



This document has been provided by the International Center for Not-for-Profit Law (ICNL).

ICNL is the leading source for information on the legal environment for civil society and public participation. Since 1992, ICNL has served as a resource to civil society leaders, government officials, and the donor community in over 90 countries.

Visit ICNL's **Online Library** at
<http://www.icnl.org/knowledge/library/index.php>
for further resources and research from countries all over the world.

Disclaimers

Content. The information provided herein is for general informational and educational purposes only. It is not intended and should not be construed to constitute legal advice. The information contained herein may not be applicable in all situations and may not, after the date of its presentation, even reflect the most current authority. Nothing contained herein should be relied or acted upon without the benefit of legal advice based upon the particular facts and circumstances presented, and nothing herein should be construed otherwise.

Translations. Translations by ICNL of any materials into other languages are intended solely as a convenience. Translation accuracy is not guaranteed nor implied. If any questions arise related to the accuracy of a translation, please refer to the original language official version of the document. Any discrepancies or differences created in the translation are not binding and have no legal effect for compliance or enforcement purposes.

Warranty and Limitation of Liability. Although ICNL uses reasonable efforts to include accurate and up-to-date information herein, ICNL makes no warranties or representations of any kind as to its accuracy, currency or completeness. You agree that access to and use of this document and the content thereof is at your own risk. ICNL disclaims all warranties of any kind, express or implied. Neither ICNL nor any party involved in creating, producing or delivering this document shall be liable for any damages whatsoever arising out of access to, use of or inability to use this document, or any errors or omissions in the content thereof.

The Future of Civil Society in Iraq: A Comparison of Draft Civil Society Laws Submitted to the Iraqi Council of Representatives

Hoshyar Salam Malo¹

I. Introduction

In this article, I make a comparative analytical study of two draft civil society laws that have been submitted to the Iraqi Council of Representatives.² The first draft was proposed by the Ministry of State for Civil Society Affairs and for this reason, it represents the view of the current Iraqi government of what the future of the Iraqi civil society should look like. The second is a draft proposed by Iraqi civil society organizations ("CSOs") with the support of the Iraq Civil Society Program (ICSP) administered by America's Development Foundation (ADF). The second draft law therefore represents the future of Iraqi civil society as envisioned by Iraqi CSOs themselves. As I will show, the civil society draft law is a superior law; it is not perfect, but it does give more space and freedom to civil society. The ministry draft has received the most attention in Iraq – although it has not been enacted by the Parliament – because it shows the way the current government (i.e., the executive branch) thinks about civil society in Iraq.

In the beginning of this article, I will briefly discuss the international charters regarding the right to freedom of association and assembly as one of the original human rights as well as the different ways this right is regulated around the world. This discussion will be followed by a review of the current legal environment for civil society in Iraq and a description of the need for a new law. Next, I will provide a general overview of the two draft law civil society laws that are the focus of this article: the draft proposed by the Ministry of Civil Society Affairs and the draft submitted by Iraqi CSOs themselves.

I will then come to the core part of this article: a comparison and analysis of the two draft laws. In reality, this is a comparison between two very different views of civil society: the view of the government and that of the CSOs. My comparison will focus on the most controversial issues debated in Iraq today: registration, the independence of CSOs, financing, penalties, and foreign CSOs operating in Iraq. I will conclude with a set of recommendations to guide the adoption of a new and more appropriate law for civil society in Iraq.

II. International Conventions on the Rights of Assembly and Association

It is generally recognized around the world today that the right of assembly and association is one of the fundamental human rights. These rights are protected by international charters such as the United Nations' 1948 *Universal Declaration of Human Rights* (UDHR),³ which states in Article 20 that:

1. *Everyone has the right to freedom of peaceful assembly and association.*
2. *No one may be compelled to belong to an association.*

This principle has been adopted by subsequent, legally binding international conventions, such as the 1966 *International Covenant on Civil and Political Rights* (ICCPR),⁴ which states in Article 21:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22 of ICCPR continues:

1. *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
2. *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

Many other international conventions adopt these principles using similar language, including the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Article 11), the *American Convention on Human Rights* (Articles 15 and 16), the *American Declaration on the Rights and Duties of Man* (Articles 11 and 12), the *Arab Charter on Human Rights* (Article 24) (not yet in effect⁵), and the *African (Banjul) Charter on Human and Peoples' Rights* (Articles 10 and 11).

All of these conventions and charters, particularly the ICCPR, emphasize that restrictions on the practice of the right of association may only be placed "in limited conditions which are necessary in a democratic society, in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others." It must be stressed that restrictions on the practice of the right of association must be prescribed by law. In addition, many of these treaties impose an affirmative obligation on nations to protect the right of freedom of association. As such, it is necessary for each country to have a civil society law which provides clear mechanisms for the exercise of these rights.

Laws and regulations that address the rights of association and assembly differ from one country to another depending on the political and economic system in the country and the level of the state's control of CSOs, but we can divide the countries of the world into three broad categories according to their regulations:

1. **Countries that adopt voluntary "notification" systems for CSOs.** These countries permit the existence of informal civil society groups; individuals generally do not need to form legal entities to practice their right of freedom of association. If an organization decides to obtain legal personality, then it simply announces its existence to the government authority by taking certain steps to notify the government. This system is used in France, Lebanon, the Netherlands, and a handful of other countries.
2. **Countries that adopt voluntary "registration" systems for CSOs.** These countries also permit the existence of informal civil society groups; however, if a CSO decides to obtain legal personality, then it must apply for registration and await the approval of a government authority. It is important to note that these types of systems can be either enabling or restrictive depending on the requirements involved, but in the United States of America and most other Western countries they are enabling.
3. **Countries that adopt mandatory registration systems for CSOs.** These countries generally prohibit informal, unregistered groups and require that certain (often very difficult) conditions be met before formal establishment of a new CSO is granted. This system is especially prevalent in the Middle East and Asia, and is used in Iraq today.

It is worth mentioning that in many countries, especially in the Middle East, neither the governments nor the people believe that the rights of association and assembly are among the fundamental rights — despite their agreement and ratification of one or more of the treaties mentioned above. Even where the government allows individuals to establish associations, this is seen more like a gift or a bonus from the government to the people than a recognition of the human rights protected by international conventions such as those mentioned above. This false understanding of human rights in the Middle East is due to many factors — mainly cultural, religious, and historical — that prop up the idea that the government grants rights and freedoms to the people.

