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Katherine Blue Carroll

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# Tribal Law and Reconciliation in the New Iraq

Katherine Blue Carroll

*As of 2009, the Government of Iraq had failed to take key steps needed to promote reconciliation between Iraq's Sunni and Shi'a communities. In contrast, Iraq's tribal leaders began working as soon as security improved in 2007 to re-knit the Iraqi community through the processes of tribal law. This article explores their efforts in Baghdad in 2008–2009. It is based primarily on approximately 30 interviews conducted when the author was a member of a Human Terrain Team supporting the US military.<sup>1</sup>*

Arab states have had notorious difficulties in establishing regularized and legitimate legal processes and in imposing them throughout their territories. The result has often been a form of legal pluralism in which religious, tribal, or even rival political forces render decisions on matters that would be, in Western conceptions of the state, under its purview alone. In particular, well-developed systems of tribal law originating in the pre-Islamic era have continued to function in the modern Arab world. Sometimes a state's challenger and sometimes its crutch, the role of tribal law in the Arab world today is best understood as a fluid product of ongoing negotiation between state and tribal actors.

Since a basic level of security was established in Baghdad in early 2008, tribal shaykhs have been involved in a frenzy of dispute resolution. Given the weakness of the new Iraqi state and in particular its legal system, it is not surprising that tribal law surged in to fill the gap.<sup>2</sup> What is interesting, however, is the key role that tribal law has played in furthering reconciliation between Baghdad's Sunni and Shi'a communities in the wake of the intense sectarian violence of 2005–2007. While the role of Iraq's tribal leaders in establishing the anti-al-Qa'ida militias of the Awakening Movement is widely

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Katherine Blue Carroll is an Assistant Professor of Political Science and Director of Public Policy Studies at Vanderbilt University in Nashville, Tennessee. She is the author of *Business as Usual? Economic Reform in Jordan* (Lanham, MD: Lexington, 2003). From April 2008 to April 2009 she was a social scientist on a Human Terrain Team in first southwest and then northwest Baghdad. She wishes to express gratitude to the soldiers of the Raider, Strike!, and Dagger Brigades for supporting this research, to Adele Elsadder for her help with translation and interpretation, and to the many Iraqis who shared their knowledge and experiences. She also wishes to thank Adeed Dawisha and William Quandt for reviewing earlier drafts.

1. Although the Iraqis I interviewed understood that I would be quoting them and drawing on their responses for this article, because these interviews were conducted during wartime I have chosen not to identify most of them by name. I was not armed during these engagements and only approximately half were done in the presence of American soldiers (and these often at casual meetings over lunch or dinner). There was no difference in the type of responses I received from people I talked to with soldiers present and without soldiers present, and I met with several of the Iraqis who provided information for this article several times.

2. Based on anecdotal evidence, the availability of the official court system in Iraq prior to 2008 was minimal. It appeared that the courts only began operating again in early 2008, and then in a very limited way. The other route for adjudicating a dispute was, of course, militia courts during the "bad years." There simply was not another easy venue for managing disputes for the time period covered in this article.

understood, there is little appreciation for what may be their greater long-term contribution to security — the promotion of reconciliation through traditional tribal processes.

### A BRIEF OVERVIEW OF TRIBAL LAW IN IRAQ<sup>3</sup>

Tribal or customary law predates *shari'a* law, but most Iraqis believe that it has been adjusted to conform to *shari'a*.<sup>4</sup> Today, many of Iraq's tribes have printed their legal codes in formal documents that may be voted into effect by the tribe's senior members. There appears to be relatively little variation in the structure, specifics, or processes of law from tribe to tribe, and this facilitates the settlement of disputes between them.<sup>5</sup> Processes center on shaykhs working with the parties involved 1) to determine the facts of the case, 2) with reference to tribal legal codes, to set out the amount of money that the perpetrator's tribe or family must pay to the victim's to avoid retribution (often referred to as "blood money" in English but called either *fasel* or the Qur'anic term *diyya* in Iraq), and 3) to enact communal rituals of reconciliation. The Arabic term for this entire process is *sulha*, or settlement, but Iraqis often use the term *fasel* to refer not only to the "blood money" paid but also to the process for determining its amount.

*Sulha* may address premeditated or accidental injuries or killings as well as damages to honor, such as pulling the *agal* (head rope) off a shaykh's head, providing a bride who is not a virgin to another tribe, or baselessly calling into question a woman's reputation. In a culture requiring that honor be restored after a wrong through the tak-

3. For information on the specific tribes of Iraq see 'Abbas Al-'Azzawi's *'Asha'ir al-'Iraq* [*The Tribes of Iraq*] (Baghdad: Matba'at Baghdad [Vol. 1]; Matba'at al-Ma'arif [Vol. 2]; Matba'at al-Tijara [Vols. 3–4]) and Younis Al-Samarra'i's *Al-Qaba'il al-'Iraqiyya* [*Iraqi Tribal Confederations*], 2<sup>nd</sup> ed. (Baghdad: Al-Sharaf Al-Jedid Press, 1989). On the role and functioning of tribal law in general, Frank H. Stewart's "Tribal Law in the Arab World: A Review of the Literature," *International Journal of Middle East Studies*, Vol. 19, No. 4 (November 1987), pp. 473–490, gives a thorough but out-of-date overview of available books. On the operation of tribal law in Iraq specifically see Mustafa Muhammad Hasanayn, *Nizam al-mas'uliyya min al-'Asha'ir al-'Iraqiyya al-Mu'asira* [*System of Responsibility among Arab Tribes in Contemporary Iraq*] (Cairo: Matba'at al-Istiqlal, 1967); al-Muzhir al-Fir'awn Fariq, *Al-Qada' al-'Asha'ir* [*Tribal Adjudication*] (Baghdad: Matba'at al-Najah, 1941); and Ibrahim Al Wahab, "Tribal Customary Law and Modern Law in Iraq," *International Labour Review*, Vol. 89, Issue 1 (1964), pp. 19–28. On tribal law in other areas of the Middle East see Sulayman N. Khalaf, "Settlement of Violence in Bedouin Society," *Ethnology*, Vol. 29, No. 3 (July 1990), pp. 225–242 (on the Bedouins of Syria); Richard Antoun, "Civil Society, Tribal Process, and Change in Jordan: An Anthropological Overview," *International Journal of Middle East Studies*, Vol. 32 (2000), pp. 441–463; and works by Aharon Layish for the Arab communities of Israel, including an article in the February 2006 issue of *Islamic Law & Society*, Vol. 13, No. 1, which is entirely devoted to the issue of customary law in Israel. Works by Joseph Ginat (1987), Lisa Welchman (2008), Hillel Frisch (1997) also deal with legal pluralism in Israel and the Occupied Territories. R.B. Serjeant's *Customary and Shari'ah Law in Arabian Society* (London: Variorum, 1990) is a collection of essays (some dating back to 1951) presenting several tribal legal cases from Yemen.

4. Mohammad Sadiq Al Sadr's book *Fiqh al-'Asha'ir* [*Tribal Jurisprudence*] dealt with the reconciliation of tribal and religious law, and many Iraqi Shi'a have surely been influenced by his teachings to view the two as compatible.

