Co-Operation within a Federation
- It All Depends on the People

The Hon Robert French AC
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Introduction

1. Australia and Nepal have federal Constitutions with very different histories, very different societal contexts and quite different provisions. It is, however, a common feature of all federal constitutions, including those of Australia and Nepal, that division of powers between components of the federation requires cooperation when a national approach is necessary in areas of public policy.

2. The *Australian Constitution* does not spell out mechanisms for cooperation. The Constitution of Nepal on the other hand, makes express provision in Pt 20 for managing relations between Federal, Provincial and Local Level governments. The Constitution of Nepal is an exercise of the sovereign authority of the people of Nepal. The inclusion of cooperative mechanisms sends a clear message to those who are entrusted with government at the Federal, Provincial and Local Levels. But in the end the success or failure of cooperative federalism depends upon the people who have to make it work. It depends upon their vision, their good faith and their ability to put the interests of the whole nation above their own political or other interests. As the great Indian Constitutionalist, Dr BR Ambedkar said on the eve of India's independence and the inauguration of a complex federal constitution:

> However good a constitution may be , if those who are implementing it are not good, it will prove to be bad. However bad a constitution may be, if those implementing it are good, it will prove to be good.

3. Those who seek to advance cooperative federalism must work with the constitutional text they are given. They do not have the luxury of having the constitution amended whenever there is a problem. Constitutions are not easy to amend. That feature is a built in protection for the stability of the legal framework within which law-making power, executive power and judicial power are exercised.

4. No amendment can be made to the Constitution of Nepal 'in [a] manner to be prejudicial to sovereignty, territorial integrity, independence of Nepal and sovereignty vested in the

people.' There are therefore fundamental, albeit not well defined, limits on the power of amendment. Amendment to Provincial borders or the list of Provincial Powers set out in Schedule-6 of the Constitution, require the consent of Provincial Assemblies. If a majority of Provincial Assemblies give notice of rejection of such a Bill to the relevant House of the Federal Parliament within three months, then the Bill shall be inoperative.[1] Bills not requiring the consent of Provincial Assemblies require at least a two-thirds majority of the total number of the then members of both Houses of the Federal Parliament.

5. On paper and in the light of experience it is harder to amend the *Australian Constitution*. Any proposed Bill for the amendment of the *Constitution* must pass through the Parliament. It must then be submitted to a popular referendum. It requires a majority of electors voting in a majority of the States of the Federation before the amendment can come into force. Australia has had 49 Referenda and only seven have succeeded.

6. Given the challenges which may be involved in amending our respective Constitutions it is important that constituent governments cooperate in the national interest to ensure that constitutions work effectively in dealing with national issues which engage the powers and responsibilities of all components of the federation.

Cooperative Federalism

7. Broadly speaking, cooperative federalism describes an attribute of a federation under which its component governments engage in cooperative action with a view to achieving common objectives. Cooperation may take various forms:

    - In law-making — the making of complementary and common form laws by different levels of government.

    - By inter-governmental agreements between different executive governments which may be reflected in cooperative administrative arrangements and also cooperative law-making.

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1 Constitution of Nepal, Article 274(7).

- In funding arrangements — conditional funding may be made available by the central government to State or Provincial governments pursuant to agreements about how it is to be applied.

- In the establishment of mechanism for regular communication between the different components of the federation — for example ministerial councils and councils of senior officers of different components of a federation who have interacting responsibilities.

8. Cooperation may be vertical, involving central and regional governments. It may be horizontal, involving regional governments only. It may use joint decision-making mechanisms set up with the support of laws made by the national and regional governments and/or executive agreements between the different governments. It may use joint decision-making mechanisms or a single decision-maker which is set up by one government but has a process of consultation with the others. Federal government and Provincial or State governments legislative powers may also be used to set up a national authority for particular purposes exercising powers conferred on it by a law made by the Federal government and laws made by Provincial governments.

9. Any observations about cooperative federalism in Nepal from a comparative Australian perspective must acknowledge that our federal Constitutions come out of very different eras and histories. Australia's federation was borne out of negotiation between six self-governing colonies on the Australian continent who saw it in their common interest to combine to form one nation. There were no diverse geographically defined ethnic communities to be accommodated. Diversity was not part of the nation-building agenda. Nor was social inclusion. Of course, much has changed since the *Australian Constitution* came into existence. Contemporary Australia is a multi-ethnic society which comprises people from 180 different countries and a population of whom nearly half were born overseas or have one parent born overseas. Our ethnic diversity is a product of immigration which began to be diversified in the second half of the 20th century. Recognition of Australia's indigenous people in the *Constitution* does not appear in the text of the *Constitution*. On the other hand, a referendum to amend the *Constitution* to authorise the federal government to make laws with respect to Aboriginal and Torres Strait Islander peoples was passed in 1967. A recent referendum

to create a constitutional Voice to the Parliament and Executive Government for Aboriginal and Torres Strait Islander peoples was defeated on 14 October 2023.

