikh al-Gizouli, although labeled a religious conservative by some, nevertheless was in the main responsible for the appointment of women judges to the Shari'a court system. For his patience and kindness in guiding me through the complex study of the Shari'a, I shall always be indebted to Sheikh al-Gizouli. For these reasons, and more than I can put into words, I acknowledge my debt to Justice Najua Kemal Farid and Sheikh Mohammed al-Gizouli by dedicating this work to them.

Others in the Judiciary to whom I am grateful include members of the High Court, both Shari'a and Civil, the Mufti and the women judges assigned to the Judiciary who have always been very open to my persistent questioning. I am especially grateful to those members of the staff who work with the preparation of Sudan Law Journal and Reports (SLJR hereafter) for bringing particular cases to my attention. The staff in the Statistics Department have also been extremely cooperative. I hope that those who have worked with me will appreciate that the list of names is too long to include in full here, so I extend a general acknowledgement with gratitude to the professionals and staff of the Sudan Judiciary.

At the University of Khartoum the professional staff of the Department of Anthropology and the Faculty of Law have been very helpful in sharing resources and academic affiliation. My grateful acknowledgement is extended to them as well.

Various judges and lawyers have been exceptionally generous with their time and have shared their legal expertise with one not formally trained in the law. I therefore extend my thanks to Judges Mohammed Mustafa, Abul Gassem Abdel-Rahim, Sinia Rashid, Amal Mohamed Hasan, Rabab Abu-Gusaysa, Dafa'lla al-Radi and to the Shari'a lawyers Gelal Eddin, Mohammed Saeed and Sheikh Hassan al-Bodani for their support and interest in my work.

On the non-professional side of life in the Sudan, a great deal of support is required from fellow humans which takes the form of family support in the Sudan. My family and I are grateful to our friends in the house of Abdel Razig in the Thowra section of Omdurman for their generous hospitality during the early months of research while we searched for a more permanent home. Thanks especially to Fatma, Samira, Siham, Mamoun, and Khider and to Dr. Mohammed Zein Shaddad. The families of Sayeda Najua and Sheikh al-Gizouli as well as Sheikh al-Bodani represented well the Sudanese tradition of generous hospitality. Special thanks to Fatma Ahmed Ibrahim for her assistance with the section on the Shari'a and communist philosophy, and to Abdallahi Ahmed al-Naiem for his help with information on the Republican Brotherhood movement. My co-translator, Hatim Babiker Hillawi, who worked faithfully on the full translation of the Judicial Circulars also contributed to my sociological understanding of the Shari'a. I would like to thank the typists, Sheila Janifer and Yvonne Shunbo, for their professional services.

I have left to the last loving acknowledgement of the support of my own family, that of Richard Andrew Lobban and Josina and Nichola Fluehr-Lobban, which in many ways has been the most critical. Life in Khartoum during 1979–80 was not easy, and it remains so today. Despite perennial shortages or the non-availability of basic commodities, added to this bouts of malaria for us all and pneumonia for Josina, the mood of the family remained positive and supportive. My husband, engaged in his own research in Sudanese urbanization, shared the academic as well as the social side of my studies, while Josina provided us with a fascinating glimpse of Sudanese culture through the eyes of a two and a half to three year old. Together we shared the challenge and the deeply rewarding experience of living and working in the Sudan.

My mother, Anne Fluehr, was a tremendous source of support to me and my younger daughter, Nichola, during the major writing of the manuscript while in Philadelphia, as were my mother- and father-inlaw, Dorothy and Richard Lobban.

NOTE

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PREFACE

"... so many great English writers have concentrated on the Bedouin side of the story; very few have any clear picture at all of how twentieth century educated Islam lives, feels and thinks."