5. Patricio Asfura-Heim found that the tribes of Anbar differed in the amount of compensation required for different types of incidents "I-MEF Reach Back Support Center for Naval Analyses Primer: Prospects and Pitfalls of Engaging with Non-State Legal Systems in Al Anbar," (March 7, 2008), p. 5.

ing of revenge against the perpetrator or his extended family, *sulha* helps the community avoid feuds. The official group responsible for vengeance and against whom vengeance may be taken is normally the *khamisa* [five], all those males who share a common ancestor five generations back).<sup>6</sup>

Since the fundamental goal of *sulha* is to restore peace through restoring honor, a mediator, who relieves the parties directly involved of having to take a first, potentially humiliating step and who limits face-to-face interactions that could worsen a dispute rather than limit it, is essential. Although religious leaders, *sayyids*, or occasionally political leaders may be involved, mediators in the *sulha* process are most often tribal shaykhs. The hierarchy of shaykhs follows the tribal structure, with the most powerful shaykh being that of the *qabila*, or tribal confederation, followed by the shaykh of the *‘ashira*, or tribe, and then of the *fakhd*, a grouping of an unspecified number of family units (usually five) within the tribe. The shaykh of one of Iraq’s largest tribal confederations explained to me that he is generally above direct participation in the *fasel* process, although he may contribute funds to facilitate reaching agreement or guarantee the safety of the perpetrator as part of the process of *sulha*.<sup>7</sup> For serious problems, such as murder or disputes between two different tribes, a shaykh at the tribal level should be involved, since tribal shaykhs are more widely known and respected than *fakhd* shaykhs and are able to impose the outcome of negotiations on a larger group. However, high demand for shaykhs to settle *fasels* in Iraq after the long period of sectarian violence seems to have resulted in more *fakhd* shaykhs handling serious cases.

The ability to speak eloquently and remain calm in the face of anger, to remember tribal precedents (amounts of past *fasels* or agreements between tribes about the costs of certain types of incidents between them), and to marshal religion and history in support of decisions are all skills Iraqis believe are crucial for shaykhs involved in dispute resolution. The ability to solve disputes successfully is a point of pride for shaykhs and a key part of their identity. The shaykh of a large Iraqi tribe described his attempts to solve an intractable dispute about water rights in a room full of people. After hours of arguing, all non-shaykhs were asked to leave the room, and within 15 minutes of this, as he recounted it, an agreement had been reached. “We were all starving and dying to solve it so we could go eat, so that helped. But also, we are shaykhs and we are good at solving these problems amongst ourselves ...”<sup>8</sup> “Great shaykhs” who can solve especially difficult problems are known and valued. As a relative of Kathim Shibli Al-Ameri, one of the most respected tribal judges in Iraq, remarked, “lots of people whom I *know* aren’t Ameri suddenly become Ameri when they get into trouble so that they can get Shaykh Kathim to settle their problems.”<sup>9</sup>

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6. The construction of the vengeance group is in practice quite flexible, as discussed in Jacob Black-Michaud, *Cohesive Force: Feud in the Mediterranean and the Middle East* (New York: St. Martin’s Press, 1975), pp. 44–45.

7. Interview by the author, March 3, 2009.

8. Interview by the author, March 7, 2009.

9. Interview by the author, March 16, 2009. With regards to tribal membership and how it was determined, tribes keep records of their members at least in some cases. Of course, tribal allies can over time become members and tribes can and do split over disputes.

*THE STEPS IN SULHA*

In the case of a death especially, *sulha* is likely to begin with the perpetrator's family asking their tribal shaykh to reach out to the shaykh of the victim's tribe. The two confer and then normally press the victim's family to accept a ceasefire or 'atwa. The 'atwa is a set period of time, generally between two weeks to a month (renewable), in which the victim's family agrees not to exercise their right to retribution. In some cases there is no 'atwa, and the perpetrator, and perhaps his close male relatives, must endure exile for a specified period of time.<sup>10</sup> In the code of the Zobai, a Sunni tribe based in Abu Ghraib, if the perpetrator was a neighbor of the victim he must endure a period of exile not to exceed seven years. During this time his family may stay in the area and no one may take his property.<sup>11</sup>

With the 'atwa or departure of the perpetrator giving time and space for potential resolution, the shaykhs begin a form of "shuttle diplomacy" between the two families, determining if the victim's family will accept payment at all in lieu of retribution. As time passes, tempers cool and pressure from the community and shaykhs to maintain peace can be brought to bear on the victim's family, making acceptance of a *fasel* more likely. Shaykhs described working during this period to transform anger into resignation. "We say things about the killer like 'he is truly a stupid young man, but imagine how horrible for his poor family, to have a stupid son like that?' or we say 'this is from God, what can we do?'"<sup>12</sup> The shaykhs open lines of communication between the families of the victim and perpetrator, and they speak for the perpetrator, who has lost his right to do so.

Tribal dispute resolution is designed to operate when the facts are known. However, the process does have an investigative element when necessary, and lore about shaykhs cleverly rooting out the truth is bountiful. Where the perpetrator refuses to confess, the facts are sketchy, or one side rejects the facts completely, a Judicial Council is formed, generally of six shaykhs from any tribe (three chosen by each party). Normally a *fakhd* has an experienced shaykh who regularly sits on such councils, hearing each side's witnesses and examining the evidence.<sup>13</sup> "They are from independent tribes, and their job is to find the truth. They are as good at it as the police, to be honest," remarked one *fakhd* shaykh of these investigators, and other Iraqis agreed that the shaykhs are good at finding out the truth, if simply because they command respect.<sup>14</sup> A party unhappy with a council's decision may appeal it to a higher tribal judge, with

10. Several Sunni shaykhs insisted that their tribes were more likely than those that were predominantly Shi'a to demand exile instead of an 'atwa.

11. I am grateful to Shaykh Dhari Al-Dhari and Shaykh 'Abdul Rahman Al-Dhari for providing me with their tribe's legal code.

12. Interview by the author with a Sunni shaykh who sits on such councils, September 11, 2008.

13. *Shari'a* rules of evidence are followed in these proceedings. Where there are no witnesses the suspect is asked to swear on the Qur'an, and if he swears that he is innocent all the shaykhs I interviewed insisted that the case would be dismissed because, as one remarked, "we are a people who fear God, so he is probably telling the truth, and in any case if he does lie his punishment in the end for this will be much worse than anything we would have inflicted."

14. Interview by the author with a Sunni *fakhd* shaykh from the Dulaymi tribe, February 26, 2009.

the caveat that his decision is final.<sup>15</sup> When the facts of a case remain unclear even after investigation, the *sulha* process may be brought to a halt.<sup>16</sup> As I discuss below, the anonymity of much of Iraq's sectarian killing posed a real challenge to the successful functioning of the tribal legal system.