10. Nepal and Australia differ significantly in population and population density. Australia's population is a little over 26.5 million people. The total land area is 7,682,300 square kilometres. That makes three people per square kilometre. Nepal's population is a little over 31 million, with a total land area of 143,350 square kilometres, which makes 216 people per square kilometre. As you can see from that, a lot of Australia is empty space.

Distribution of governmental powers in Nepal and Australia.

11. Article 56 of the Constitution of Nepal defines its 'main structure' as consisting of three levels — the Federation, the Province and the Local Level.

12. The distribution of powers may be summarised thus:

    (1) The powers of the Federation relate to the matters set out in Schedule-5 to the Constitution — Article 57(1).

    (2) The powers of the Provinces relate to the matters set out in Schedule-6 — Article 57(2).

    (3) The concurrent powers of the Federation and Provinces relate to the matters enumerated in Schedule-7 — Article 57(3).

    (4) Local Level powers relate to the matters set out in Schedule-8 — Article 57(4).

    (5) Concurrent powers of the Federation, Province and Local Levels relate to the matters set out in Schedule-9 — Article 57(5).

    There is a paramountcy provision, which is Article 57(6). Federal law overrides inconsistent Provincial or Local laws.

13. The Federation has power on any matter not enumerated in the combined list of powers referred to above. Financial powers are provided for in Article 59.

14. The *Australian Constitution* sets out the legislative powers of the Federal Parliament by reference to 39 subject matter headings in s 51. For the most part the Federal

Government has concurrent but not exclusive power in relation to those subject areas. There is a paramountcy provision (s 109) which provides that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

Cooperative federalism provisions in the Constitution — comparing Nepal and Australia

15. A comparison of the Constitution of Nepal and the *Constitution* of Australia discloses that the Constitution of Nepal has a very strong and express focus on cooperative federalism. There is no real equivalent in the *Australian Constitution*.

16. Part 20 of the Constitution of Nepal is dedicated to inter-relations between the Federation, the Provinces and Local Levels. An important principle is stated in Article 232 which concerns relations between Federation, Province and Local Level:

> (1) The relations between the Federation, Provinces and Local Levels shall be based on the principles of cooperation, co-existence and coordination.

17. Article 233, which deals with relations between Provinces, provides for mutual assistance in the execution of laws or judicial and administrative decisions. This may be seen as roughly equivalent to s 118 of the *Australian Constitution* which provides that:

> Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

And Article 233(3) which provides that:

> A Province shall, in accordance with its provincial law, provide equal security, treatment and facility residents of another Province.

is similar to s 117 of the *Australian Constitution* which says:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Article 233, however, makes an additional provision not expressly covered in the *Australian Constitution* which authorises Provinces to exchange information and

consult with each other on matters of common concern and interest and to coordinate each other on their activities and laws and to extend mutual assistance.

18. Article 234 finds no equivalent in the *Australian Constitution* and that is the establishment of an Inter-Province Council to settle political disputes between the Federation and a Province and between Provinces. The Article does not say how Inter-Province Councils will settle political disputes.

19. Mechanisms which have been used to effect cooperative federalism in Australia have come out of the general legislative and executive powers of the Commonwealth and the States. One such provision is the power of the Commonwealth Parliament under s 51(xxxvii) to make laws on:

> matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

20. This mechanism can be used to give the Commonwealth Parliament law-making power on a subject matter which is not expressly set out in the *Constitution*. A State Parliament may make a law referring to the Commonwealth power to make laws on a specific matter. An example of the exercise of that power is an agreement made between State and Federal governments that the States will refer to the Federal government a draft Bill for a law which the Federal Parliament may enact as a law of the Commonwealth. It may be a condition of the referral that there be no amendment to the referred law except with the agreement of the referring State.

21. Another mechanism is the making of conditional grants by the Commonwealth Government to the States. This is provided for by s 96:

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

22. It is well-established that the Parliament can make conditional grants relevant to subject areas in which it does not have law-making authority.

Statutory provision for cooperative federalism in Nepal

23. Nepal has an *Intergovernmental Relations Act*. Its long title is:

> An Act designed to manage coordination and inter-government relations between Federation, Province and Local Level.