John Fowles, Introduction to Miramar, a novel by Naguib Mahfouz

The ideology and culture of Islamic regions has aroused renewed interest in the West since the oil crisis of the 1970s, the political events in Iran and the rise of 'fundamentalist' Islam. Oil wealth in some countries and extreme underdevelopment and dependency in other countries have set the stage where Western influence has not been so great in the Middle East and Africa since the time of European colonialism. Yet in the face of tremendous cultural pressures to 'secularize' and 'westernize', Islamic institutions have stood fast and have resisted their transformation from the West and in certain ways have enjoyed a revival and a constructive re-examination.

Islamic law, the Shari'a, is one such basic institution which has been subjected to a great deal of this pressure because its essence is religious belief applied to the practical problems and affairs of daily living. Relegated as it has been in most modern Muslim areas to a personal status law alone, the arena of family law has been a focus of the current debate to liberalize the law or to reassert traditional interpretations regarding marriage, divorce, and inheritance, especially. Often liberal moves have been taken to be of Western inspiration, but this study shows that, for the Sudan, legal innovation and change in the twentieth century is for the most part Islamic in both inspiration and execution. To be sure many of these developments took place in the context of colonialism and were reactive to it, but the question is not how the Shari'a was changed by Western influence, but how the Shari'a survived the onslaught. One reason for the relative independence of the Shari'a in the Sudan is the autonomy which was granted to 'Mohammedan' institutions by the British after the reconquest, in the face of having crushed an Islamic rebellion, that of the Mahdists, which itself defeated British forces in 1884. Numerous concessions to Islamic elements were

granted in the establishment of the Anglo-Egyptian Sudan in 1900; of importance to this study was the separate jurisdiction and functioning of the Shari'a courts. This allowed a degree of independence from English administration which other segments of the law did not share. After independence in 1956, the basic structure of the law remained intact keeping the Civil and Shari'a divisions separate, and further development of Islamic law continued in a manner which was consistent with rather than a break with the past.

The present study comes at an opportune time because it was conducted at the time when the system just described was coming to an end, in 1979. In that year the courts began a process of amalgamation of the Civil and Shari'a law which was to be completed in three years' time. Thus this study is not only the first exploration in English of Islamic law and society in the Sudan, but it is set in a time, the last time, that the Shari'a law and courts functioned as a separate and independent system. Although the former system is still very much in evidence, the future course for the development of a combined law and courts is set.

Very few studies exist which attempt to be comprehensive regarding the subject of Islamic law in practice in particular countries, among these Djamour's study of the Muslim matrimonial courts of Singapore (1962) and Layish's study of the Shari'a (1975) as applied in the occupied Arab territories of the state of Israel. No such study of Islamic law in operation in a Muslim African state or region exists, especially important as such studies would highlight the role of custom in the local development of the Shari'a. This study is built upon the scholarly contributions of J.N.D. Anderson, who is without peer as a compiler of recent change in Islamic law in Africa, the Middle East and Asia, as well as the work of Trimingham and Coulson. Yet in many ways it represents a break with past scholarship in that it deals essentially with the law in practice, rather than primarily in theory, and in interpretation, and it attempts to be Sudan-centered, telling the story of the law in its own terms and not in terms of Western stereotypes.

A great deal of the misapprehension in the West surrounding Arab society has focused on the law as archaic, rigid and harsh in its application. The Shari'a is neither unbending nor doctrinaire, as exemplified in its ability to amend itself, in the case of divorce reform. But it does reflect and uphold the cultural system and set of beliefs out of which it emerged, that of Islam. The fundamental difference between Islamic and Western conceptions of law is one of culture. For example Islamic law favors the values of honor and sexual propriety and so it defends the legitimate sexual access to women through polygamy and regards as dishonorable any result of illicit sexual contact. Divorce is reprehensible and is not viewed generally as representing freedom for women,

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which might be said to be the opposite of its interpretation socially in the West. Marriage is still very much a family affair and is not an institution, socially or legally, to be left to the two individuals concerned alone. The law of inheritance, rather than emphasizing the individual benefit of nuclear family members, represents a balance between the interests of the agnatic kin and the nuclear family. The law in this area as well has undergone an evolution away from the unrestricted rights of the male agnates to a greater emphasis on the nuclear family, an historical trend traceable to the origins of Islam itself when rights of inheritance were bestowed on certain categories of female kin not among the agnatic relations.