III. Current Civil Society Regulations in Iraq and the Need for New Legislation

In Iraq today there are three regulations for civil society, applicable depending upon the location in which the CSO is registered:

1. **Coalition Provisional Authority (CPA) Order Number 45.** Issued by the CPA in 2003 on authority of UN Security Council Decisions 1483 and 1511, this law — also known as “Bremer’s order”— is applicable in the center and south regions of Iraq. More specifically, it applies in all Iraqi governorates, except Irbil, Duhok, and Sulaimaniya (the Kurdistan region) — as is the case with most Iraqi laws and regulations that are not included in the exclusive powers of the federal authorities.⁶
2. **Kurdish National Assembly (KNA) Law Number 15.** Issued by the KNA on October 24, 2001, this law is applicable in the entire Kurdistan region with exception of Sulaimaniya governorate. It is often referred to as the “Kurdistani NGOs law.”
3. **Kurdistan Regional Government (KRG) – Sulaimaniya Governorate Decision Number 297.** KRG Decision Number 297, issued on December 25, 1999, is applicable solely in the Sulaimaniya governorate. This decision, often referred to as “the System of Civil Society Organizations Act in the Kurdistan Region,” was issued when two separate government administrations existed in the Kurdish region (the Patriotic Union of Kurdistan, or PUK; and the Kurdistan Democratic Party, or KDP). Today, both administrations have been unified and there is only one KRG, but this decision is still in force and is applicable in the Sulaimaniya governorate as of this writing.

Despite the different organization and terminology used by the regulations mentioned above, all three are very similar in substance because all of them endorse strong governmental control of civil society. Several provisions of these laws are disliked by Iraqi CSOs, including the mandatory registration / licensing rules, the fact that the registering agency is controlled by the government, the rules in place for foreign CSOs in Iraq, the detailed intervention of these regulations in internal CSO management issues, provisions legalizing governmental monitoring of the finances and accounts of CSOs, and other deficiencies. Beyond simple dislike, these regulations prevent civil society from fulfilling its potential role in the reconstruction and rehabilitation of Iraq.

In fact, all of the laws and regulations mentioned above need to be liberalized in order to take into consideration the protection of human rights. These regulations should be redesigned in a way that minimizes the intervention of the government in CSO internal affairs and that guarantees the independence of civil society both ideologically and practically. The civil society sector will not reach its full potential if it continues to be subject to the type of interference and government control that characterizes the situation in Iraq right now. If a civil society is truly independent, it will be able to criticize the negative aspects of the government and help to reform the government and to provide services to the people; but if it is dependent on the government, then of course it will be reluctant to criticize the government policies and actions.

Furthermore, it is very clear that the laws and regulations mentioned above contain vague provisions regarding the large number of foreign and international CSOs operating in Iraq. Instead of facilitating the work of these important organizations, Iraqi regulations create obstacles to their effectiveness. Any new legislation needs to be clearer regarding foreign and international CSOs in Iraq because of the community’s need for their assistance and especially because local Iraqi CSOs critically need their financial and technical support.

According to Article 45 of Iraqi Constitution, “the state is keen to strengthen the role of civil society groups and to support, develop them and preserve their independence in accordance with peaceful means to realize legitimate goals.” But current regulations accomplish just the opposite. For all the reasons mentioned above, a real need exists for the adoption of a new law for civil society that addresses these problems.

IV. General Overview of the Government and Civil Society Draft Laws

A. The Draft Law Submitted by the Ministry of State for Civil Society Affairs

This draft law was written by the Ministry of State for Civil Society Affairs in 2006. It is also known as the “draft of al-Asadi” because it was drafted while Mr. Adel Al-Asadi was the Minister of State for Civil Society Affairs in Nouri Al-Maliki’s cabinet.

Section V of this article argues that the Ministry’s draft law (hereafter the “MCS draft”) demonstrates that the government does not accept the independence and freedom of associations in Iraq. Section V will further identify the deficiencies in this draft law, including the excessive control over civil society through their bylaws, finances, administration, etc.

After much pressure from Iraqi CSO and extensive lobbying, advocacy, media pressure, and proposal of alternatives, the MCS draft was withdrawn from the Legal Committee of the Iraqi Council of Representatives at the end of 2006. CSOs then began the process of drafting their own law with the assistance of the United Nations, international and foreign CSOs, and the Ministry of State for Civil Society. However, even though the Ministry draft has been withdrawn, it is worth studying because of the clear picture it gives of the Iraqi government’s thinking on civil society issues.

B. The Draft Law Submitted by Iraqi CSOs

The draft law submitted by Iraqi CSOs is the preferred draft of most representatives of the Iraqi civil society because it is from CSOs and for CSOs. It is important to mention that the drafting of this law (hereafter referred to as the “CSO draft”) took a long time — about two years of hard work by hundreds of CSOs from all regions of Iraq. The work was supported by ADF, many local and international legal experts, and civil society representatives. The CSO draft law tried to address all the deficiencies of the draft law of the Ministry with respect to the government’s control over CSOs, protection of CSO independence, and space for freedom of association. It is not a perfect law, but I believe that it is the best one among the many civil society law drafts that have been submitted to the Council of Representatives.

As an additional note, several other draft civil society laws have been submitted to the council of representatives in the last few years by groups, including Iraqi Al-Amal Association, the Iraqi Civil Society Congress, the National Board of Iraqi Civil Society Organizations, and the Civil Society Committee in the Council of Representatives. However, these drafts are not considered in this article because they are similar to each other or to one of the drafts that are the subject of this study, and in many cases are regional rather than national draft legislation. As such, I have chosen the MCS draft and the CSO draft because they are representative of the two distinct views toward civil society in Iraq.

V. Analytical Comparison Between the Ministry and Civil Society Draft Laws

In this section of my article, I will focus on the differences between the two most important draft civil society laws that were submitted to the Iraqi Council of Representatives – the MCS draft and the draft proposed by Iraqi CSOs with the support of the ADF ICSP program. It must be said that there is a big gap between the two different views of civil society represented by these drafts: one calls for more government control and isolation of civil society in Iraq from the world, while the other calls for more freedom of association and more openness in Iraq. Needless to say, most civil society groups in Iraq do not accept the MCS draft; but on the other hand, the government and especially the radical and conservative parties in Iraq do not accept the CSO draft.

