

We Are Not Accomplices to Power!

Interview with Nizar Saghieh

Perspectives: Maître Saghieh, what are the main challenges that the Arab judiciary is facing today?

SAGHIEH: One problem the judiciary in all Arab countries is facing is the overwhelming centrality of the executive power. The role of the judiciary, by contrast, remains very limited. The second challenge is that, at least before the revolutions of 2011, there was no Arab country that fully grants judges the right to freedom of expression and association. Thirdly, there are no effective guarantees for the independence of the judiciary. The political pressures on judges are high, and in case they do resist, they do not enjoy any protection.

Perspectives: Can you give examples?

SAGHIEH: When some Egyptian judges in the year 2005 denounced the fraud that took place in the parliamentary elections - which they were tasked to supervise by constitution! - they were tried on disciplinary charges. In Tunisia the situation was even worse: In 2005, the Association of Tunisian Judges protested against the police taking action against lawyers for political reasons. As a result, the board of the Association was dissolved and the judges who had protested were silenced, removed from their posts, and transferred to remote provinces. This occurred even though the Tunisian judges were not even able to demonstrate as their Egyptian counterparts did. They just circulated a communiqué. Also in Lebanon, which is widely hailed for its freedom of expression, Lebanese judges who pass verdicts based on social and human rights are also pressured. For example, recently, judge John Azzi ruled that a Lebanese woman who had been married

to an Egyptian, now deceased, could transfer her nationality to her children. Until now, the Lebanese law doesn't grant women the right to pass their citizenship to their husbands and children. This however contradicts both the Lebanese constitution which stipulates gender-quality, and the international human rights conventions that Lebanon has ratified. Based on these principles, and because the Lebanese

As the representatives of executive power seek to control society, they define the judge as a pure servant of the law. This very narrow definition limits the judge's ability to actively interpret the law.

law is vaguely formulated, the judge ruled in favor of the woman. The result was that he was transferred from his post to another one, and not authorized to speak in public. Another judge - ironically a female one - finally revoked Azzi's verdict. In 2010, the Lebanese Ministry of Justice also issued a circular, prohibiting public statements by judges without prior authorization from the Ministry. This attitude towards judges is often justified by the judge's "obligation to preserve a distance". But in reality, it denies the judge the right to assume a social role.

Perspectives: What exactly do you mean when you say that the judge should have a "social role"?

SAGHIEH: As the representatives of executive



Nizar Saghieh

Nizar Saghieh is a lawyer and researcher, based in Beirut. He is the co-founder of "Legal Agenda" which publicly debates issues pertaining to the law. He is active in numerous human rights cases, defending "illegal" refugees and victims of war crimes. He wrote extensively on the judiciary, war memory, amnesty laws, gender, and censorship. He initiated a project to network among Arab judges and instigate collective action, and edited the study volume "Towards a Judges' Movement" (Arabic, 2009).

power seek to control society, they define the judge as a pure servant of the law. This very narrow definition limits the judge's ability to actively interpret the law. If a judge dares to give a bold interpretation of the law, s/he is considered as going beyond the legitimate authority assigned to him/her. It means that the judge is not only a servant of the law, but also becomes a servant to power and hence a pillar of the authoritarian regime. For a democratic society however, it is very important that a judge can interpret the law according to social and human rights and international conventions. This requires a social acceptance of such standards. In our societies, we have to create this awareness and redefine the role of the judge in society accordingly.

Perspectives: In those countries currently undergoing change, what should be the priorities for the judiciary?

SAGHIEH: First of all, the judiciary has to build its credibility. To achieve this, citizens' problems need to be transformed into public problems. This is the main issue: our countries and citizens are in the hands of one or few men and the public discourse is mainly around them, about them. The judiciary has to serve as a platform for public debate, a space, which provides the opportunity for everybody to come and claim his/her rights.

Perspectives: During the past few years, you have been engaged in connecting judges and judges' clubs in different Arab countries. What is the function of judges' clubs and what do you seek to achieve by creating networks between them?

SAGHIEH: Ideally, judges' clubs are associations that create exchange between judges and represent their interests. Some judges' clubs in the Arab world have been able to retain some independence, even within authoritarian conditions. Others are controlled or infiltrated by the regime. We are working with those that try hard to retain their independence. Networking efforts are always taking place in the spirit of

creating solidarity among actors who refuse to submit to power. Simply said, we are trying to create a precedent by stating "We are not accomplices to power!" Saying this jointly gives them strength. When a judge is left alone, s/

Resistance exerted by judges was most successful in those countries where it could build on tradition. Both in Tunisia and in Egypt, the history of judges associations go back to the 1940s and therefore there is a strong tradition.

he is weak in the face of power. Once judges are connected to each other, however, they will be more courageous. The collective movement of judges that we encourage, creates an environment in which the judge will feel that s/he is not alone. This gives judges the capacity to resist, and the ultimate goal is to turn the judiciary into an institution that citizens trust, that they refer to.