As a system of law the Shari'a is rather unusual in so far as it is at once both essentially sacred in its theological foundations and profoundly secular in its practical application. In the area of personal law. theology and the state are not separate, but are one, with respect to the governance of the affairs of Muslim citizens. To be sure the interests of the secular state often override matters of purely spiritual character, however the power of the religious established hierarchy cannot be underestimated, and the dual nature of the law has acted as both a bridge between religion and the state and as a source of tension. It is very often an uneasy peace or a delicate balance of forces that characterizes relations between the secular state and the traditional religious leaders. In the Sudan where the state, since independence, has been ruled militarily for the most part, this tension has erupted into major confrontations on a number of occasions resulting in a realignment of forces favoring for a time religious or secularizing moves. The Shari'a at this time is a focus of this tension as various political elements are promoting or opposing the move toward an Islamic-based constitution in the Sudan. It is thus an inescapable fact that Islamic institutions are bound to nationalist political sentiments. As such the endurance and even revival of the basic Islamic way of life, embodied in the Shari'a, is a major feature of contemporary Muslim life and politics and is likely to remain so for some time. It is equally apparent that change has and will continue to take place within an Islamic cultural framework, one part of which is the changing, adapting and developing Shari'a.

METHODOLOGY

I have conducted anthropological research into the dynamics of law and society in the Sudan since 1970. Originally I researched and analyzed the socio-legal aspects of homicide in the country as a whole (1972; 1976). Later I investigated the status of women by looking specifically at the effects of the Sudanese women's movement on the reform of both Civil

and Islamic law (1974; 1977). It was the contradiction between myth and fact, between stereotype and reality of Sudanese Muslim women that attracted me to the latter study, and it was basically this same motivation that inspired my interest to make a study of Shari'a law in the Sudan. As the strength and independence of Sudanese women I came to know violated the stereotype of the docile Arab woman, I wanted to discover if Islamic law was as socially retrograde as its stereotype in the West. In the course of my research I uncovered not only enlightenment and progressive thinking, but also a very human application of the law in Sudanese jurisprudence and in the courtrooms which I visited.

The study was conducted during 1979-80 in Khartoum, comprising the three towns of Khartoum, Omdurman and Khartoum North. Its geographical base is urban, primarily, as are the Shari'a courts primarily an urban phenomenon. Rural case material is included here as well to show the role of custom and its interplay with formalized Shari'a law. During the course of the research we lived with Sudanese family friends in Omdurman and later as a nuclear family in Khartoum.

The research comprised several phases and basic elements including bibliographic research, study of the Shari'a, translation of existing materials and direct courtroom observations. With respect to general sources on Islamic law the libraries of the Law and Social Sciences Faculties of the University of Khartoum were very helpful as was the special Sudan Collection of the general library of the University. As very little material on the application of the Shari'a in the Sudan exists, in Arabic or English, a great deal of my data had to be self-generated. As such, primary case material was collected through the kind assistance of the staff in the Sudan Judiciary along with basic statistics for the operation of the Shari'a courts and the record keeping of the maa'zuns who register marriages and divorces. These were collected for the Sudan as a whole as well as for the metropolitan Khartoum area during the period of the 1970s.

As the importance of the Judicial Circulars, which have been issued from the office of the Grand Qadi on specific points of law since the early part of this century, became apparent, I undertook the project of translating them in full with a Sudanese colleague. Certain of the circulars had been summarized by J. N. D. Anderson in his *Islamic Law* in Africa (1955) and elsewhere, but the circulars since the 1960s had not been reported upon nor received comment. Moreover a complete translation was necessary for my work in the history of the development of the Shari'a law in the Sudan in the twentieth century.* The circulars, constituting essential features of the applied law in the Sudan, form an

^{*} Judicial Circulars of the Shari'a Courts in the Sudan, 1902-79 (Manshurat al-Mhakim al-Shari'a fi Sudan), Journal of African Law, 27: 2, 1983.