This comparison and analysis will focus on the most important differences between the two drafts:

1. Registration of CSOs;

2. Authority of registration;
3. Protection of CSO independence;
4. CSO finances;
5. Penalties against CSOs; and
6. Foreign CSOs operating in Iraq.

Generally, I will follow a convention of presenting, for each major point, the approach of the MCS draft, the approach of the CSO draft, and then finally my recommendations for what a final CSO law in Iraq should look like.

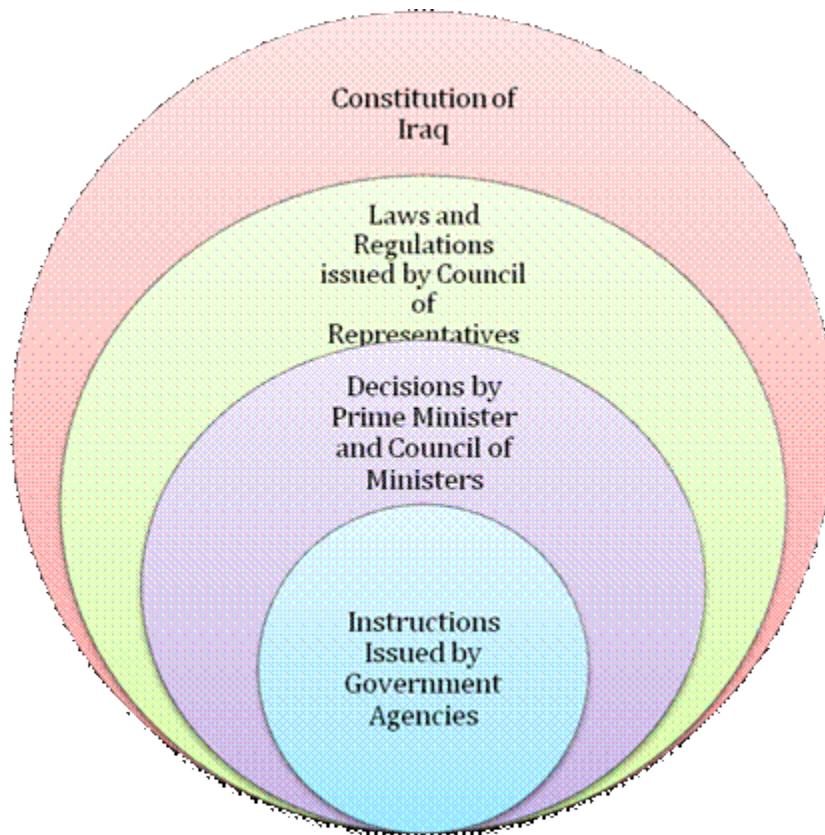
First, however, I will discuss briefly some of the constitutional basis and objectives of both laws.

A. Constitutional Basis of the Law

It is a common legal principle that any law to be legislated should be based on constitutional authority. In this way, laws derive their legality and legitimacy from the constitution, which is the supreme law of the land. In this case, both the MCS and CSO drafts lack an appropriate constitutional basis.

The preamble of the MCS draft states:

In pursuance of the provisions of paragraphs (a) and (b) of Article 30 of the Iraqi State Administration Law for the Interim Period, the following Law is issued ...



This, of course, is an incorrect basis for the law. Any law to be applied in Iraq today should be based on the Constitution, not on the Administration Law for the Interim Period (which has expired). Of course, there is a transition period, in which laws drafted under the Administration Law must be updated to reflect the new source of constitutional authority; but that period has now passed and it is now improper to depend on interim laws as the basis for the legitimacy of permanent laws.

The CSO draft, for its part, completely fails to mention its constitutional basis.

In light of the fact that Iraq now has a permanent Constitution, any law to be enacted by the Council of Representatives should be based on one or more articles of the Constitution; in turn, any decisions taken by the Council of Ministers should be based on a valid law, any administrative orders by the separate ministries should be based on a valid decision of the Council of Ministers, and finally any instructions by government agencies and branches should be based on a valid decision (see illustration).

As such, a better approach for any draft CSO law would be to cite the constitutional authority provided by Article 45(1) of the permanent Iraqi Constitution:

The state is keen to strengthen the role of civil society groups and to support, develop them and preserve their independence in accordance with peaceful means to realize legitimate goals. This shall be regulated by law ...

as well as that provided by Article 39(1):

The freedom to form and join associations and political parties shall be guaranteed, and this shall be regulated by law ...

B. Objectives of the Law

Both the MCS and CSO drafts are vague and unclear in terms of their objectives. In the MCS draft, Article 1 states that the law “aims to establish non-governmental organizations that guarantee the freedom of individuals to gather and carry out ... activities,” but this goal is “subject” to Article 3, which says that CSOs may not “conflict with the independence of the state, its national unity and republican system ... [or] contravene public order and morals.” These types of provisions simply do not belong in the “objectives” of the law, because they open the door for abuse by government authorities — not just in a newly established democracy like Iraq, but in any country. Because other provisions of the law are interpreted in light of the objectives of the law, it is very important that these objectives be narrowly defined.

For example, what exactly is “public order and morals”? Although the ICCPR and other international conventions allow restriction where activities would contravene public health, safety or morals, these restrictions must be narrowly construed, not completely open to interpretation as they are in this law. How are these terms defined, and by whom? In one of the workshops on CSO law reform held in Baghdad in which I participated, one participant pointed out that the government may use these terms in a different way than a civil society would. He said that if a CSO representative tears the picture of the Iraq’s President, the government might consider it a contravention of public order and morals.

The CSO draft similarly fails to state clear objectives. The draft does provide a certain degree of specificity and support, especially in the first part of Article 2 which states that the law should “register, encourage, develop, support, and regulate Iraqi civil society organizations and foreign organizations operating in Iraq.” This is a comprehensive and positive objective. However, the second part of Article 2 states that the law is also intended “to establish an independent ‘Commission of Civil Society Organizations’ under the Parliament to exercise the authority of the state in implementing this law.” As I will discuss in greater detail below, the inclusion of provisions relating to the Commission is inappropriate because this is a very complex issue that needs to be addressed in a separate law.