Perspectives: Which country has the strongest judges' clubs or associations?

SAGHIEH: Tunisia and Egypt.

Perspectives: Tunisia and Egypt? That is interesting. Do you consider it a coincidence that the revolutions started in these two countries and that they are the most successful ones until now?

SAGHIEH: I may say that the existence of such strong associations in these two countries is significant. That means that some kind of discourse of rights exists. One of the findings of our studies was that resistance exerted by judges was most successful in those countries where it could build on tradition. Both in Tunisia and in Egypt, the history of judges associations go back to the 1940s and therefore there is a strong tradition. They retained a forceful presence in the face of power and oppression.

Perspectives: Where have such judges' movements been less successful?

SAGHIEH: In other countries there were attempts to create judges clubs, such as in Lebanon in the 1970s and 1980s. But they were not able to take root. In Morocco, an association was created by the king himself. As a result there was neither dynamism nor debate. The club served the authorities merely as a framework to control judges better. In Tunisia and Egypt, by contrast, the clubs are dynamic bodies that carry out elections and maintain other mechanisms to ensure internal democracy. The Egyptian club especially has served as a model for other countries.

Perspectives: Why is the Egyptian club hailed as a model for the Arab world?

SAGHIEH: Simply because of the importance of Egypt. Why do we hear more about the Egyptian revolution than the Tunisian one? Because Egypt plays a more vital and central role in the Arab world than Tunisia. It is also the biggest country in terms of population. The Egyptian judges' club has thousands of members. In addition, when the Egyptian judges revolted in 2005, they were surrounded by a fully-fledged civil rights movement: the Kifaya-movement, the academics, the workers, the students, and all the other segments of society that demanded an end to authoritarian rule. In Tunisia, civil society space was extremely restricted and judges were much more isolated. This is also the reason why they were not able to stage demonstrations and instead restricted themselves to publishing communiqués.

Perspectives: Did judges play a vital role in the Tunisian and Egyptian revolutions? Do they play a role in the other countries that are shaken by protests?

SAGHIEH: In Egypt, judges were acting more as individual citizens during the Revolution than as a collective of judges. In the last elections of the Egyptian judges' club in 2009, pro-government judges won and reformists lost. The club has therefore become more reactionary,

due to political pressure. This might be a reason that judges did not act as a collective in the revolution. Prominent judges however participated actively in the protests. Judge Mahmud Makki for example was present in the protests in Alexandria and Cairo, and judge Hisham Bastawisi joined protests in Tahrir square in Cairo. Bastawisi is now a presidential candidate. He enjoys strong support from many young people. This is a positive sign. It means that those judges who stood up against the dictatorship in difficult times, enjoy a good reputation among the activist youth. In Tunisia, the judges who were silenced and removed from their posts, appeared on the media during the revolution, especially on Al-Jazeera, and were very outspoken. Now they are forming a real

The foremost task for the judiciary would be to claim a more central role and to become a credible and independent authority within the new order.

syndicate that may replace the association. In Yemen, judges revolted in front of the building of the High Judicial Council, which is controlled by the regime. They demanded its reform and the right to form an independent syndicate.

Perspectives: In Tunisia, there is some criticism that judges have lately become too involved in politics and political parties, and that some have compromised the distance that is required of a judge. What is your take on that?

SAGHIEH: Yes, this has happened in some extent. But, to be frank, I think this is normal after a revolution. Later, the situation will be more balanced and regulated. You also have to keep in mind that these judges have immensely suffered and that they were victims of massive pressure. It is quite natural that now, with the changed situation, they are eager to play a role.

They consider themselves as beneficiaries of the revolution. This is why it is difficult for some of them to remain at a distance.

Perspectives: What, in your opinion, are the main concrete issues that the Egyptian and Tunisian judiciary need to tackle today? Is it constitutional amendments, or corruption, or political crimes and transitional justice?

SAGHIEH: The foremost task for the judiciary would be to claim a more central role and to become a credible and independent authority within the new order. For this to happen it is necessary to establish an equilibrium between the judiciary and other public powers. For example, I personally find it very frustrating that the Egyptian revolution should conclude with a few constitutional amendments, as the military wants to make us believe. Judges supervised the referendum on the constitutional amendments, but they were assigned a purely technical role. Judges however could play a much more vital role in this transitional period. The process should have been much more comprehensive. The amendment process selected only a few points, while there are many other aspects in the constitution that are problematic as well, but were not addressed. The referendum on the amendments more or less forced people who were in favor of the amendments, to vote for the whole constitution, which eventually legitimized it. All in all, it would have been better to form

Political corruption typically involves large numbers of people. A judge can try a hundred people, but thousands..? This goes beyond the capacities of the regular judiciary.

a transitional assembly to prepare for a new constitution instead of electing a new assembly directly. Judges could have provided valuable input during this period.

Perspectives: In Egypt, political corruption engulfed all public institutions. Is it helpful to arrest a handful of ministers?

