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## The Iraqi Constitution from an Economic Perspective

Interview with Noah Feldman  
*New York University School of Law*

In his interview with CIPE, New York University Law Professor and constitutional expert Noah Feldman discusses the issues faced while framing the Iraqi Constitution and how the constitution will affect the commercial and legal environment in Iraq. Importantly, he discusses the constitution in the light of its economic, not just political, consequences.

Iraq's future is predicated upon a functioning economy, which requires such things as firm private property rights guarantees. But it's more than just writing the laws on the paper. If, following the ratification, politicians are unable to effectively administer the government and encourage economic growth, there is little hope that the public will embrace the constitution. However, while the constitution is very important in shaping the future of the Iraqi economy, the most pressing issue facing Iraq remains the security situation. A secure Iraq governed by the rule of law is the first precondition for a flourishing economy and functioning constitution. Once Iraq is able to eliminate security threats, its future will brighten considerably.



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1155 Fifteenth Street NW • Suite 700 • Washington, DC 20005 • USA

ph: (202) 721-9200 • web: [www.cipe.org](http://www.cipe.org) • e-mail: [cipe@cipe.org](mailto:cipe@cipe.org)

**CIPE:** What has been the progress so far in developing the Iraqi Constitution?

**Mr. Feldman:** Well, we have to look at two sides of developing a constitution – process and substance. On the whole, the process has gone relatively well, though not without hiccups. The cornerstone so far has been the interim constitution, the so-called transitional administrative law, a document that had some public support, but was not designed to be ratified by the general public. It was designed to open the way for the constitutional process to take place, and that's what is happening now. So one can say with confidence that there has been decent progress in that the transitional law covering the interim period has been put in place. Moreover, the law is working – elections have been held and a constitutional committee has been established and is discussing the new draft constitution.

However, questions remain in regards to the substance of the constitution. The new draft in the process of being produced takes different standpoints on a variety of issues, which is perfectly appropriate, but it's too soon to make any confident predictions about the actual substance.

**CIPE:** The economic dimensions of constitutions are often overlooked, although extremely important. One of the dimensions that has come up on several different occasions is the idea that Sharia is to be a main source of the Iraqi Constitution. Will that have an effect on commercial codes and other kinds of legal ramifications that are of concern to business people and to the economy as a whole?

**Mr. Feldman:** It's too soon to tell. There probably will be some general language, either saying that Sharia is a source of law or a main source of law. But there will still be independent commercial codes, without any doubt. It's very likely that those codes will resemble what we observe in other civil law countries. But this also means that down the road it's possible that there will be court cases asking about the relationship between those Sharia provisions of the constitution and the commercial code. At present, I don't think we're likely to see the replacement of those commercial codes with more restrictive or Islamically-oriented commercial laws. In the future, however, the question remains very much an open one.

We have to remember that in other countries of the Muslim World that similarly recognize Islam as a source of law, even as a principal source of law, commercial codes remain on the books that enable people to engage in relatively ordinary commercial transactions in ways that are very similar to

what's in place in other civil law countries. In Egypt, for example, the constitution specifies Islam as a source of law, but the commercial code continues to operate, and the same is true in most other Arabic-speaking countries.

I think that the business community in Iraq can come out in support of the way the constitution could be written and have a reasonable expectation that the standard pattern that tends to emerge in other Middle East countries would prevail. Of course, there are no guarantees in politics, but I don't think that the constitutional language that uses Sharia would necessarily spell problems for the business community.

**CIPE:** Several articles in a draft of the constitution that has circulated seem to indicate that the government is following more of an European social market model and incorporating into the draft Constitution some aspects of economic guarantees for the population, as well as social safety nets. What is your take on this?

**Mr. Feldman:** I would begin by saying that one should be very skeptical about leaked drafts. That's just one experience that I had working on the interim constitution, mainly that different people were leaking documents to achieve different objectives, and it's often the case that what's out in the public sphere is not what's been there previously.

With that initial caveat, I would say that there is a sense among Iraqis that the constitution should, if not guarantee, at least encourage the creation of a social safety net. It would certainly help the unemployed and people with disabilities, and I'm guessing that it's very likely that the European model will be adopted. It is also important to note that part of the reason for this is that the United States and its coalition partners adopted a very similar policy – they have been promoting a form of a very aggressive welfare state in Iraq, partly because of the realities of the situation. Many people were dependent on government salaries and cutting them off would have left them entirely unemployed or without a major source of income.