C. Registration of CSOs

Under existing Iraqi law, as is the case in most countries of the Middle East and North Africa, CSO registration is mandatory. The government sees the right of association as a gift from the government to the people, when in actuality it is one of the original human rights and is protected as such by international law (as discussed above in Part II). Registration of CSOs is mandatory, and even informal groups are prohibited from operating without first obtaining a license. Furthermore, complicated registration procedures with many requirements make the registration of a new CSO difficult or near impossible.

Any new CSO law for Iraq should take this history into account and facilitate the registration of CSOs. Unfortunately, both the MCS and CSO drafts embrace mandatory licensing of all CSOs. Articles 4 through 8 of the MCS draft set up a procedure by which a CSO submits an “application” for an “establishment license” that is either “granted” or “rejected” by the Minister. This provision is hotly contested by CSOs, and rightly so. An organization should properly be considered *established* as an informal entity on the date of its first founding meeting. This informal entity must be recognized by the government as legitimate even though it has not been registered by a government agency. This is the view embraced in the UDHR and ICCPR as well: CSOs are not obliged to obtain legal personality in order to practice the fundamental right of association. Registration is only required when the CSO desires to establish itself as a *legal* entity.

The CSO draft is marginally better because it employs the term “registration” instead of “establishment” and the term “certification” instead of “license,” indicating the true nature of what is being granted by the government (see Articles 18 and 19). The use of these terms indicates recognition that CSOs are *established* by the free will of their founders and *registered* by the government. Individuals should not need permission to *establish* CSOs. The CSO draft also provides that the registration of CSOs should be made exclusively by an independent commission rather than a single minister (Article 18). Finally, the CSO draft recognizes prior registrations, meaning that existing CSOs registered under the Ministry of Planning, the Ministry of Civil Society Affairs, and the Ministry of

the Interior will not need to re-register (Article 18(2)). However, despite these improvements, the fact remains that the CSO draft establishes a mandatory registration procedure which prevents the existence of informal CSOs.

A better approach to a final CSO draft law in Iraq would be to create a system of incentives for voluntary registration by CSOs. For example, CSOs will be likely to seek registration if they receive certain specific benefits, such as the protection of legal entity status (i.e., limited liability), tax benefits, and so on. These benefits would enhance the likelihood of CSO registration without imposing mandatory and repressive laws upon them.

D. Registration Authority

The authority that is responsible for CSO registration now for most of Iraq is the NGO Assistance Office, which is part of the Iraqi Ministry of Planning (in the Kurdistan region it is the KRG Ministry of Interior). Given the history of government control over civil society in this part of the world, as well as the relatively poor relationship that currently exists between the government and civil society in Iraq, the question I want to ask is, why should registration be under the authority of the executive branch of the government in the first place? Doing so only opens the way for the government to interfere in CSO internal issues.

The MCS draft states in Article 5 that the Ministry of State for Civil Society Affairs is responsible for CSO registration. This is not acceptable to most of the CSOs in Iraq because they think that this will lead to control of civil society by the government and total loss of CSO independence. As a result, CSOs proposed in their draft that registration authority be given to an independent organization patterned after the Independent Electoral Commission of Iraq. The proposed Commission of CSOs would include elected members from CSOs in all of Iraq's governorates: members of parliament and members of the executive branch (one each from the Ministry of Planning, the Ministry of Finance, the Ministry of Women's Rights, the Ministry of Human Rights, and the Commission on Public Integrity).

As everyone knows, civil society is a newly established sector in Iraq which needs a suitable legal environment to mature in the right way. We Iraqis should not (re)invent everything by ourselves, but should instead take advantage of other countries' successful and unsuccessful experiences. In the case of the Ministry of Civil Society, it is worth noting that I have never come across this type of government office anywhere else in the world. The only country that attempted this model was Palestine, where after just six months the Ministry was dissolved and the idea was condemned as illogical and unworkable. And yet the MCS draft wants Iraq to follow this failed model!

The CSO draft, on the other hand, proposes registration of CSOs through an independent Commission of Civil Society Organizations, which is loosely patterned after successful examples, including in the United Kingdom and Moldova. However, this solution has also been criticized by those who argue that the Iraqis are not yet ready for such degree of independent civil society. Many people, including government officials, journalists, writers, and even some civil society activists, say that the CSO draft law is unrealistic and ignores the state of society in Iraq as it is today.

In fact, many discussions took place regarding the issue of the independent Commission of CSOs during the more than one year of planning and writing of the CSO draft. These discussions included local CSOs and international and foreign CSOs and focused on how such a commission might be established, how it would be structured, how commissioners would be selected, and so on. Initially, it was expected that a separate law solely focused on the commission would eventually be generated, but by the end of the process Iraqi CSOs decided to simply merge the separate commission law into the CSO law. (Personally I don't agree with this decision because the two different laws have very different aims; but this was the decision that was made.)

In any event, according to the CSO draft, the legal status of the Commission of CSOs would be the same as that of the Independent Electoral Commission of Iraq. The Commission of CSOs would "derive its authority from the Parliament,"² and would receive "an annual budget ... in the same manner as for

other government agencies" (Article 4). Article 5 explains the composition and structure of the commission, defining it as a group of twenty-seven persons, selected as follows:

- Eighteen voting representatives from civil society (one from each of Iraq's eighteen provinces);
- Four voting representatives from the Parliament – "two men and two women from different political entities and different parts of the country," selected by the Speaker of Parliament; and
- Five voting representatives of the Government or Executive Branch, "including one each designated by the Ministers of: 1) Planning and Development Cooperation, 2) Finance, 3) Women's Rights, 4) Human Rights, and 5) the Commissioner of the Commission on Public Integrity.

The most important powers and responsibilities of the Commission are the registration of CSOs; provision of technical and financial support to CSOs; issuance of regulations and instructions regarding CSO activities; and acting as a liaison between CSOs, the Parliament and the Government on civil society issues. The CSO draft law also contains detailed provisions on election of Commission members, eligibility for elections, nomination procedures for elections, and so on.

One issue that has been raised in connection to the CSO draft is the method of electing members of the Commission of CSOs. Many worry that these elections will be influenced by political parties (as is the case with all elections in Iraq, including professional unions, syndicates, student associations, etc.) and that this influence will affect the quality and independence of the individuals who will be elected to the commission. In addition, the process of setting up the commission and electing commissioners will take a long time, but the CSO draft law does not contain provisions on what will happen during the interim period.