The central step in *sulha* is setting the amount of the *fasel* payment, which may be determined either during shuttle diplomacy or in a large communal gathering traditionally held in the victim's house (as a sign of goodwill), a tribal meeting house, or a shaykh's house. The starting point for negotiating compensation is clear, as the costs of very specific types of wrongs are written into each tribe's legal code or may have been set in long-term bilateral agreements between the two tribes. The process of setting the amount of a *fasel* is not just one of mathematics and memory; the final sum is also influenced by the reasons for the incident, the behavior of the perpetrator, the suffering of the victim's family, and the status of the victim. For example, the *fasel* for manslaughter is generally lower than that for murder, and those who confess quickly or somehow help their victims — by taking them to the hospital or notifying the police or the family — may pay reduced amounts, whereas failure to take responsibility can result in a higher *fasel*. In the Zobai tribal code, for example, if a perpetrator confesses more than three days after the act he must pay double the *fasel* amount. The *fasel* amount is also influenced by the extent of suffering caused. This suffering may arise from unforeseen consequences of bad acts, as one shaykh illustrated in a story about a cousin who was the victim of a hit and run accident in the dark and whose body was repeatedly hit — and torn apart — by subsequent cars. The tribal judge in the case assessed an unusually high *fasel* on the original offender because his actions had led to such a terrible situation for the family.<sup>17</sup> Iraqis I interviewed differed about whether the *fasel* for the killing of a woman was less than or greater than that for a man.<sup>18</sup> However, killing of the main shaykh of a tribe is seen as an attack on the honor of the whole tribe. Thus, if a *fasel* is accepted at all in these cases, it is generally four times the normal amount.<sup>19</sup>

It is important to understand the *fasel* not as a punishment of those who commit crimes or as a replacement of the monetary value to the family of an individual,

15. Stewart's research throughout the Middle East found, in contrast, that the decision may be appealed up to three times, but once two similar decisions are given the case can no longer be appealed. Frank H. Stewart, "Customary Law Among the Bedouin of the Middle East and North Africa," in Dawn Chatty, ed., *Nomadic Societies in the Middle East and North Africa: Entering the 21st Century* (Boston: Brill, 2006), p. 247.

16. If the *sulha* process fails, a family may seek retribution if they can, or they may wait to seek redress in the court system if it is a serious offense covered by state law. Interviewees all made clear that the *fasel* process usually works out, but not always. The US military investigated murders across Baghdad while this fieldwork was conducted and sometimes found out that the cause was retribution for a wrong done to another vengeance group.

17. Interview by the author with a Sunni *fakhd* shaykh, November 9, 2008.

18. In the Zobai code the *fasel* for a woman is set at half that of a man, yet shaykhs from other tribes insisted that *fasels* for killing women were much higher since the inability to protect a woman was particularly damaging to a tribe's honor. Frank H. Stewart's research confirms this variation, finding that in many places the blood money for a woman is half that for a man, "but it is notable that in the Sinai and Palestine, where her legal status is low, her blood-money is four times a man's (provided the injury is caused by a man)." Stewart, "Customary Law Among the Bedouin of the Middle East and North Africa," p. 247.

19. Interview by the author, February 21, 2009.

though these justifications are not absent from Iraqis' conception of its role, but rather as the cost of not killing in return.<sup>20</sup> The *fasel* is the price of the damage to honor that results from giving up the right to retribution. "[Y]ou can never pay the price of a human soul; it is too valuable. So the family has to accept that the *fasel* is not that. It is a payment for forgiveness and for moving forward," an experienced Shi'a tribal shaykh explained.<sup>21</sup> For the *fasel* to function to restore honor, however, the shaykhs must settle on an amount that is not too high, which would damage the honor of the perpetrator's tribe, and not too low, which would damage the honor of the victim's tribe. Given this, any other part of the process of *sulha* that increases the honor of the victim's tribe may then lower the amount of the *fasel*, such as a perpetrator behaving respectfully towards them or a powerful individual taking a public interest in the case. Indeed the *fasel*, once set, may be publicly "discounted" by the victim's family to honor *sayyids* (descendants of the Prophet) or other notables present. In the end, a victim's family may even opt to forego all compensation because, as one tribal shaykh remarked: "Sometimes it is best to fully forgive, because then forgiveness is there when you need it."<sup>22</sup>

Amounts of *fasels* vary by the circumstances of the incident, the tribe involved, and to a certain extent the region in which the incident occurred; but it is absolutely clear that since 2003 the average cost of the *fasel* in Iraq has been rising. Most Iraqis I interviewed attributed this to wartime inflation, though some also faulted unscrupulous "fake shaykhs" who failed to follow precedents or who used the *sulha* process to extort money. All the shaykhs interviewed insisted that they do not accept a percentage payment for concluding a *fasel* but that gifts are generally given to them after the process is finished. Rising *fasels* may also reflect Iraqis' insecurity about the future. Those who accept a lower *fasel* are less sure than they were in the past to reap the benefits of their magnanimity at some future date. Many shaykhs who had knowledge of amounts paid in the past were killed or left the country, and Iraqis are still uncertain about the role tribal law will play in their future.

The *fasel* goes to those in the tribe who would be responsible for taking revenge — those with the right to forgive. These are, in order of their rights, 1) the victim's father, 2) the victim's brother, and 3) the victim's son, and presumably after that to others in the *khamisa* (five generation vengeance group).<sup>23</sup> Although these tribal members ask for the money, it goes to support the victim's widow and children in the case of death or to the victim in the case of injury to person or honor. Real estate and other property can be used to pay a *fasel*, and some shaykhs in Baghdad insisted that, while the practice is much more limited than in the past, women are sometimes still given in marriage to the victim's tribe as *fasel*.<sup>24</sup>

In the past, money for *fasels* came from the tribe as a whole, which kept a box

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20. Murder as retribution was not relegated to cases in which the original crime was a capital offense, but could involve a situation where honor was seriously damaged. For example, informants related a case in which a man caught his best friend and his wife in bed. The wife was killed, and the man would also have been killed had his tribe not paid an enormous *fasel*.

21. Interview by the author, March 7, 2009.

22. Interview by the author, January 22, 2009.

23. Interview with a historian of the Zobai tribe who is also an expert on tribal law in Iraq, February 21, 2009.

24. Stewart attributes the decline in the use of women as *fasel* to increasing state review of tribal legal processes in the 20th century. Stewart, "Customary Law Among the Bedouin," p. 272.

to which all working males contributed regularly.<sup>25</sup> This is often still the case, and one *fakhd* shaykh from Sadr City even remarked that the tribe as a whole pays the *fasels* not only for its members, but also for its “black slaves.”<sup>26</sup> However, under some circumstances the perpetrator’s family may be required to pay the entire *fasel* themselves. According to Shaykh ‘Abud Al Issawi, the Prime Minister’s tribal advisor on the National Reconciliation and Follow-up Committee: “In case of intentional killing, theft within the tribe, or rape, the person who commits these crimes will be dishonored, expelled from the tribe, and will not be protected or assisted by his tribe with a *fasel*. Even if he is killed as a revenge for his crime, his tribe or family would not ask for a *fasel* from the killer.”<sup>27</sup> A Sunni *fakhd* shaykh from Radwaniyya, a rural area south of Baghdad that has suffered great economic loss as a result of the war, remarked that, increasingly, if the killer’s family had the money to pay the *fasel* they would be expected to do so, with the tribe only contributing where necessary.<sup>28</sup>

With the amount of the payment set and arrangements made for its delivery, rituals of reconciliation begin, including the family of the victim and the perpetrator greeting each other normally and sharing coffee and food to illustrate a return to normal relations. There are two types of *sulha*: partial and comprehensive. Where a broad feud has broken out, a partial *sulha* may simply suspend hostilities under certain conditions, but a comprehensive *sulha* wipes the slate completely clean between two groups. The shaykhs of Baghdad whom I came to know seemed most often to conduct comprehensive *sulha*. As a *fakhd* shaykh remarked, “The acceptance of the *fasel* must make the crime, for the victim’s family, as if it never happened. The slate is wiped clean, and this cannot be mentioned again.”<sup>29</sup>

Strong incentives enforce the outcomes of *sulha*. Those who take revenge after accepting a *fasel* must pay their victim four times the original *fasel*, and the tribe generally will not help with this payment. Failing to uphold the *fasel* is an offense to the shaykh who negotiated it, and he is likely to withdraw support as a result. Once the *fasel* is concluded, a representative of the perpetrator asks those assembled who will guarantee his safety, and a prominent person volunteers or a major shaykh may be “volunteered” in absentia. This guarantor (present or not) must take revenge on the victim’s family if they break the agreement. Finally, as all shaykhs explained, and here I quote a Sunni *fakhd* shaykh and former army officer who is from the Dulaymi tribe: those who disrespect the *fasel* risk becoming social outcasts. “They are invited nowhere, they are not asked to be on councils, they can’t sit with the shaykhs. This is terrible for the person who broke the *fasel* and it keeps them from doing it. The law is respected. Those who mess with tribal law don’t go to court, but they are humiliated and lose respect.”<sup>30</sup> *Fasels*, Iraqis stressed to me, are almost always upheld.