So, I think that you're right and we are likely to see something along those lines, but the constitutional document that I saw was more hortatory in this respect. It was saying things like the government shall strive to produce full employment rather than saying that it would produce full employment, and the provision that I saw on unemployment compensation implied that the government was under no duty to provide a permanent unemployment benefit to able-bodied people. It was only a duty to help support people who otherwise

could not work for disability reasons. This is more of the traditional sense of what we mean by social safety net rather than guarantees of social outcomes.

Another thing I would emphasize is that these are the kinds of decisions that are always more legislative than constitutional, and no matter what the constitution says, there will be a lot of flexibility for the subsequent Iraqi legislature to design an economic and social welfare system in accordance with preferred policies.

**CIPE:** And, of course, it's that kind of flexibility that constitutional experts prefer as the optimum in constitution drafting. In your past work, you drew the parallel between the Irish Constitution, the German, and several other constitutions, some of which seemed to go more in the direction of dictating outcomes rather than setting out a goal for the country.

**Mr. Feldman:** I think it's really risky when it comes to social welfare programs for the constitution to promise what it can't deliver. There's no better way to discredit a constitution than for it to promise certain forms of economic development that no government entity can actually guarantee in the real world. So I think that if a constitution is to include social welfare guarantees, it ought to provide them in an aspirational way.

The one exception is certain basic rights, like health care and education, because without a strict guarantee in the constitution, the flexibility provision can end up being completely empty. And with respect to things like that, there is a strong argument for making them obligatory in the constitution.

**CIPE:** How about other economic dimensions that are often of concern to people who are looking at, for example, private enterprise systems and market economies, particularly a guarantee for the right to hold private property?

**Mr. Feldman:** Well, I think a strong property right guarantee has traditionally been shown to be a very effective tool for encouraging investment, and I want to emphasize that you need to protect not only real property, but also intangible property. Protecting property also means requiring the government, if it takes property by eminent domain, to provide just compensation and a good procedure for ensuring that the compensation is actually just. I think that the Iraqis involved in the constitutional process understand very well the need to make Iraq an attractive venue for

direct foreign investment, and I think we will see property guarantees in accordance with that.

We should also expect this to extend to the issue of land. Iraq does have a history of private land ownership, despite restrictions during Saddam's regime, and I think we'll continue to see that. The earliest drafts of the constitution that have been circulated have included provisions specifically guaranteeing the right of anybody to own land anywhere in the country.

**CIPE:** From our experience, and Brazil immediately comes to mind, one of the temptations for the framers of the constitution has been to try to lock into place things like caps on interest rates or other economic measures because they felt that they didn't want to leave the debate to a future parliament. Have you seen the process in Iraq go in that direction?

**Mr. Feldman:** I have not yet seen proposed provisions that put particular numbers on anything that resembles that kind of micromanaging the future fiscal or economic policy via the constitutional document. I think the Iraqis involved in the process understand the extreme difficulties in predicting in advance what economic circumstances will bring. For that reason, there's a tendency towards leaving a certain degree of flexibility in place.

The perfect question is whether there will be a central Iraqi bank that controls fiscal policy outside of the political process or to some degree removed from the political process. That is unclear at present. And although I have not heard serious proposals for such a thing yet, in the long run it would be an interesting issue to contemplate.

**CIPE:** Well, providing for an independent central bank has been one of the measures that the IMF, the World Bank, and most international economists would say greatly helps a country, particularly in the kind of situation that Iraq finds itself.

**Mr. Feldman:** It's true. That has become the key part of what you might call the "Washington Consensus" on economic development, and there are obviously good reasons for that. It's good to have some basis for reposition of fiscal discipline on a government. On the other hand, there's always a countervailing concern, which is putting significant power into a central bank, which is, if not non-responsible politically, at least less politically responsible than other branches of government. So that's a balance that

the Iraqis are going to have to strike. But Iraq is now in need of international assistance and the international institutions like the IMF or the World Bank are in a position to impose certain conditions as a prerequisite for aid. It's very possible that we will see something just like that.

From the point of view of the Iraqis, it would be better if they could come to that conclusion themselves. We've seen this throughout the world, that various decisions that the government needs to take tend to have more buy-in from the public if they're perceived as having been made domestically rather imposed by the international organizations that control inflows of capital.

**CIPE:** The picture you're giving us is very hopeful in terms of coming out with a product that will balance and set national goals while at the same time giving a realistic framework for decision-making. Do you feel that this is going to increase the legitimacy of a future Iraqi government? Will it create the kind of framework where the elected politicians are going to be able to turn to the public and say that we have a legitimate document that will guide our country and provide for the legitimacy of the state?