All things considered, I think it is clear that registration of CSOs by an independent commission is superior to placing registration authority solely in the hands of one executive ministry. However, I want to add a couple of caveats to my endorsement of the CSO draft. First, an alternative process of establishing the commission that is simpler, easier, and more realistic, is essential. Any CSO law must include provisions for the registration and regulation of CSOs while the commission is being established. Finally, the structure of the commission should include a liaison function that will bring together members from all the different executive ministries in order to facilitate access to information for CSOs and to increase coordination between the government and civil society. This, after all, should be the normal relationship: one based on cooperation, coordination, and complementary relations rather than antagonism.

One final note about the CSO draft concerns the concept of "registration by law" or default registration. Article 19(2) of the CSO draft states that if a CSO validly applies for registration (turns in all required documents correctly filled out) but does not receive any response from the Commission after thirty days, then the CSO will be considered validly registered. The idea is inspired from other countries' regulations but needs more particularization for the Iraqi context. What should a CSO do to prove that it filed registration but did not get a response? How is a CSO supposed to apply for funds from a donor on the basis of a "registration by law," with no proof of registration from the government? The CSO draft law does not suggest any suitable solution to these problems.

I think that the best solution to this legal dilemma is to involve a judicial authority in the registration procedure. I would recommend that a new paragraph be added to Article 19 of the CSO draft to guarantee that CSOs receive a registration letter after the thirty day period expires. The CSO should be able to address a request to a local court demanding a registration letter, and the court should then order the commission to issue a registration letter for the CSO.

E. Protection of CSO Independence

Current CSO legislation in Iraq allows the government to intervene in many internal issues of CSOs, which leads to a loss of civil society's independence. When a government, political party, or any agency of the state imposes its agenda on CSOs, then civil society becomes meaningless in any real sense.

The degree of allowed government intrusion presents the most significant difference between the MCS and CSO draft laws that are the subjects of this study. The MCS draft clearly demonstrates that the Iraqi government desires to control the civil society sector in Iraq in a heavy-handed manner, while the CSO draft clearly shows that civil society is demanding more space to work and less intervention on the part of the government.

For example, Article 7 of the MCS draft allows the minister to "request the realization of legal amendments or additions to the bylaws" of an organization, but beyond providing certain minimum standards, a government has no business telling civil society organizations what their bylaws should contain. Similarly, the MCS draft gives the individual governors of the province in which a given CSO attempts to incorporate the ability to object to the opening of a CSO's office (Article 10) so that even if a CSO gets an official license from the Ministry, the governor may still block its operations. A CSO can object to a governor's decision by bringing a request to the Ministry of State for Civil Society Affairs — but in this case both the adversary (the governor) and the judge (the Minister) are from the same branch of the government (the executive)! This is unfair because a CSO will not be facing an impartial judge but instead will be facing a judge closely identified with its adversary.

Intervention of the Government in CSO Relationships and Membership

The MCS draft law gives other inappropriate powers to the Minister; for example, CSOs cannot merge with one another and cannot affiliate, participate in, or join other international entities or organizations without the permission of the minister (Article 11). These are major infringements on the freedom of association. More worryingly, Article 15 gives the Minister of State for Civil Society Affairs the power to force a CSO to accept a membership application it may have rejected — thus forcing CSOs to accept as members potential bad actors or government representatives.

Iraqi government and political leaders often say that the civil society in Iraq needs international support and that the reconstruction process in Iraq requires assistance and effort from foreign CSOs. But they then turn around and put into place regulations that create obstacles to the existence of foreign CSOs in Iraq, to their successful operations, and to their ability to work with local CSOs. For example, Article 17 includes limitations on the membership of non-Iraqis in Iraqi CSOs, preventing them from voting or participating in administrative committees. All these obstacles and limitations show the mentality of the Iraqi government toward civil society.

Intervention of the Government in CSO Operations

Another important way in which the MCS draft interferes with the freedom of association comes from the very detailed provisions on issues that should be left to CSOs to decide. For example, Article 17 determines the decision-making process inside the CSO, requiring certain majorities for certain activities. Articles 18 and 19 determine the process of elections and the approval of general balance sheets; Article 22 requires the attendance of a judge to supervise any elections of CSO administrative committees; and Article 23 gives the Minister the right to cancel the elections of CSOs or any decision taken by the administrative committee or by the president of the organization. While it is important to encourage good bylaws for CSOs and appropriate regulation of internal issues, these measures go too far.

Securing Independence: The CSO Draft

Unlike the MCS draft, the CSO draft makes a great effort to protect the independence of civil society from inappropriate interventions by the government and the political parties. Articles 21 and 22 provide some basic requirements for what should be included in bylaws—things like "basic internal

policies for financial management” and rules prohibiting “conflicts of interest”—but they do not impose overly broad requirements and restrictions on CSOs. The CSO draft does not give the Commission the kinds of inappropriate powers that the MCS draft gives to the Minister. With few exceptions, most internal issues are left to the organization to decide. This is the real meaning of “civil society”: groups of people organizing among themselves to pursue their own interests. The Commission of CSOs is meant to provide technical assistance rather than to dominate the entire sector.

Other legal protections for civil society included in the CSO draft law are freedom of activities for local and foreign NGOs (Article 27):

The state shall ensure the freedom of all civil society organizations’ work in Iraq in accordance with the Constitution, and likewise for foreign organizations.

The CSO draft also includes an affirmative requirement that the Commission of CSOs protect civil society (Article 27(3)):

The Commission shall have the responsibility to assist any civil society institution whose activities are prevented, interrupted, harassed, or otherwise interfered with by individuals, political organizations, or government agencies at any level.

And finally, the draft provides explicit rights for CSOs to practice economic activities and own movable property, real estate, or other fixed assets (article 28); and to engage in political expression and to propose or oppose any legislation or action of the government at any level (Article 29).

Many people, especially those from the Iraqi government, argue that it is not realistic to ask the government to help and support NGOs and at the same time ask the government not to intervene in civil society. These people argue that even in Europe and the United States of America, the government has the ability to impose its agenda on CSOs. But this is not true. The governments of the United States and Europe have powers to seek accountability from CSOs to ensure that their funds are spent properly; but a given CSO is pursuing its own agenda, and it is the CSO that seeks funding from the government, not the government that forces the CSO to run certain programs. This is an important distinction. What the law is designed to do is to regulate the relationship between civil society and the state — but these are two different sectors in the end. Therefore, it is important to set some basic guidelines and then to step away and let civil society decide for itself how best to pursue its aims.