25. In interviews, when asked who contributed the money for *fasels*, Iraqis consistently used the word “tribe” [asheera]. However, research by Stewart (2006) and others finds that *fasels* are in fact paid by smaller, blood money groups, whose composition may follow the lines of a *fakhd* or may be contractual.

26. Interview by the author, October 9, 2008. The term used in this conversation was *‘abeed* and may have referred to someone with the status of a retainer or servant. The intended point is that tribes take responsibility not only for members but also for those who fall under their purview, such as guests.

27. Interview by the author, December 11, 2008.

28. Interview by the author, September 11, 2008.

29. Interview by the author, January 22, 2009.

30. Interview by the author, February 26, 2009.



*TRIBAL DISPUTE RESOLUTION IN IRAQ PRIOR TO 2003*

The Tribal Disputes Act, drawn up by the British in 1916 and then adopted by King Faysal's government in 1924, permitted tribal law to reign in the tribal areas with state law applicable in Baghdad.<sup>31</sup> After taking power in 1958, Prime Minister 'Abdel Karim Qassim attempted to unify the legal system under state law, but did not fully achieve his goal before his death. Iraqis interviewed differed widely in their presentation of the role that tribal law played during Arab Nationalist and Ba'athist rule. Most agreed, however, that while tribal law never disappeared from modern Iraq, at the heyday of state power in the 1970s and 1980s its operation in urban areas was limited. During these decades the state court system functioned throughout the country, and while in Iraq's more tribal areas traditional dispute resolution continued for problems of all types, the process was often parallel to and subservient to state legal proceedings.

One former Iraqi army officer and *fakhd* shaykh offered the following analysis of the historic role of tribal law in Iraq, which is worth quoting at length:

When the British came into Iraq it was a totally tribal system. The tribe could execute any criminal and didn't have to answer to the government at all. Why? Because civil law was weak and even if there was civil law it was only operating in the population centers. Afterward, the state started to build the army and the police and the citizens started to be able to go to the police and get some justice through civil law. People started to believe in the civil system's ability to give them their rights and to accept it. During the rule of the 'Arifs ['Abdul Salam and 'Abdul Rahman] and Saddam Husayn *fasel* was cancelled — gone. The state was strong enough to overcome the system by threatening legal action against anyone who takes revenge on a killer. Then if people are afraid of the law they probably won't try to get revenge. In general it has always been in Iraq that you have to go to the victim's family and ask for a settlement or they would kill you, but when the law was very strong and could protect you from them you didn't have to. But if the law is weak and can't protect you from the victim's tribe you need the *fasel*.<sup>32</sup>

It is certain that in the 1990s, as the Iraqi state weakened under the pressure of economic sanctions, Saddam Husayn kept tribal leaders loyal by, in part, allowing them greater control over dispute resolution.<sup>33</sup> Latitude was not so great where the state felt the need to flex its muscles; Iraqis whose tribes were based in both the Sunni west and Shi'a south explained to me that while the tribes of Anbar were permitted to settle murder cases, those from the south were permitted only to settle civil cases. Yet even in 1990s Baghdad, according to Falah Jabar, a legal duality had re-emerged sufficient to

31. Toby Dodge, *Inventing Iraq: The Failure of Nation Building and a History Denied* (New York: Columbia University Press, 2003), p. 168.

32. Interview by the author, February 26, 2009.

33. On the evolution of the role of tribes in Iraq under Saddam Husayn, see Falah A. Jabar, "Sheikhs and Ideologues: Deconstruction and Reconstruction of Tribes under Patrimonial Totalitarianism in Iraq, 1968–1998," in Falah A. Jabar and Hosham Dawod, eds., *Tribes and Power: Nationalism and Ethnicity in the Middle East* (London: Saqi Books, 2003), pp. 69–109; and Amatzia Baram, "Neo-Tribalism in Iraq: Saddam Hussein's Tribal Policies 1991–96," *International Journal of Middle East Studies*, Vol. 29, No. 1 (February 1997), pp. 1–31.

encourage tribes to demand *fasels* from individuals whose transgressions had occurred while they were acting in an official capacity. The state responded in 1997 by passing a law prohibiting such suits.<sup>34</sup>

Most of the shaykhs I interviewed in Baghdad said that just prior to the 2003 invasion they had been doing a greater number of *fasels* than before. They attributed this to a deal struck between Saddam Husayn and tribal leaders by which large numbers of prisoners held since the first Gulf War were eligible for release provided that they concluded a *fasel*. The uncertainty of the overthrow of the regime put a halt to the *fasel* process temporarily, but in the relatively secure year following the invasion, tribal dispute resolution recommenced as shaykhs stepped in for an absent state. However, their activity was soon brought to a halt by rising levels of violence.

### TRIBAL DISPUTE RESOLUTION AND SECTARIAN VIOLENCE

Beginning with al-Qa'ida's attacks on civilians in 2004, but especially after the February 2006 bombing of the Al-'Askari mosque, widespread, unpredictable, and horrific violence halted the operation of tribal law in Baghdad. Many shaykhs were either killed or fled the country, and those who stayed could not risk traveling to *fasel* meetings or even to nearby neighborhoods to speak with families or investigate crimes. And where no one seemed to have the authority to enforce decisions except a constantly changing cast of militia leaders and American commanders, the *fasel* process had little to offer. Shaykhly authority was at a low point, and families unhappy with the outcome of tribal negotiations could in any case have simply hired a militia to kill the shaykh, or the entire family of the victim or perpetrator. Victims who might otherwise have resorted to tribal dispute resolution sought no redress, attempted to influence American forces to arrest the perpetrator, or else took their problems to whatever violent group was currently empowered in their area. When sectarian militias such as the Mahdi Army and al-Qa'ida took over neighborhoods in Baghdad and towns throughout Iraq, they normally set up "courts" that enforced religious law (often harshly interpreted) to settle disputes. Shaykhs who continued to conduct *fasels* put themselves at risk by being seen to challenge these militias for control of dispute resolution.