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integral part of this study in so far as they have given major direction to currents in the law during the course of this century.

At the Sudan Judiciary I was warmly received by my friend and colleague, Sayeda Najua Kemal Farid, a First Class Shari'a judge attached to the High Court, who introduced me to Sheikh Mohammed al-Gizouli, then Grand Qadi of the Sudan. As Sheikh Mohammed was about to retire at that time in 1979 he had some free time and agreed to take me on as a student of the Shari'a both as philosophy and jurisprudence and as a matter of practical application in the Sudan. 'Moalana' (the honorary term for judges) has had a lengthy experience in the Islamic courts, serving over the past few decades in many provincial towns as well as Khartoum. For discussions of matters of marriage, divorce, inheritance, wills and the like Justice Najua often joined us. She had been Sheikh al-Gizouli's student at the University of Khartoum in the late 1960s and he was among those who had recommended her appointment as an Islamic judge in 1970 making her not only one of the youngest judges in the country, but probably the first woman to be appointed as a Shari'a judge in the modern African Muslim world.

Several times a week for four months we met in the Grand Qadi's chambers in the Judiciary during which time I also observed a number of urgent cases brought before the High Court as well as a session of the High Court and the issuing of one of the Judicial Circulars. On other days I began my visits to the various Islamic courts in the three towns. including observations in Second Class, First Class and Province courts. so combined with the High Court observations just mentioned, I have sat in Shari'a courts at each of the various levels of the judicial hierarchy. As I gained in experience, I found the Second Class courts and Province courts most active and interesting as the former dealt with the first hearing of the case while the latter dealt with more serious matters or cases on appeal. The tolerance of my presence in each of these courts by the judges even to the point of stopping sessions and explaining various points of the law, is but one mark of the overall openness and hospitality extended to me during the entire course of the research. During the period of my courtroom experience I collected information on 60 cases through direct observation while several other cases were taken from the file of recent cases in the High Court. For the cases which I was able to follow from one session to another, I had the opportunity to become acquainted with the litigants and to learn other facts not necessarily part of the legal case, but which were nevertheless useful in a sociological interpretation of the case. In every instance in this study. the identity of litigants associated with Shari'a cases is protected for there is a high degree of social stigma attached to the use of the courts.

A number of lawyers who specialize in the Shari'a were also of great assistance in introducing me to interesting cases, interviewing litigants and observing simple legal procedures in their offices. I visited the special section of the court devoted to the handling and expediting of simple inheritance cases and observed the initiation of suits as well as the registration of marriages and divorces with the maa'zun(s) attached to the Shari'a court. In these ways I attempted to gain an accurate picture of the daily functioning of the courts.

Other parts of my commentary herein, especially as related to matters of Sudanese society, have been gleaned from more than a decade during which, at various times. I have lived and conducted research in the Sudan. Living and visiting with Sudanese families and speaking the colloquial language have aided enormously in an understanding of Sudanese life. Experiencing first-hand the ease and pleasure of life in Khartoum in 1970-72 as contrasted with the struggle for basic services and commodities that life had become in 1979-80 is a fundamental lesson in economic and social change that provides the larger context for this study. Khartoum has more than doubled its population in the decade from 1970-80 and the economic crisis grew and worsened during that time resulting in great pressure exerted on traditional family life. Cases unheard of in the past, such as a court order for a son to support his mother, were now making their appearance. Judicial divorce by women increased as did the number of young women who married without the consent of their fathers. Society had become more clearly divided along class lines and strong political movements moved in opposite directions with respect to the law, towards greater reform of the Shari'a and towards its fundamental restoration. Still the Sudanese remain in their character proud and uncorrupted, dignified and generous, sensitive and caring about others and as such it has been a deeply rewarding experience to have lived and worked among them, even for a time.