F. Financing of CSOs

The question of how CSOs can be financed in Iraq today has no satisfactory answer. Many CSOs receive funding exclusively from the government and thus consider themselves essentially arms of the government; others are funded exclusively by political parties and thus consider themselves political organs. Most CSOs do not have sufficiently diverse funding sources to feel that they are truly independent. Furthermore, in parts of Iraq such as the Kurdistan region, where the government is providing funding to CSOs, money is unfairly directed toward those groups whose founders have personal relations with individuals in the government or the relevant department. In the end, there is no real legal framework for financing civil society.

The MCS draft law defines seven sources of financing for CSOs (Article 26):

1. Cash or in-kind donations;
2. Inheritance, bequests, or grants;
3. Membership fees;

4. Real-estate ownership;
5. Income generated from legitimate commercial activities;
6. Allocations from the state budget; and
7. Profits and interest from investments.

The CSO draft includes an almost identical list of potential income sources in Article 33. However, though both drafts seem to be the same on the surface, in fact there are two very important differences.

Limitations on Foreign and Domestic Funding

According to the MCS draft, Iraqi CSOs are “prohibited from receiving or taking funds of any kind from inside Iraq or from abroad ... except with the approval of the minister” (Article 27). Not only does this prohibition make the preceding Article 26 worth very little, but it absolutely ensures that Iraqi civil society will be a failure from the start. In essence, Article 27 makes the Minister of State for Civil Society Affairs the executive director of all the CSOs in Iraq — not one organization will be able to conduct a program or raise funds without his approval. Even the most liberal and enlightened minister and his staff would be unable to review the funding requests of every single CSO in Iraq every single time it attempts to raise funds!

Of course, it is appropriate for the government to monitor the funding sources of CSOs, but this does not mean that the government must pre-approve every single transaction. The MCS draft already contains appropriate monitoring provisions: for example, Article 34 obliges all CSOs to provide the minister with annual reports on every detail of their activities and budgets that are reviewed by a licensed auditor. There is actually no need at all for this kind of pre-approval process. The CSO draft, of course, does not contain the same kinds of restrictions, and, in fact, explicitly recognizes the right of CSOs to receive funding and support from “foreign and international organizations” (Article 33). This is especially important because international donors can truly enhance Iraqi civil society, both financially and technically.

State Funding

As I have mentioned, the biggest problem facing civil society in Iraq now is funding. But Iraq has a huge potential for income from oil,⁸ and CSOs are providing important public services, including reconstruction, so it is only logical and fair that CSOs get a share of this income. The question is, how can CSOs get their fair share of state oil income while simultaneously protecting their independence?

To be fair, the MCS draft law recognizes the right of civil society to have a share of the state budget, and this is a very positive point (see Article 26(6)). Unfortunately the draft does not mention how much CSOs are entitled to or how they might get it. Nevertheless, this shows that the government recognizes that CSOs are entitled to a percentage of the state budget because their activities are serving Iraq’s people.

The CSO draft law solves the problem of specifics by compelling the government to invest significantly in the civil society sector and by specifying that the Parliament must dedicate “unconditional” support of no less than 1/1000 of 1% of the annual national budget of Iraq for civil society organizations engaged in public benefit activities (Article 36). This money is then awarded through a competitive proposal program administered by the Commission of CSOs and approved by the Parliament (Article 37).

Although the CSO draft is an improvement over the MCS draft, the issue of state funding could be legislated more clearly. I am specifically thinking of the mechanisms for allocation under the

competitive proposals: this needs to be more detailed and to consider who will be responsible for reviewing CSO proposals, how priorities will be set up regarding the CSO projects, what should be included in the Commission of CSOs' plan for spending, etc. I would further recommend that the government go beyond the allocation of funding for civil society designed projects (as is contained in the CSO draft) and that it adopt a model like that used in the United States, where the government entrusts implementation of certain social services and humanitarian projects to the CSO sector and in effect pays the sector to design and administer certain government programs as well.

G. Penalties

When a CSO violates the law, what should be the penalty or sanction, and who is responsible to impose it? On this topic, both the MCS and CSO drafts are problematic.

Executive Discretion

The MCS draft gives very wide powers to the Minister of State for Civil Society Affairs to freeze, suspend, or dissolve CSOs (Articles 36 and 37). These powers are so discretionary that they will almost certainly be abused; I would estimate that fully 90% of currently existing Iraqi CSOs could expect to be shut down simply because civil society is a new sector in Iraq. For example, the Minister can dissolve a CSO if it:

- "[C]ontravenes public order and morals";
- Conflicts with "national unity";
- Fails to maintain certain records or submit certain reports;
- "Becomes unable to fulfill its undertakings and obligations"
- Has "gambled"; or
- Uses its funds in pursuit of "objectives other than those for which it was established."

Even worse, the right to appeal the Minister's decision is limited because any appeal must be lodged with the Council of Ministers (Article 38), which is a part of the same branch of government (the executive) that the Minister comes from! Instead of requiring consideration of a dispute by an independent court, the MCS draft puts the government in the position of arbitrator and disputant at the same time.

The CSO draft avoids the problem of too much government discretion by limiting the power to impose punishments to the independent Commission of CSOs. The Executive Director of the Commission does have the power to suspend or decertify CSOs that fail to respond to warnings that they are not complying with the law (see Articles 38 – 41); but the potential for abuse is lower because the Executive Director is an independent Commissioner and not a member of the executive branch. In addition, the CSO draft allows organizations that are subject to penalties to appeal these penalties to a Council of the Commission, and if this does not satisfy the parties they may appeal to an Iraqi Court of Appeals (Article 43).