24. The Preamble to the Act sets out its objective:

> To make necessary arrangement for managing the interrelations of the Federation, Province and Local Level in exercise of their state authority as per the Constitution of Nepal on the basis of the principles of cooperativeness, co-existence, coordination and mutual cooperation in order for strengthening the pluralism based competitive multiparty federal democratic republican governance system adopted by the country.

25. Section 3 of that Act sets out the foundation of inter-relations between the Federal, the Province and Local Level. These are essentially objectives expressed at an aspirational or general level.

26. Article 4(1) requires the Federation to consider the following matters while formulating law or policy under its exclusive or concurrent jurisdiction:

> (a) Shall not encroach on exclusive rights of Province and Local Level.
>
> (b) Appropriateness of involving Provincial and Local Level to implement those subject matters from the point of view of the cost, sustainability or effectiveness of service delivery.
>
> (c) Continuity of the role of Federal, Provincial and Local Levels, without duplication in the implementation of any subject matter.

Similar, although not identical provisions appear in Article 4 in relation to the Provinces and the Local Level. Importantly it requires that Provinces, in formulating law or policy under their exclusive or concurrent jurisdiction consider a number of matters, including:

> (a) Shall not encroach upon the exclusive rights of Federal and Local Level.
>
> (b) Not to be inconsistent with federal law.
>
> (c) Compliance with national policy and priorities and helpful for their implementation.
>
> (d) Appropriateness for the implementation of those subject matters through Local Level from the point of view of cost, sustainability, or effectiveness of service delivery.

(e) Continuity of local role without duplication in the implementation of any subject matter.

27. A similar prescription applies to the Local Level under Article 4(3). Articles 5 and 6 deal respectively with the exercise of exclusive jurisdiction and concurrent jurisdiction. Article 11 sets out matters on which the Government of Nepal is to coordinate and consult with Provincial Governments.

28. Article 11 requires the Government of Nepal to coordinate and consult with Provincial Government on listed matters. They include law and policies on matters of concurrent powers mentioned in Schedule-7 of the Constitution.

29. Under Article 16, a National Coordination Council is established to manage coordination and interrelations between the Federation, Province and Local Level. The Constitution also provides for Thematic Committees 'to bring effectiveness to the implementation of policy and plans and development works through coordination among the concerned line ministry of the Federation, Province and Local Level.' (Article 22(1)).

30. Article 24 provides for the formation of a Provincial Coordination Council. Chapter 5 deals with dispute resolution.

31. There is also an *Intergovernmental Fiscal Arrangement Act 2017*, which opens with the following recital:

> Whereas it is expedient to provide necessary provisions regarding revenue rights, revenue sharing, grants, loans, budget arrangements, public expenditures and fiscal discipline of the Government of Nepal, the State and Local Level …

32. This Act sets out in Chapter 2 what are called 'Revenue Rights'. The terminology used in this Act speaks of the Government of Nepal and State and Local Levels. It creates an Inter-Governmental Fiscal Council to hold and maintain necessary consultation and coordination between the Government of Nepal, the State and Local Level on inter-governmental fiscal arrangements.

33. The Government of Nepal is empowered under Article 34 to give necessary directives to the State Council of Ministers on fiscal-related matters to be coordinated among States. It is the duty of the concerned State Council of Ministers to abide by such

directives. The Government may also give directives to the Local Level on fiscal-related matters. There are Schedules to the Act which set out tax and non-tax revenues which may be levied by the Government of Nepal (Schedule 1) pursuant to s 3(1).

34. Schedule-2 sets out subject matter areas with respect to which the States may levy tax and non-tax revenues. Schedule-3 sets out matters on which tax and non-tax revenues may be levied by the Local Level.

Cooperative federalism in practice in Australia

35. There is a variety of techniques whereby cooperative federalism can be practiced consistently with the *Australian Constitution*. Some of those have already been mentioned in passing.

36. Until recently, the leading political mechanism for the practice of co-operative federalism in Australia was the Council of Australian Governments (COAG), which was established in 1992. Its members were the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association. It adopted an extensive reform agenda which emphasised 'co-operative working relationships'. That agenda involved the implementation of an intergovernmental agreement on federal financial relations which commenced on 1 January 2009. The object of the agreement was 'to enhance collaborative federalism by reducing the previous complexity of the Commonwealth's financial relations with the States and the Territories, promoting greater flexibility in service delivery, and enhancing public accountability for achieving outcomes.'[2] The agreement provided an umbrella for a number of National Agreements, National Partnerships, Project Agreements and Implementation Plans. Six National Agreements covered the service areas of health care, education, skills and workforce development, disability, affordable housing and indigenous reform. National Partnership Agreements were said to define mutually agreed objectives, outcomes and outputs and performance benchmarks or milestones related to the delivery of specific projects, improvements in service delivery or reform. Project Agreements were a species of national partnership used to implement

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[2] Council of Australian Governments, 'COAG's Reform Agenda' <https://www.coag.gov.au/reform_agenda>.

projects considered low-value and/or low risk. Implementation Plans were subsidiary documents to some of the National Partnership Agreements.