Said one powerful *qabila* shaykh of this brutal period,

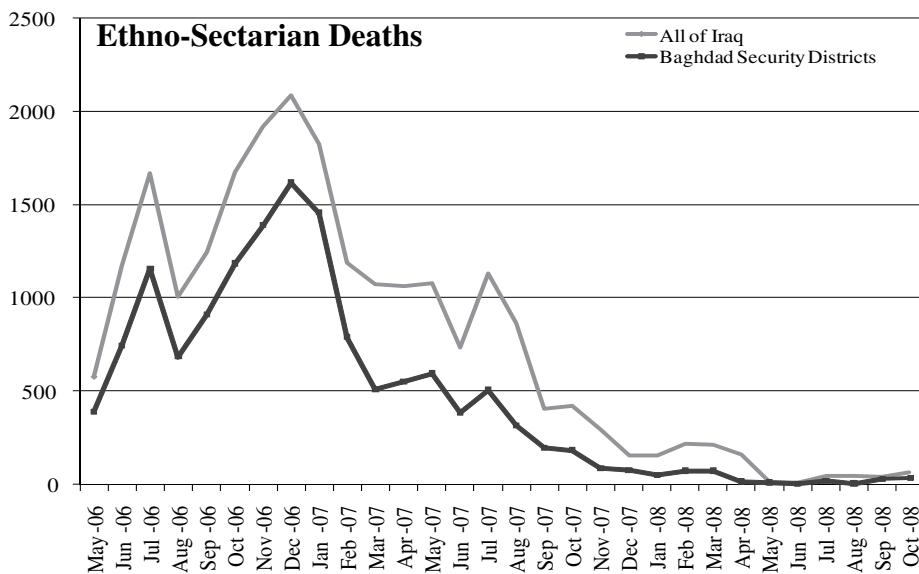
The violence left no space for the tribes to enter and operate. There was no hope of justice because of the chaos. Even if there was a judgment nobody followed the orders. No one could ask for his rights because of the situation. You couldn't come and ask the shaykh for your rights because the shaykh couldn't give them to you.<sup>35</sup>

Most challenging to the functioning of the tribal system, however, was the fact that the killing of these years was, at least initially, anonymous. When loved-ones were shot merely because the names on their identification cards tagged them as being from one sect or another, it was difficult to trace what individual was responsible for the crime.

By the end of 2007, the US troop surge, Muqtada al-Sadr's call for a ceasefire by

34. Jabar, "Sheikhs and Ideologues" (citing newspaper *Asharq Al-Awsat*), pp. 97–99.

35. Interview by the author, March 3, 2009.



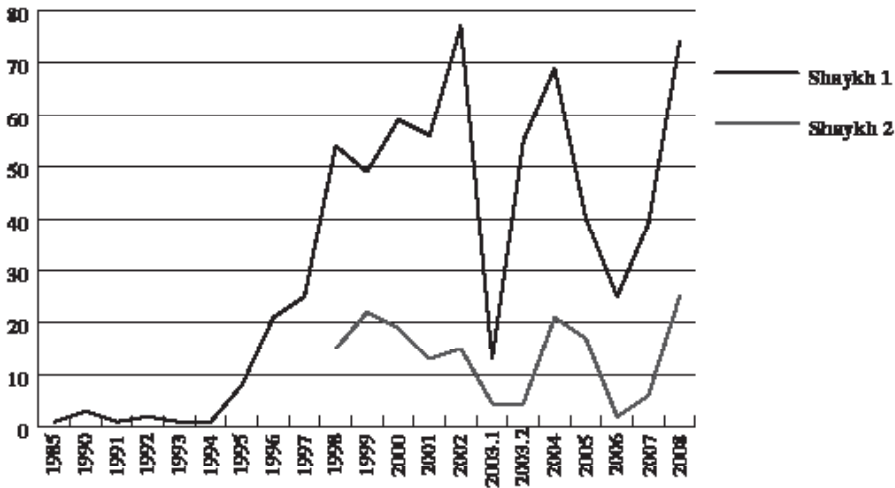
Source: Graph provided to the author by a member of General Raymond Odierno's staff, April 2009. Based on MNF-I J5 Assessments CIOC Trends Database (Coalition and Iraqi Reports) as of October 31, 2008.

the Mahdi Army, and the rise of the Awakening Movement all combined to reduce the level of violence in Baghdad. The city was still dangerous, but Iraqis began cautiously to return to the streets and stores (though for a long time only of their immediate neighborhoods). The above statistics on Iraqi deaths with no apparent motive but identity, which were commonly used in military briefings in 2008–2009, illustrate the changing security climate at this time.

By 2008, Baghdad's shaykhs were unanimous: even minimal increases in security had brought a surge in demand for *fasels*. This is illustrated below in a graphic created from the personal *fasel* records of two Baghdad shaykhs (The shaykhs, though friends, are not from the same neighborhood). Although Shaykh 1 (a Shi'a from Hurriya) did a larger number of *fasels* than Shaykh 2 (a Sunni from Jami'a), the common trend in their activities is striking. In particular, the drop in *fasels* during the violent years and the great increase in their number during 2008 are obvious. This upward trend was ongoing when I left Baghdad in April 2009. As one tribal shaykh remarked when I asked him in spring 2009 about trends in his work over time: "I used to do one or two *fasels* a month but now, since the end of 2007, I do one or even two a day. I am so tired, but I cannot say no, this is my responsibility, and the work is rewarding." Another tribal shaykh, also from Hurriya, an area of Baghdad scarred by vicious sectarian violence, remarked: "In the 1980s we were doing two a year, and then before this war one or two a month. Now in a week we are doing three or four of the hardest kind — those for killing. We are tired."<sup>36</sup>

36. Interview by the author, March 7, 2009.

**Figure 2: Two Baghdad Sheikhs' *Fasels* Per Year: 1985–2008**



Source: Graph constructed by the author based on accounts of the two Baghdad shaykhs described above. Note the following events: 1996- Saddam Husayn passes law reducing sentences for those with successful fasels; 2003- Chaos of the US invasion halts fasels; 2003/2004- Fasels resume in initial more secure years of the occupation. In absence of functioning state institutions, shaykhs continue to have a large role in settling disputes; 2006- Sectarian violence halts fasels; 2008- Security permits fasels to begin again in enormous numbers as Iraqis seek redress for sectarian violence.

Several factors explain the jump in *fasels* of 2008 seen above. First, and most obviously, there were more *fasels* because there were so many disputes requiring settlement stemming from the years of sectarian violence as well as the chaos following the 2003 invasion. Second, Iraqis turned to shaykhs because they had nowhere else to go for justice. Iraq’s legal system fell apart along with other state institutions in 2003, and what the invasion did not destroy, widespread violence and displacement did. Investigative judges were killed or fled. Iraqis were trapped in their own neighborhoods, fearing militias in surrounding areas and unable to reach courts that might be functioning. Between 2003 and 2006 there was effectively no criminal justice system in Anbar, and as of 2008 Anbar province had only two felony courts.<sup>37</sup> These factors also inhibited the operation of tribal processes but, rooted outside the destroyed Iraqi state, these were able to bounce back more quickly. And, as many Iraqis stressed to me, the tribal and state legal systems provide different but equally needed outcomes. The state receives its “rights” through the court system, but only the tribal system can create forgiveness and communal reconciliation.

The increase in *fasels* also reflected a more general growth in tribal identity and the influence of the shaykhs. In 2008, Iraqis were turning to shaykhs not only for dispute resolution but also for security, information, and resources. Your local shaykh — with his political and tribal contacts and (often) ties to the Americans — was useful in

37. Asfura-Heim, “I-MEF Reach Back Support Center for Naval Analyses Primer: Prospects and Pitfalls of Engaging with Non-State Legal Systems in Al Anbar,” p. 5 (Email correspondence with the author).

a way that political leaders sequestered in walled compounds or the International Zone seldom were for average Iraqis.

“Right now the tribe gives people what they need,” said one *fakhd* shaykh,

so tribal identity is strong. The tribes, even in Baghdad, can protect and help people in ways that the state is not ... It wasn't always like this, but now people are thinking about things this way because the state is so weak. Even someone like me, an officer in the IA [Iraqi Army] who graduated from college with a degree in political science, the situation in Iraq today is making me think like a farmer.<sup>38</sup>

The final reason for the increase in *fasels* in 2008 was that the Iraqi government had begun to rhetorically encourage the operation of the *fasel* process to promote reconciliation.