Disproportional Punishments

The potential punishments for noncompliance with the law are disproportionate in both the MCS and CSO drafts. In addition, the MCS draft imposes individual penalties for violations that are properly the fault of the organization itself as a separate legal person. For example, Article 41 of the MCS draft imposes a fine of up to 100,000 Iraqi Dinars ("ID") on the members of the administrative committee

of a CSO for a variety of minor organizational violations, including “accepting a member who did not fulfill the membership conditions stipulated.” Article 42 even provides for a prison sentence of up to three years for every member of a group “that performed work ... without completing its establishment procedures.” This contradicts the international right of association, particularly the rights of informal entities to freedom of association. The penalty of jail time simply should not be included in a civil society law; crimes that deserve to be punished by jail, like fraud and corruption, are already regulated by other laws.

The CSO draft has similarly high monetary penalties for non-compliance with an order to correct violations (see Article 39). But the point here is that fines or other punishments should be appropriate to the violation. A fine of 100,000 ID is not appropriate for a minor violation; but neither the CSO draft, nor the MCS draft contains any recognition of this principle. Only in limited and very serious cases (for example, criminal activity or fraud) should fines of this amount, or the greater penalties of decertification and dissolution, actually be applied.

H. Foreign CSOs in Iraq

Current regulations in Iraq create many obstacles and put many restrictions on foreign CSOs working in Iraq, but because civil society is so new in this country, local CSOs are in need of international and foreign support. Therefore, any new civil society law for Iraq should create a comfortable legal environment that facilitates the operation of foreign CSOs in Iraq.

Unfortunately, Article 45 of the MCS draft retains the existing mentality and makes it even more difficult for foreign and international CSOs to work in Iraq (or more accurately, to be registered in Iraq). In order to register legally, a foreign CSO must, among other things:

- Obtain a “verification” from the Iraqi Ministry of Foreign Affairs stating that the CSO has worked and is registered in another country;
- Provide the Ministry with a letter from the national government of the foreign CSO’s home country;
- Provide the addresses of the CSO’s foreign staff;
- Specify the number of visits of the CSO’s foreign staff to Iraq; and
- List the CSO’s revenues, expenditures, assets, balance sheet, sources of finance, and debts for the current year and the previous and subsequent three years.

The MCS draft also requires the director of the foreign CSO’s local branch to be an Iraqi citizen and provides that no less than 80% of the members should be Iraqis (Article 45). Furthermore, Article 48 of the MCS draft allows the Minister of State for Civil Society Affairs to amend the bylaws of a foreign CSO and if the minister decides to reject their registration, his decision is final and cannot be appealed (Article 49). All these provisions are in addition to the obstacles mentioned throughout this article that apply to local CSOs – meaning, for example, that a foreign CSO cannot receive or send any funds to international or local entities except with ministerial approval.

The government argues that it raises obstacles against foreign CSOs and makes their existence in Iraq difficult because foreign CSOs will change the customs, traditions, and morals of the Iraqi people and will lead to an ideological invasion of Iraq. We have even heard the frail excuse that foreign CSOs are actually working for intelligence agencies. But all of this is nothing more than a pretense.

I think it is clear that the aim of placing all these obstacles on foreign CSOs is to prevent them from operating in Iraq. These CSOs are enhancing and promoting the community’s ability to abide by

democratic principles. They are helping the Iraqi people become aware of their rights and freedoms in order to embrace the new democracy and pass through the transitional period from dictatorship to democracy. Before 2003, most Iraqis did not know what their rights were; their concept of public service was more like a gift or a donation from the government, not a duty which the government was required to uphold. Now, the Iraqi people have started to know their rights and have started to talk openly about the deficiencies of the government, such as its inability to provide security and public services, inability to remedy violations of rights, etc.

Therefore, the conflict between the government and foreign or international CSOs is continuing. It is a conflict between democracy, freedom, civil society, the international community, foreign and international CSOs, openness to the world, globalization, and human rights, on one side; and on the other side, the concepts of strong national government, sovereignty of the state, isolation from the world, control of civil society, national security, radical Islamic political parties, etc.

The CSO draft takes an almost opposite approach from the MCS draft; instead of raising obstacles, it facilitates foreign CSOs' activities. In fact, encouraging the growth of foreign CSOs is one of the explicit "goals" of the law (see Article 2(4)). The registration process is extremely streamlined (Article 20), requiring only that the foreign CSO provide any formal document to the Commission for CSOs that proves it is a CSO with a legal personality in its home country. These facilitations were placed in the draft law as a result of pressure of a large number of Iraqi CSOs, because, in fact, it is already difficult enough for foreign CSOs to work in Iraq and to endure the bad security, radical Islamic entities, and government hostility. We wanted to encourage a foreign CSO presence in Iraq rather than discourage it further.

It is worth mentioning that almost all civil society activities in Iraq today are supported and funded by foreign and international NGOs — even the development of the "CSO draft." Therefore, we should not contradict ourselves by obliging these organizations to go through difficult registration processes as long as we need their help.

VI. Results and Recommendations

There is no doubt that there is a real need for new legislation on civil society organizations in Iraq. It is time for Iraq to embrace more openness so that its people can continue to democratize the laws and protect human rights while minimizing the intervention of the government in CSO issues and guaranteeing the independence of CSOs. Iraq is one of the countries that signed the ICCPR; this should be reflected in all national legislation and regulations, especially laws that regulate civil society in order to guarantee the protection of human rights. With these thoughts in mind, I make the following recommendations and conclusions:

1. CSOs should be involved in the drafting process for any new civil society law. Any draft law submitted by the government without participation of CSOs will be unacceptable, and CSOs will object strongly because civil society in Iraq intends to be involved in all legal reforms and legal developments from now on, including the law of anti-terrorism, the emergency law, and so on.
2. The new law of civil society should move toward the "notification" system rather than a "registration" or "licensing" system because this is a very successful model in countries that are attempting to escape an authoritarian past. Even if a "licensing" or "registration" system is ultimately chosen, it should be voluntary for organizations that seek formal legal status, not required of all organizations. Only a voluntary system can reflect the concept that the right of association is one of the original human rights and not a gift from the government to the people. Only a voluntary system would allow for informal groups to practice their right to freedom of association and assembly.
3. I also believe that the registration authority must be an independent agency instead of one tied to the government. The suggested registration authority contained in the CSO

draft, which is a very good one, is an independent commission of civil society affairs, but this authority should be regulated in a separate law rather than the civil society law because of the complexity of organizing and administering that body.