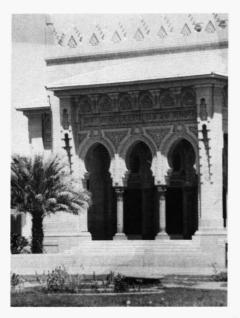
Dedication

To

'Moalana', Sheikh Mohammed al-Gizouli, Grand Qadi of the Sudan, 1973-79

and

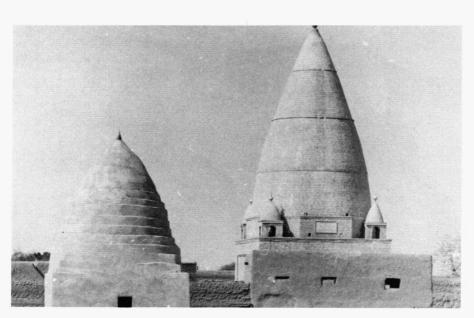
Sayeda Nagua Kemal Farid, First Class Shari'a Judge, 1970 to present



1. Central Mosque in downtown Khartoum.



2. Neighborhood mosque, Tuti Island, Khartoum.



3. Tombs of holy men at Eilafun.



4. Village mosque from an unusual perspective.



5. Left, The Honorable Abul Gassim Abder Rahim, one of the High Court Judges and, right, The Mufti, Hon. Abu-Gusaysa, 1980. Pictures of previous Grand Qadis in the background.



6. The Honorable Sheikh Mohammed El-Gizouli, Grand Qadi of the Sudan 1973-79.



7. The author with women judges, Civil and Islamic, and legal professionals at the Sudan Judiciary, 1979.



8. Bride and groom at a traditional Northern Sudanese wedding.

9. Sudanese marriage, at the center of cultural and social life. Wedding in Omdurman in March 1971.







ملكه جمال ٠٠ مديرة

وتقوم صديعه ميليلوء (٢٦ عاما) يتدره معاتلة لتصبح نانبة لها

وكما هو معروف فــان فرانميسكا ملكة جمال سابقة كانت قد فازت بعدة القاب في السابق ٠٠

_ر ان الـــ السودانية نالت الكثير

الذى لاتزال فيه المراة نى العديد من دول العالم الثالث تطالب

بالاعتتراف بمقها الانساني في الحياة •



كارولين لوبان

اثر السموم على خلايا، بسم الانسان

نقوم التكنورة ريف عبد النصيروعي بقسم الكيمياه الحيوية بجامعة تخرطوم باجراء بعض التجارب عن ثري السعوم على عطيات التنفس الاثنار التي تعديمًا في خلايا جسم الانسان

متعال اسم دهنديه في خلايا حسم الانسان وتقول الدكتــــود رئيب أن أقرارت الارابية للتجارب والبحوث قبير الى أن السعوم تعدث بخص الثانير في العمايات الكيميائية للتقي خلية الدينة في حسم الانســـان(وتعرى التجارب الان للومسول الى ناكد من الاسياب التي نؤدى الى تحليل الخلية الدينة .

كتب التنفيذي لاتحادنساء السودان يناقش تساؤلات التى طرحها الرئيس القائد

تنساؤ لأن الذي طرحها الرفعي القائد المجتمع الكاف المجتمع الكاف المجتمع الكنب التنافية الاختيار الأصدات الميدوان في الاسبوء فلشوا المحتم المتعافرة بالاتحاد الانشراكي ودائل وسترتبر عام التحسانساء السردان دين ناقش الاجتماع أما السادات المردان دين ناقش الاجتماع أما السودان يوم ٢١ اكتوبسد الاستهلاق ونشائه الإسلامة استقلال المتعافرة مثالة المتعافرة على مواددة على على معافرة المتعافرة المتعافرة المتعافرة المتعافرة المتعافرة التنظيم عن مواددة المعافرة المتعافرة على المتعافرة المتعاف

