2.2.3.1 The Case of Iyās b. Muʿāwiya

If the *qāḍī* was not selected from among the "pious experts", this also meant that the categories of his administration of justice did not necessarily correspond to theirs. During the sixties of the first century a settled Bedouin (*aʿrābī madarī*) was a – successful, we are told – judge in Egypt, although he was unable to write and had not mastered the Quran.[1]

Even in the second half of the second century, during the time of the caliph al-Mahdī, the *qāḍī* Khālid b. Ṭalīq was accused of being ignorant in his own field: he did not even know the name of Muḥammad's mother.[2] He was, however, an educated man – but a genealogist and historian (*akhbārī*), not a jurist.[3] Half a century earlier, he would probably not have shocked anyone.

The tribes in which these men had gathered their experience followed a different legal tradition. Differences would have been settled by the *ʿarīf*, on the basis of *ʿurf*.[4] The *qāḍī* would have been approached only in exceptional cases, and if he was consulted, his function would have been like that of the *ḥakam*, the arbitrator who would have been the expert in pre-Islamic times.[5] The institution of the *ḥakam* had by no means vanished among the settled tribes; after all, the office of *qāḍī* evolved out of it.[6] When we occasionally read of a tribal *qāḍī*,[7] this is probably exactly what the author meant. Not even members of religious groups who ought to have been committed to the new ideal always turned to the superior public authority. The Ibāḍites had their own authorities,[8] and Jaʿfar al-Ṣādiq appears to have been put out when two

1 Kindī, *Quḍāt Miṣr* 312, 9ff.

2 Wakīʿ, *Akhbār* II 127, 12, and 130, 12f.

3 Ibn al-Nadīm, *FIhrist* 107, 9ff.

4 Cf. EI² I 629f. s. v. *ʿArīf*, and Serjeant in: JSS 29/1984/73.

5 Thus e.g. Ḥasan al-Baṣrī (cf. Wakīʿ I 309. 8ff.) or a generation later Sawwār b. ʿAbdallāh al-ʿAnbarī (Fasawī II 247, 1; regarding him see p. 178 below).

6 As Kindī puts it, ʿAmr b. al-ʿĀṣ was said to have appointed a former *ḥakam qāḍī* in Egypt (*Quḍāt Miṣr* 305, 2ff.). Concerning the *ḥakam* in general cf. E. Tyan in EI² III 72 s. v.; also G. Jacob, *Beduinenleben* 217f.; Schacht, *Introduction* 8; Muh. Ibrahim el-Shoush, *The Nature of Authority in Arabia at the Advent of Islam* (PhD thesis, London 1959), p. 214ff.; W. Reiner, *Das Recht in der altarabischen Poesie* (PhD thesis Cologne 1963), p. 42ff.; Dannhauer, *Qāḍī-Amt* 12ff.; Ph. Rancillac in: MIDEO 13/1977/147ff.; Morony, *Iraq* 440; Chelhod in: SI 64/1986/22ff. and 31f.; also my own thoughts in: *La notion de liberté au Moyen Age* 25ff. Concerning the continued existence of the *ḥakam* in present-day Yemen cf. Chelhod, *L'Arabie du Sud* III 149ff.

7 Thus said of a "*qāḍī* of the Tamīm" in Abū Nuʿaym, *Ḥilya* III 110, 12.

8 See p. 529 below.

Shīʿites brought their quarrel before the *qāḍī*, who was not a Shīʿite.[9] A good example of the type of judge who came from the older background was

Abū Wāthila Iyās b. Muʿāwiya b. Qurra al-Muzanī,

d. 122/740 at the age of 76.[10] His talent as a judge was beyond doubt, but there is no evidence that he relied in any great degree on the Quran, let alone prophetic tradition.[11] He had no time for people who devoted themselves to *tafsīr* or hadith.[12] He relied entirely on his common sense and on his knowledge of human nature. And he was inspired; he became the ideal exponent of the *firāsa*, a kind of Solomon, as Ch. Pellat put it,[13] and was remembered in the proverbial phrase *azkan min Iyās* "of greater perspicacity than Iyās".

Cf. Ḥamza al-Iṣfahānī, *Al-durra al-fākhira* 215f. no. 294 > Maydānī, *Amthāl* I 325 no. 1754; also Freytag, *Proverbia* I 593. Wakīʿ I 328, 4ff. and 361ff. has some anecdotes on the subject; TTD III 178ff.; Thaʿālibī, *Thimār al-qulūb* 92ff. no. 134; Ibn Qayyim al-Jawziyya, *Al-ṭuruq al-ḥikmiyya fī l-siyāsa al-sharʿiyya* (Cairo 1317), p. 25 and 31ff. The ultimate source is probably mainly Madāʾinī, *K. akhbār Iyās b. Muʿāwiya* (Ibn al-Nadīm, *Fihrist* 117, 5) or *K. zakan Iyās* (Ḥamza, *Durra* 215, ult. > Maydānī I 326a, 12ff.); it is also the source of the MS Azhar, majmūʿ 1182 (fol. 93a–99a) mentioned in GAS 3/357. Similar stories have been told about some Bedouin judges until the present day (cf. Gräf, *Das Rechtswesen der heutigen Beduinen* 102ff.).

As his talent of observation and deduction frequently proved successful around animals as well, Jāḥiẓ included some of this material in *K. al-Ḥayawān*.[14] However, he also noted Iyās' mistakes;[15] the methodological carelessness came at a price. Jāḥiẓ thought his vanity led him to jump to conclusions; he also

9 Kulīnī, *Kāfī* I 67, 11ff. Even in the most recent past it was taboo among the Tahtacı in Turkey to consult a secular court; differences were arbitrated by a *dede* (Kehl, *Die Tahtacı* 48). Concerning arbitration as a characteristic of legal systems in societies predating high civilisation cf. in general K. Eder, *Die Entstehung staatlich organisierter Gesellschaften* 159f.

10 Wakīʿ I 373, apu. ff.; 121/739 as claimed by Ṣafadī, *Wāfī* IX 465, 4, is probably an error.

11 An isolated opinion on a problem of exegesis (sura 13:2) has been preserved in Ṭūsī, *Tibyān* VI 213, 8f.

12 Wakīʿ I 371, 6ff.

13 EI² IV 291. Cf. also F. Malti-Douglas in: Arabica 35/1988/68f.

14 Cf. e.g. II 75, apu. ff. and VI 481, 2ff.; also VI 19, 1ff.

15 Ibid. I 149, 3ff. = VI 18, 6ff.; V 368, ult. ff.