SAGHIEH: It is certainly positive to see that some of those figures who embodied corruption are being arrested and convicted. But if you want to achieve more comprehensive results, a process of transitional justice is needed. Transitional justice requires a framework that sets clear criteria for what constitutes a political crime, instruments for the investigation of abuses, and a mechanism for prosecution and compensation. The interim government in Tunisia established a committee to investigate corruption. Some judges are opposed to it because they believe this to be the task of the judiciary. But it is a monumental task. Political corruption typically involves large numbers of people. A judge can try a hundred people, but thousands..? This goes beyond the capacities of the regular judiciary. This is why other countries established truth commissions. But there is no set recipe; the process has to be decided by the public of each country. It also requires time before people can start to think about the past calmly. There are hardly any countries where the process of transitional justice started immediately after political change took place.

Perspectives: It was impressive to see how quickly the Tunisians and Egyptians acted to freeze bank accounts of former presidents Ben Ali and Mubarak. Was this mainly the initiative of the judiciary?

SAGHIEH: Yes, some judges decided to claim appropriated resources. These were not verdicts, but rather a freeze of possessions. In Tunisia, an official commission on corruption was established quite rapidly as I said before. In Egypt, lawyers and the bar association played a role by making cases in Egypt, Europe and beyond.

Perspectives: What about corruption within the ranks of the judiciary? Is it an issue now?

SAGHIEH: In Tunisia, some judges were sacked for corruption, but it didn't happen in

compliance with the disciplinary rules. In Egypt, until now there is no talk of corrupted judges.

Perspectives: Are you in contact with judges in the Gulf countries that are witnessing protests?

SAGHIEH: No. The problem in the Gulf countries is that many judges are “non citizens.” Bahrain, Kuwait, Oman, Qatar, and the Emirates recruit judges mainly from Egypt, but also from Lebanon, Jordan and Syria. Since their legal system is based on the shari’a, and specifically on the Sunni Islamic schools, they particularly target Sunni judges. The reason might be a lack of qualified local personnel. Another reason however lies in the limited definition of the role of the judge that I have identified as a problem. Judges usually have social influence. But if you define and treat them as mere technocrats, you limit their power. Can you imagine an Egyptian judge protesting against the Bahraini regime? Especially if this judge has a limited contract for two years and is a foreigner with a work contract that may be terminated at any time. Therefore, apart from the lack of qualified personnel, there might be also a political intention behind this recruitment policy.

Perspectives: If their role is very limited, why are these positions so attractive to judges?

SAGHIEH: The answer is very simple: In Lebanon and Egypt, a judge earns approx. 800-1500 US\$ per month. In Abu Dhabi, the average salary goes up to 15,000 US\$.

Perspectives: The Arab judges clubs and associations seem to be very male dominated. Do women play a role in the judiciary at all?

SAGHIEH: There are some countries with a number of female judges, including Tunisia, Lebanon, Morocco, Jordan, Algeria, and Syria. In Tunisia, women were well presented not only in the judiciary, but also in the association of judges and on its board. There are also prominent female judges who took part in the judges’ protests of 2005. In Iraq, there are some female judges, but they preside mainly

over juvenile courts. In Algeria the situation has improved, with now approx. 25% female judges. In Egypt, most judges are male because the judiciary was opened to women only very recently. There are still some formal procedures

Until now, an organized claim for social rights has not been put forward. We should remind ourselves that revolutions have as their basis social and economic demands, not only political reforms and constitutional amendments.

and conditions imposed on women that make it difficult for them to join the profession. In the Gulf countries, women are largely excluded from the judiciary.

Perspectives: You are promoting a rights-based approach in your work with the Arab judiciary. What do you mean in concrete terms?

SAGHIEH: You would expect that after a revolution, the “real” issue would be to address the broader socio-economic demands and demands for more direct democracy, which allows for citizens to directly bring forward their claims. In Egypt, people are now looking around and recognize that their living conditions have remained unchanged. Once they raise this issue, the military accuses them of “selfish demands”. But in my opinion a revolution should have high ambitions. Until now, an organized claim for social rights has not been put forward. We should remind ourselves that revolutions have as their basis social and economic demands, not only political reforms and constitutional amendments. What about education, housing, workers rights...? In South Africa, many strategic litigations on housing were made. Whole villages raised cases against the government and forced it to provide housing. In 2010, an Egyptian lawyer, Khaled El Ali, won

a case on the minimum wage. And around this case, a whole civil movement was formed. The judge ruled that, against the backdrop of

The judiciary should be a counterpart to political power.

rising prices, the government should raise the minimum wage. This is precisely the job of judges: to provide a platform for rights claims, and to force the authorities to introduce and implement policies accordingly. The judiciary

should be a counterpart to political power. Even if a “good” president and a democratic parliament are installed, the danger remains that democratic institutions and processes will erode. The judiciary has to play a role here. It should work to safeguard the dignity of the people. The ideal result would be to create a junction between a rights movement and an independent judiciary.

Interview by Layla Al-Zubaidi, 14 March 2011.