كارولين لوبان استأذة علم الاجتال

• ومن زيبارتها أحده الإبيوس

باحدي الجامعات الاجريكية في في المنافقة حوالي شهرين مقد
الكثير من العالات القير منطقات

الكثير من العالات القير منطقات الدي مستدعه اليه لإعداد يحد

للقراء كان يوبن طبيع وقييت

الدي مستدعه الدي مستدعه اليه لإعداد يحد عربية الهريقية وزوجى يفد الى جنوب القارة الافريقية واخبرا انفقتا على المجيء الى السسودار لكونه يجمع بين رغبتنا بما بعنك دراسة عن قواتين الاحوالالشخصية

التي طوات على برى المصروجزيرة توقى منذ عام ١٩٧٠ وحتى اليوم: ● ومن واقع دراستها تقول عن القوانين الخاصة بالراة والاســرة _ أعتق ان المراة عندكم نتعتاع بوضعيه اقضل عكس مايحدث عنينا مادات من هذه التاجية بالزواع في المربكا عملية بسيطة للغاية ولاتكلف اكثر من ١٠ دولار تقريب بموجب تصديق من مجلس المدينة ١٠ مبا الطلاق فيمثل مشكلة وتكاليف باهظة جدا فلابد من توكيل محامي

وحتى في بعض الدول المتقدمة وجزيرة نوني كذلك فقد حصرت ، فأن الرأة مازالت تعانى ، فقى لويان سعفار كلية الاحفاد الجامعية امريكا مثلا كما تقول الدكت وره الذي عقد في فعراير الماضي . كان المراجع المستحدد المستحد المستحدد الم بعرُهل واحد في تاريخ وموقع واحد الدراسات والبحوث الخاصة سدا ولكن سرت مختلف حدث تقاضي عملنا قانا افضل الذهاب الى دوا ولكن بعرتب مختلف حيث تتقاضى الراة مرتبا اللمنزميلهاوحتى تصل ه مرتب المستوى عليها أن تذهب المحكمة لاثبات ذلك · وهــــذا المثال ينطبق على العديد من المهن والمواقع الاخرى .

والأربع بدوي السودان (والكلام اما عندكم في السودان (والكلام لدكتوره لويان) فإن القانون اعطى الراة نفس الحقوق مع الرجل فسي مجال المتعلم والعمال ونرى ذلك

ميلية .

ود - كـــارولين لا تزور
السودان هذه الإيام للمرة الإولى
(يكنها ألم اللساللة وقد كانت
رزيامية الاولى في عام ۱۹۷۰ معي رزيامية الاولى في عام ۱۹۷۰ معي رزيامية التري يعمل استلادا جامعيا في نقس الجامعة بعدي المتاتجة المعيد رسالتها للككرواء من جريعة الفتل في السودان أما زرجها قد قسام بريمة القلق في السودان أما زرجها قد قسام بريمة القلق في السودان أما زرجها فقد قام بتحضير رسالته للدكتوراء عن عادات وتقيالد بري الحد

يرة السودانية فهي صاحبة نصر بر تعليمي اللغة العربية في فسر ميزة جدا من خلال معايشتي ا در البیت السودانی . ● باختصار نقول آن من پشرد ۱، الگول لابد آن یعود البه هـــد ادری کما فعلـــت د . کارونه وزوچها د • ريتشارد ٠

ية المطرفين في هذا ال المراة العاملة تعالى م

وعن نظرة المراة الامريك

الواة الامريكية لانعرف النا

لراة العربيةبصفة عامة ولا ..

يا الكثير عن

ة وما احرزته من ند ...

كارولين لوبان ف النيين قلوبهم بيضاء) حا-

ى دول اوربا تقريبا وده العربية ودول الشرق الار-

ة السائدة انها حب لاتتعلم ولا تعمل

10. The author interviewed in the Khartoum daily, Al-Ayyam, comparing the status of women in America and the Sudan.