### TRIBAL DISPUTE RESOLUTION AND SECTARIAN RECONCILIATION

When Baghdadis speak of reconciliation they may acknowledge a need to address the injustices and divisions of, especially, the latter years of Saddam Husayn's rule; but moving beyond the extreme violence of 2006–2007 is foremost in their mind. These “bad years” were characterized by, among other horrors, bodies left in the streets, loved ones not returning from simple errands or from work, violent home evictions, and gruesome public killings designed to frighten one group or another away from an area. The violence of this period is understood as having been driven by sectarian fears and animosities and conducted by militias (though history will probably conclude it to have been much more complex). How were the Iraqis to begin to reach out to each other across the abyss of this identity-driven killing — anonymous, widespread, and complex as it all was? In Baghdad in 2008, shaykhs began to use the *fasel* process to work through these crimes and in the process to create reconciliation between Sunnis and Shi'a.

After 2007, according to each of the five Baghdad shaykhs of whom I asked the question directly, there were more *fasels* than ever before between Sunni and Shi'a, most dealing with the events of the “bad years.” “Sectarian killing is tough, but in two years we have done maybe 110 such cases,” said one shaykh.<sup>39</sup> Shaykhs and many non-shaykhs I spoke with during 2008–2009 argued that the shaykhs were the best hope for reconciliation. This was, they said, because tribalism is neither “political” nor “religious” nor sectarian, the motivations held responsible for the frenzy of violence Iraqis had just been through. Iraq's large tribes have both Sunni and Shi'a members. Iraqi tribes had never repudiated the rights of the Shi'a to Iraqi citizenship and had generally been angered by al-Qa'ida in Iraq's terrorist attacks on Shi'a civilians.<sup>40</sup> Also, despite whatever feelings Shi'a may have had about the Awakening or, as they were later called, the Sons of Iraq (and there were more Shi'a Sons of Iraq in Baghdad than is generally acknowledged), they appreciated that tribal leaders had put themselves at

38. Interview by the author, February 26, 2009.

39. Interview by the author, September 11, 2008.

40. Amatzia Baram, “Iraq 2003–2009: The US Between Baghdad, al-Qa'idah, and the Tribal *Sahwa*,” (draft of forthcoming article provided to author in July 2009).

the forefront of the fight against al-Qa'ida.<sup>41</sup> The following quote from a young Sunni shaykh from the Abu Ghraib area is similar to remarks made by Shi'a shaykhs as they attempted to impress on me the importance of shaykhs, tribalism, and tribal practices in the healing of Iraq.<sup>42</sup>

If I want to go from the West to the South the tribes will protect me by the tribal law. It is those outside the tribal system who will kill me. If I got killed visiting a tribe it would be a big problem for them, so they have it in their interest to keep me safe. The tribes have refused these sectarian fighters, and reconciliation in Iraq is something that has to take place between tribes. And the tribe has a good reputation of trying to bring people together through bringing tribal leaders together to fix problems. The tribal leaders talk to both sides and try to know the facts; they see who is guilty and who is innocent; and they talk to both sides about the outcome and make sure there is consensus. This is all done under the rule of tribal law; it's not capricious.<sup>43</sup>

Throughout Baghdad in 2008, shaykhs pushed for acknowledgement of their role in establishing security and reconciliation, often through the use of the *fasel*. In Dora, the former al-Qa'ida stronghold in southern Baghdad, area shaykhs met on April 2, 2008 and composed an "Honor Agreement" that was delivered to the local Iraqi authorities, the US military, and the Iraqi Security Forces (ISF). The "rules and foundations" it called for included, as a first point:

1 - That all tribes are represented by their general shaykhs, their names registered below, united in solidarity one with another for better or for worse, and their joint responsibility in spreading security and bringing about peace and security to the quarters of their area.<sup>44</sup>

Immediately after, on June 29, 2008 in Abu T'Shir, a poor and predominantly Shi'a southern neighborhood of Baghdad, 30 local shaykhs gathered in the aftermath of the murder of a popular local official by the Mahdi Army to assert their right to hold militia members responsible for their crimes in accordance with tribal law. Those involved in the killing could be killed or their property seized, if they did not submit to the *fasel* process.<sup>45</sup> In Baya'a, a formerly-mixed neighborhood just south of the International Zone where sectarian violence had been dreadful, a Reconciliation Agreement was signed in 2008 with, as its 8<sup>th</sup> point: "When a homicide has been committed, a tribal meeting will be held for the purpose of settling the claim in addition to any judgment passed by the Iraqi Civil Court system." Other reconciliation

41. Statistics on composition of Sons of Iraq groups were maintained by both the Strike! and Dagger Brigades. This information was provided to the author between 2008–2009.

42. There does not appear to be any sort of statute of limitations on *fasel* payments. Informants mentioned the cases of perpetrators who had been held in jail for decades still requiring *fasels* upon their release.

43. Interview by the author, March 6, 2009.

44. Shaykh's document provided to me by the staff of the "Raider Brigade," the 1<sup>st</sup> Brigade Combat Team of the 4<sup>th</sup> Infantry Division, Forward Operating Base Falcon, Baghdad, Iraq, April 2008.

45. Much of this information comes from interviews conducted by "Mahmoud," an Egyptian-American and fellow member of the Human Terrain Team at Forward Operating Base Falcon.

agreements throughout Baghdad also referred to tribal dispute resolution as a way to deal with violence.<sup>46</sup>

### ADJUSTING TRIBAL LAW TO DEAL WITH SECTARIAN VIOLENCE

The violence of the “bad years” of 2006–2007 was qualitatively and quantitatively different from anything that the tribal dispute resolution process had dealt with in Iraqi memory. The sheer number of incidents requiring resolution was overwhelming, and the facts in many cases were unclear. Also, the environment of lingering anxiety, insecurity, and distrust represented a serious challenge to the functioning of the process. Tribal law works best in cases in which the facts are known to most or immediately confessed to, in which social authority is well-established, and in which maximum community attention is available to be brought to bear to solve issues. None of this was the case in 2008–2009, yet Baghdad’s shaykhs tackled sectarian violence through the use of tribal law.

Baghdad’s shaykhs made efforts to adjust the processes of tribal dispute resolution to accommodate the challenges to reconciliation that the wave of sectarian killing had created. One way they did this was by working more often than was usual in formalized groups. Rather than being done by individual shaykhs or *ad hoc* small groups as in the past, *sulha* was conducted by shaykhs organized into a plethora of “councils.” Sometimes these groups emerged from or within tribal or local committees that were forming for other reasons (to interact with the US military or the Iraqi state, for example), and sometimes they were formed specifically to conduct *fasels*. In Sadr City, where individual shaykhs had normally conducted *fasels* on their own in the home of the victim’s family, *fasels* began to be done by the Shaykhs’ Council and in the Shaykhs’ Council building.<sup>47</sup> Another committee of eight shaykhs, four Sunnis and four Shi’a, was created by a respected tribal leader in 2007 with the specific purpose of settling difficult, sectarian issues.<sup>48</sup> Throughout 2008 such small, mixed-sect committees became increasingly common in Baghdad. In an environment of sectarian distrust and weak authority, the benefits of this adjustment to the *fasel* process are obvious. It was easier for a larger, mixed group of shaykhs to be seen as justly dealing with sectarian violence, and it was also easier for them to amass the authority needed to impose a solution on the two dis-

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46. Reconciliation documents were normally signed by local shaykhs and officials, members of the ISF, and American commanders. They set forth pledges of ceasefires and respect for law, as well as the roles and responsibilities of all parties in the area in maintaining security and furthering reconciliation. They often hung on the walls of meeting rooms in American military outposts in Baghdad’s neighborhoods. I copied them there or copies were provided to me by members of Shaykhs’ Councils.