**Mr. Feldman:** Right now, Iraqis are very skeptical about pieces of paper. So, what they will want to see for the document and the constitutional structure to be legitimized, is not just a good document with a lot of flexibility, but a government that actually can deliver and do a good job within that. I predict that even if the constitution is excellent, if the politicians do a poor job of administering the government, if they adopt policies that don't lead to economic growth more significantly, the public will end up dissatisfied with the constitution and not just with the politicians. But if the constitution and the government work, then people will accept it and regard it as "not such a bad idea after all."

**CIPE:** From our experience of working in more than 90 countries, selling any document, not just a constitution, to the public requires engaging the population in debates and discussion in an open manner. It creates local ownership of the process and widespread support. Is there a plan in place to do that in Iraq? Will there be sufficient time to get input from the public?

**Mr. Feldman:** I don't think it's in the present schedule of timing. There's a possibility of having a draft of the constitution by August 15th, which is very optimistic, and a constitutional referendum is expected to be held in mid-

October. And two months are not long enough for a realistic conversation and debate, and they're also not enough for people to make proposals that would then be reintegrated into a new constitutional draft before the constitution is put up for a vote. I'm quite concerned that the truncated process may lead to less buy-in from the Iraqi public. On the other hand, there is still the option of extension. If that option is actually exercised, it would have a positive effect in terms of allowing a national debate. But that's certainly a balance for the Iraqis to decide, because some may feel that they want to have national elections as soon as possible, and they want to ratify the constitution quickly in order to hold those national elections.

**CIPE:** Looking past the constitution, one of the striking phenomena that we discovered in surveys of the Iraqi private sector is a feeling that there are no real mechanisms from consultation on draft laws, whether it is a constitution or whether it is an individual law on say, privatization or tax rates. There really isn't much of a mechanism for communicating the views of business or other social groups to decision-makers, and after the laws are put into place, there isn't much of an effort to explain to the people how those laws are to be implemented and enforced. Do you feel that that might change?

**Mr. Feldman:** I think part of the reason for that is that there are a lot of different things going on right now in the country. In such a situation, ordinary political processes have a hard time operating, when people, for example, can't live their lives in an ordinary way. Everything is so focused on the security situation right now that it's hard to get full concentration on economic issues and very hard to get broader participation from civil society, like business groups. So, in the long run, if security is reestablished, and that's a huge if, I think that will change. And the reason is that the politicians will need to be reelected and they'll support the business community.

But in the short term, sadly, as long as the security situation remains as grim as it has been, I don't anticipate substantial improvement on this front. In the Iraqi case, the priorities of security are going to override the very important point that you mentioned of getting civil society organizations involved in the process of consultation.

**CIPE:** So we have to stay hopeful?

**Mr. Feldman:** In the long run, economic development is absolutely central to Iraq's future, and it's basic to the

entire constitutional structure that there be a functioning economy. It's also very important that that economy will diversify itself away from the heavy reliance on oil and towards an entrepreneurial culture that will foster big and small business. Small business has to be there to create jobs but it may not be that easy, because Iraq is working in what some economists have called the "resource-curse" conditions. The key step for getting to a market economy and a vibrant private sector is establishing security first. None of the market mechanisms, not small business, not big business, not even the oil industry, can run effectively under conditions of insecurity. And so that's the first thing Iraqis need to do, and once they've done it, I think we're headed for a good outcome.

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*Noah Feldman specializes in the relationship between religion and political authority. He served as senior advisor on constitutional law to the Coalition Provisional Authority in Iraq and as advisor to Iraqis involved in the constitutional process there. Feldman's latest book, *Divided by God: America's Church-State Problem - and What We Should Do About It*, was published by Farrar, Straus & Giroux in July 2005. His previous books include *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton 2004) and *After Jihad: America and the Struggle for Islamic Democracy* (FSG 2003). Feldman is Professor of Law at the NYU School of Law, having joined the faculty in fall 2001 from Harvard University, where he was a Junior Fellow of the Society of Fellows. He was a visiting professor at Yale Law School in fall 2004, and in spring 2005 he was a visiting professor at Harvard Law School. Dr. Feldman received his A.B. summa cum laude from Harvard University. Selected as a Rhodes Scholar, he earned a doctorate in Islamic Thought from Oxford University and his J.D. from Yale Law School, after which he served as a law clerk to Justice David H. Souter of the U.S. Supreme Court.*

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