4. In the period before the establishment of the Commission, the Ministry of Civil Society Affairs could take responsibility for registration. The responsibility should then be transferred to the Commission, after which it may be possible to dissolve the Ministry of Civil Society Affairs.
5. The civil society law to be legislated in Iraq should deal with major issues and general concepts to provide minimum guidelines regulating the relations between the government and the civil society. Subsequent regional regulations should deal with registration procedures and other details of applying for registration. The details of CSO operations should be regulated by their internal bylaws and the law does not need to specify, nor should it regulate, all the details of the CSO operations.
6. The new law should include articles that prevent or decrease inappropriate governmental and political party's intervention in civil society affairs; in other words, the civil society should be allowed to pursue its own agenda.
7. Iraq is a rich country with a huge and increasing income from oil; at the same time, Iraqi CSOs are major contributors to the rebuilding and rehabilitation of this country. It is therefore axiomatic that CSOs should get their share of the nation's (not the government's!) wealth. Any new civil society law should require that a good percentage of the state budget be allocated for civil society via a clear mechanism that guarantees that the funds will be accessible by CSOs. One of the best possible mechanisms is through a competitive project bidding, as such exists in most countries in the world.
8. The law of civil society should also be clear in terms of CSO involvement in implementation of government projects in a way that does not negatively affect civil society's independence. Also, the law should encourage the private sector to make investments in civil society and facilitate these investments through, for example, tax exemptions.
9. Any new CSO law for Iraq must remove all legal limitations on the receiving and sending of funds for the civil society sector from inside or outside of Iraq.
10. The law should facilitate the existence of foreign CSOs in Iraq. Current regulations are unclear and put many legal restrictions for their registration and operation in Iraq. Given the current environment in Iraq, it should be enough for a foreign CSO to prove that it is a legally registered CSO with a legal personality in its home country for it to operate in Iraq because local CSOs need financial and technical support from foreign NGOs.
11. The new law should not allow the government to control the relations of local CSOs with international and foreign CSOs, including their right to network and affiliate.
12. The new law should enable CSOs to access information from the government that they need in order to implement their programs.

Finally, there is a big gap between the CSO and MCS drafts. The gap is basically between two different mentalities: the government's, which embraces international isolation and control of civil society justified by the current situation in Iraq; and that of the civil society, which promotes increased openness to the world justified by thinking of the future of Iraq. Some criticize the CSO draft as unrealistic for the current situation in Iraq, but legislation is not supposed to be limited by reality; it is

supposed to change reality! This is the entire point of the law — it is a key to change in the community.

At the Iraqi Civil Society Conference II in Amman, Jordan on November 21, 2006, a decision was made that a new CSO law would be drafted by a high committee that includes members from the US Agency for International Development, the UN Assistance Mission for Iraq, America's Development Foundation, the Iraqi Ministry of State for Civil Society Affairs, the UN Office for Project Services, and a number of local Iraqi CSOs and university professors. In order to draft the best possible law and create enough consensus to see the law through passage in the Council of Representatives, the new draft must take advantage of all previous drafts that have been submitted to the Council of Representatives, and especially of the two drafts that are analyzed here.

VII. Epilogue

With the conclusion of this research I hope that I have been able to present something new and helpful to assist in the development of a new civil society law for Iraq. Enacting a new CSO law is an important part of reforming the entire legal environment that exists in Iraq in order to support our new growing democracy. Despite the current situation, we believe that the democratic reform process in Iraq, and especially the legal reform, should not stop, because the Constitution guarantees the right of freedom of expression and the right of freedom of association, but these statements need laws to regulate and enshrine our rights. Now is the right time to seize the opportunity for a civil society law reform. Iraq is starting to set up the legal system, and therefore, we should put things in the right way from the beginning in order "for the tree to have a straight trunk."⁹ I hope that my comments and recommendations will contribute to the development of the civil society law in Iraq in such a way that would enable the civil society to face more challenges and to work on other laws in the future.

References

Civil Society / ADF ICSP Coalition, *Final Draft Civil Society Law* (Baghdad 2006).

International Center for Not-for-Profit Law, *Comments on the Regulation of Non-Governmental Organizations Issued by the Coalition Provisional Authority, Order Number 45* (Washington, DC, 2003).

International Center for Not-for-Profit Law, *Guidelines for Laws Affecting Civic Organizations* (Open Society Institute, New York, 2004).

Iraqi Ministry of State for Civil Society Affairs, *Final Draft Civil Society Law* (Baghdad, 2006).

All of these documents and several additional resources are available to the public in the ICNL Online Library – <http://www.icnl.org/knowledge/library/index.php>

¹ Hoshyar Malo is a lawyer and the Director of Kurdish Human Rights Watch and is based in Baghdad and Irbil, Iraq. This article is the product of Mr. Malo's Senior Research Fellowship with the International Center for Not-for-Profit Law (ICNL).

I would like to dedicate this humble article to all those brave persons who work for civil society in Iraq. I would also like to express my thanks and appreciation to the Middle East Partnership Initiative (MEPI) and the International Center for Not-for-Profit Law (ICNL), especially to Catherine Shea, Kareem Elbayar, and Douglas Rutzen for their efforts and continuous support. My hope is that this research will promote the adoption of the best civil society regulation for Iraq in the near future.

² The Council of Representatives, or *Majlis an-Nawwab*, consists of 275 members elected for a four-year term. It is the lower house of the new Iraqi parliament and the main source of legislative power.

The upper house of parliament, called the Council of Union (or *Majlis al-Ittihad*), has not yet been constituted.

3 Adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948.

4 Adopted and opened for signature, ratification, and accession by UN General Assembly Resolution 2200A (XXI) of 16 December 1966. Iraq signed on 18 February 1969 and ratified on 25 January 1971.

5 This treaty will not take effect until it has been signed by seven members of the League of Arab States. As of this writing, only Jordan and Tunisia have signed.

6 See Article 117 of the Constitution of Iraq ("The governments of regions have the right to practice legislative, executive and judicial powers according to this Constitution, except in areas listed as exclusive powers of the federal authorities.")

7 Some Iraqi CSOs objected to this language out of fear that it would make the Commission of CSOs subordinate to the parliament, thus affecting its independence.

8 Iraq is now exporting 2 million barrels per day, and when the security situation improves the export rate has the potential to be multiplied many times over.

9 This is a very common Iraqi saying; if you have a tree with a bent trunk it is almost impossible to straighten, so things should be done in the right way from the very beginning!