47. Interview by the author, October 9, 2008. Shaykhs’ Councils (there were many of these in Baghdad by 2008) were formed to interact with the Iraqi government on behalf of a certain area, to deal with disputes, interact and negotiate with the American forces, and help with security, among other functions. Some of these were official Tribal Support Councils sanctioned by the government of Iraq and given some limited funding, while others were *ad hoc* (but these always planned or hoped to get formal recognition from the government). The council in Sadr City is longstanding in some form or another.

48. Interview by the author, August 24, 2008.

puting parties. Moreover, shaykhs felt safer traveling and working in numbers.<sup>49</sup>

As *fasels* began to increase with improved security, shaykhs initially dealt with the easiest cases — those between two known, individual parties. However, many of the problems of the “bad years” were between whole tribal sections or villages. The sheer monumentality of the task facing the shaykhs, as well as the fact that many complex fights had broken out between large groups, eventually led them to seek blanket settlements. The *fasel* process has traditionally dealt with multi-party disputes involving a mix of types of transgressions, but never in such an environment of rancor and uncertainty. These *fasels* were much more difficult, as numerous crimes had to be investigated, compensation set, and then complex cumulative settlements between groups agreed upon.

Sometimes shaykhs doing *fasels* were able to cut through the complexities of these cases and encourage a simple solution in the interest of moving forward, as one Sunni shaykh from southwest Baghdad illustrated with the following example (I have withheld the names of people and places from this quote for their security):

In 2006 there was a case in [location omitted] between a Shi‘a tribe and a Sunni tribe. People from the Sunni tribe were involved in al-Qa‘ida and those from the Shi‘a tribe were involved in the Mahdi Army. The sectarian fighting caused a total of 67 men to be killed, over 100 men injured, and many families displaced, houses burnt down, and farms and other properties destroyed. It was a huge mess. These two tribes requested the help of tribal judges to settle their *fasel*. Three judges attended the *fasel*, and after hearing the facts and sitting there for some days, the judges decided that both tribes should reconcile by forgiving and forgetting each other’s charges, due to the case’s complexities and severity. All agreed, and the *fasel* changed into a feast where all involved celebrated the decision and conciliated their differences.<sup>50</sup>

In this case, and perhaps in others like it, the scale and complexity of the dispute probably encouraged a settlement. Where the entire community on both sides of a dispute is clearly suffering, it may be easier for a group to feel that they have not been specifically dishonored by violence against them, thus making a settlement without compensation easier to swallow.

The greatest challenge to tribal dispute resolution presented by Iraq’s wave of sectarian violence was the absence of clear facts, or often even of bodies, a situation incredibly upsetting for families and one that would normally cut off any possibility of tribal settlement. As security began to improve, information did emerge about the facts of cases that were previously unsolved. A *qabila* shaykh from the north of Iraq said,

We still don’t know who did 90% of these killings, but after the security got better the tribes had a space to operate in and they started to solve the problem. People would get information about the killing of their family members and then come to the shaykhs asking for justice. Nobody knew who killed whom before, but now people are looking for their rights. And so now the tribes are working in reconciliation.<sup>51</sup>

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49. In the summer of 2009, a wave of attacks against shaykhs who seemed to have nothing in common other than the fact that they were activist tribal leaders took place in Baghdad, and some shaykhs in the city who had not normally done so began to wear Western clothing.

50. Interview by the author, December 11, 2008.

51. Interview by the author, February 4, 2009.



Baghdad's shaykhs spent hours on the phone and in visits puzzling through incoming information, but sometimes the absence of facts posed an insurmountable obstacle to the *sulha* process (again I have removed names from this story, told by a Sunni shaykh from southern Baghdad who was very active in conducting *fasels* and who also served on tribal Judicial Councils):

We recently worked on a case between [a predominantly Shi'a tribe] and [a predominantly Sunni tribe] in [location omitted]. During a month of terrorism the Sunni tribe had lost 35 and the Shi'a tribe had lost seven. Our committee came to settle the whole thing, but there was just not enough information to say who was lying and who wasn't. It took us six weeks to do the research, and then in the end we could not give a decision. The incidents had to be put down to unknown terrorism.<sup>52</sup>

Some of Baghdad's shaykhs sought ways to make the *fasel* process adjust to these new limitations on information. The shaykh of a predominantly Sunni tribe on Baghdad's western outskirts proposed to the shaykh of a predominantly Shi'a tribe from his area — with which his tribe had fought extensively — that they solve all the outstanding problems between the two groups in a collective settlement, bringing all other tribes from a larger geographic area who were involved in the violence into the process as well. In a letter to both the US military and to his fellow shaykh, the Sunni shaykh insisted that the *fasel* process was “the key for a new start of goodness and kindness and to restore good and neighborly relations” between these two tribes. The process, if it were to work without bodies or confessions, would require bolstering from both the Americans and the Iraqi government, as his letter, quoted here, illustrates:

- Both sides have claims for many corpses that cannot be located.
- *Fasels* should be comprehensive so as to leave no issues unsettled between tribes and thereby restore peace.
- Detainees held by the US military and the Iraqi government should be released as a way of supporting the *fasel*.
- Internally Displaced People (IDPs) should be repatriated to the area.
- The Iraqi government should provide some compensation for bombed or demolished houses.
- All tribes in the geographic area should be involved in one large *fasel* settlement for the area.<sup>53</sup>

When I left Baghdad, the Shi'a shaykh was continuing to reject the idea of a collective settlement without bodies or confessions by the guilty. Without these, he did not believe that the *fasel* process could be successful (although as a Shi'a he may have also believed that his tribe would be more likely to receive justice through actions by the state courts or the Iraqi Security Forces). The Sunni shaykh's position was that the *fasel* process was at least worth a try because, as he said, “we will never find these bodies or know who killed some of these people, yet we have to try to move on anyway.”<sup>54</sup> This was a view common of many of Baghdad's shaykhs in late 2008 and early 2009: the

52. Interview by the author, September 11, 2008.

53. A copy of this letter was provided to me by the Sunni shaykh, March 4, 2009.

54. Interview by the author, March 4, 2009.

*fasel* process had to be *made to work*, because reconciliation was essential and there was no other tool available through which to pursue it.

As the above request for special government compensation for destroyed houses illustrates, some shaykhs felt that government support for *fasels* would help overcome the obstacles to the process posed by the nature of Iraq's sectarian violence (a rumor circulated in Baghdad in summer 2008 that the state was going to pay the *fasels* of those killed by unknown perpetrators). The majority of the shaykhs with whom I spoke felt that the inclusion of state resources would completely undermine the fundamental operation of the *sulha* process. "If the state pays the *fasel* then the victim is essentially paying twice, and how does that restore their honor?" asked one shaykh.<sup>55</sup>

Not all of the interactions of the *fasel* system with the problems in Iraq were, of course, positive. Extortionary demands were sometimes presented in the guise of a *fasel*, which weaker parties simply paid to avoid problems. In other cases, families desperate for some sort of redress after the death of a loved-one demanded *fasels* from those only tangentially involved in crimes or accidents. In 2008, security had improved in Baghdad in the sense that there were many fewer apparently random killings, but an undercurrent of lawlessness and threat made most Iraqis dread any sort of social friction, which might give someone a reason to attack them. This left average Iraqis vulnerable to manipulations of the tribal legal system. However, while problems existed, overall it seemed that Iraq's shaykhs tackled sectarian reconciliation through the use of the *fasel* with energy and creativity — forming new organizations, working to impose blanket settlements on large groups, and exploring options for applying the *fasel* in the absence of critical information.

### *THE IRAQI GOVERNMENT AND TRIBAL DISPUTE RESOLUTION*

Officially, the role of tribal law in the new Iraqi legal system is extremely limited. According to the Iraqi civil code, custom and tradition are the fifth-degree source of legislation, but in the criminal law there is no other source of reference but the code itself. Anything not mentioned in the state law is not applicable in dispute settlement, including religious and tribal law. In short, there is no state-sanctioned right to avenge damage to honor.<sup>56</sup>

Yet most Iraqi officials I interviewed, including state judges, spoke favorably about *fasels* as a means of achieving justice and peace. The Maliki government was also rhetorically supportive of tribal dispute resolution as a means of furthering reconciliation. "Maliki is from a tribe," said one political insider when asked whether or not the government viewed the process as threatening, "and he understands this system."<sup>57</sup> The National Reconciliation and Follow-Up Committee, the prime ministerial body responsible for encouraging reconciliation, has also pushed the use of the *fasel* process. This body was responsible for, among other things, authorizing and funding the Tribal Support Councils that began to pop up across Baghdad in 2007–2008. These groups of 20 local leaders (shaykhs and other notables) were initially meant to participate with

55. Interview by the author, January 22, 2009.

56. E-mail exchange with Zuhair Al-Maliki, former Iraqi Criminal Court Judge and legal advisor to the Baghdad Provincial Reconstruction Team's Rule of Law section (June 2008).

57. Interview by the author, December 11, 2008.

American forces and the ISF in security, but their mandate grew to, among other things, promoting reconciliation through *fasels*. ISF commanders and local officials also frequently asked shaykhs to work hard at concluding *fasels*, which they saw as a critical step in creating lasting security.<sup>58</sup> Despite these gestures of support, the only consistent overlap between the tribal and state legal systems that emerged from interviews with shaykhs, state judges, and policemen was that state judges would reduce the sentences of those with successful *fasels* by half or completely.<sup>59</sup>

The consolidation of those Middle Eastern states formed where tribes were active has always required the destruction of tribal independence, a move often accompanied by token gestures of respect for tribal leaders and by the co-optation of tribal concepts by the state. The shaykhs I interviewed expressed an understanding of this dynamic and yet also insisted that they saw no conflict between tribal and state legal systems. For them, the two systems were distinct and should easily coexist, each working in their own way to prevent death and mayhem. In fact, Baghdad's shaykhs all expressed longing for a just, functioning state legal system and resentment that they had to take on so many roles that should have been handled by the state.

## CONCLUSION

In circles outside the US military, it is unfashionable to be fond of tribal leaders and focused on their accomplishments. In his analysis of Britain's 1916 Tribal Disputes Act, which permitted tribal law to operate in the Iraqi countryside, Toby Dodge writes that the Act "encapsulated the dominance of the romance of supposedly pre-modern collectivism through which many colonial officials saw Iraq."<sup>60</sup> This article is not meant to comment on the modernity of Iraqi society, to suggest that tribes are in some way inherently beneficial forms of social organization in the modern world, or to encourage a future role for tribal law in Iraq. My goal here has simply been to illustrate that under the (I hope unique) conditions of Iraq in 2008–2009 (the need to deal with massive sectarian violence in the absence of an active state legal system), the *fasel* process allowed Baghdad's shaykhs to translate security into some form of reconciliation.

The *fasel* process was well-suited to the task of reconciliation in Baghdad for several reasons. First, tribal law furthers *communal* reconciliation, which was and is sorely needed. Iraqis feel that individuals who conducted sectarian killings are responsible for their actions, but Iraqi culture holds families and larger communities responsible for the good or bad behavior of their members. Reconciliation must account for this, as the *fasel* process does. Second, as of 2009, courts in Iraq remained difficult to access,

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58. For example, at an IDP resettlement meeting held by the Iraqi Army and attended by the US military and local shaykhs on October 26, 2008 at Muthanna Airbase, the Iraqi commander for the area pushed shaykhs to complete more *fasels*.

59. This conforms to the requirements of the Ottoman Penal Code of 1840 with respect to those who had paid a *diya* in *shari'a* court. M.J.L. Hardy, *Blood Feuds and the Payment of Blood Money in the Middle East* (Beirut: Catholic Press, 1963), p. 50. For information on Israeli state courts' lowering of sentences for those who have paid blood money, see Nurit Tsafir, "Arab Customary Law in Israel: *Sulha* Agreements and Israeli Courts," *Islamic Law & Society*, Vol. 13, No. 1 (February 2006), pp. 76–98.

60. Toby Dodge, *Inventing Iraq*, p. 92.

clogged, and corrupt, and it is unlikely that they will ever provide either information about or justice for the crimes of the “bad years.” Thus the system of tribal law may offer, for some, the only hope of closure on the terrible events of the past. Finally and most importantly, the *fasel* process is designed to allow individuals to move forward after crime with the support of the community, and this is exactly what reconciliation requires. For many Iraqis, the *fasel* process makes reconciliation culturally acceptable, and participation in the process is also a way that many Iraqis can again find a much-needed common ground in their own heritage.

Of course, the *fasel* process alone cannot fully reconcile Iraqis. This will also require difficult political decisions about resources, institutions, and the nation’s character that Iraq’s current political leaders seem painfully slow, even unwilling, to make. And sadly, true reconciliation in the next few generations may be impossible for, as one young Iraqi Sunni remarked: “You saw someone kill your whole family and you know where they live ... how can you forget either of those things?” Yet in their conversations with me, while many Baghdadis were skeptical about real reconciliation, most also agreed that the *fasel* process was a key first step in any attempt to re-knit the nation. And all insisted that the *fasel* process operates on the level of society where the larger political decisions needed to move forward would be slow to achieve their effect even if they were made.

In Baghdad in 2008 and 2009, Iraqis from all walks of life acknowledged that shaykhs were better positioned than most to promote reconciliation. As an example, the following quote is from a sophisticated, urban Shi’a with a doctorate in political science from an Iranian university. One would not expect him to be supportive of tribalism in any form, yet he is currently working with various shaykhs’ committees in Baghdad. When asked why, his response was illustrative of the way many Baghdadis seem to feel about the tribes today:

My thinking differs absolutely from those of these shaykhs — their worldview is far from my own. I am Shi’a and many of them are Sunni, and I am not tribal and they are. And they are traditional. But for me right now this work is important. To accomplish something in Iraq right now you need to reconnect with the population. You have to be with them and rebuild Iraq through the society. The Shaykhs’ Councils are popular. Women’s organizations are popular. The shaykhs also share some thinking with me and they have a unique ability to work to achieve the goals I believe in. We need democracy, and they are in favor of that. We need to accept each other across sectarian lines and the shaykhs are the first ones to do that too. They know each other and they know the law and respect the traditional laws that helped this country get along together. They can do the job.<sup>61</sup>

Developing an effective state legal system in Iraq is essential, but it is a task that will take many decades to accomplish. In the meantime, reconciliation and some form of justice must be ongoing. At this point in Iraqi history, the *fasel* process is contributing to both.

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61. Interview by the author, January 26, 2009.