37. Beyond the federal financial relations framework, COAG, in 2011, agreed upon five themes of strategic importance said to 'lie at the intersection of jurisdictional responsibilities'. They were:

    1. A long-term strategy for economic and social participation.

    2. A national economy driven by our competitive advantages.

    3. A more sustainable and liveable Australia.

    4. Better health services and a more sustainable health system for all Australians; and

    5. Closing the gap on indigenous disadvantage.

38. In a report in 2014, the National Commission of Audit (Commission) pointed to the generation of over 300 documents under the intergovernmental agreement process. In addition to the six National Agreements, there were 51 National Partnership Agreements and 230 Implementation Plans. The merits of the co-operative arrangements thus described have been debated and in particular criticised by the Commission.[3]

39. With the advent of the COVID-19 pandemic, COAG was discontinued and a National Cabinet process established under which the Prime Minister and the Premiers met together principally focussing upon national and local responses to the COVID pandemic. Ministerial Councils were discontinued.

40. It is unnecessary to explore the merits of the operation of COAG and the change to a National Cabinet system. It is sufficient to observe, at least in a formal sense, the practice of cooperative federalism depends upon inter-governmental arrangements between executive governments. Such arrangements and agreements may result in

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[3] Report of the National Commission of Audit, *Towards Responsible Government,* Phase One (February 2014) Ch 3.3.

cooperative legislation. Such cooperative legislation may take the form of uniform laws enacted in each component of the federation.

41. An early example of uniform legislation in Australia was the *Uniform Companies Act* enacted by each of the Australian States in 1961. Under that scheme each State passed its own Companies Ac in the same form as other States. I will return to the story of cooperative companies legislation in Australia shortly. Another more recent example was the enactment of Civil Liability Acts regulating claims for damages for civil wrongs or torts in each of the Australian States and Territories. Uniform Evidence Acts are in place in most of the Australian States. Their enactment began with the *Evidence Act 1995* (Cth), which set out the rules of evidence to be applied in Federal courts. Mirror legislation was subsequently enacted in New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory. Western Australia is shortly to join that scheme but with a variation in relation to a particular class of evidence called 'tendency evidence'.

42. Plainly, mirror legislation does not depend for its efficacy upon take-up by all of the components of the federation. In the case of Australia, there may be some States signing up to mirror legislation initially and others joining in later. Ministerial councils or some equivalent may provide oversight for the operation of such legislation. There is nothing to prevent a State which has enacted uniform legislation from amending its own Act without reference to the other States.

43. A particular and perhaps more systematic approach to cooperative legislative action involves an agreement between all components of the federation where one jurisdiction, that is to say one State or the Federal Government, passes a law which the other States adopt as their own.

44. An example of that technique is found in the field of energy regulation in Australia. In 2004, the Commonwealth, State and Territory governments entered into the Australian Energy Market Agreement. The Agreement has been amended a number of times. It provides for the establishment of a regulatory body, the Australian Energy Regulator (AER), governed by Pt IIIAA of the *Competition and Consumer Act 2010* (Cth) and the Australian Energy Market Commission (AEMC) established by the *Australian Energy*

Market Commission Establishment Act 2004 (SA). The Agreement records that different jurisdictions have different roles within the national framework:

- The Commonwealth, New South Wales, Victoria, Queensland, Tasmania and the Australian Capital Territory undertook to enact implementing legislation to participate in a National Electricity Law, a National Gas Law and a National Energy Retail Law. Those laws confer functions and powers in respect of electricity and natural gas on the AEMC and the AER. They enable those bodies to exercise functions and powers within each of the jurisdictions conferring those functions and powers.

- South Australia undertook:

    - to enact the *National Energy Retail (South Australia) Act 2011* (SA) to create the National Energy Retail Law under which the National Energy Retail Regulations and the National Energy Retail Rules operate;

    - to amend the pre-existing *National Electricity (South Australia) Act 1996* (SA), which gave effect to the National Electricity Market in accordance with the Agreement;

    - to enact the *National Gas (South Australia) Act 2008* (SA) to create the National Gas Law under which the National Gas Regulations and the National Gas Rules operate.

- Western Australia undertook only to confer functions on the AEMC in respect of natural gas pipeline access for which purpose it passed the *National Gas Access (WA) Act 2009* (WA) retaining the option to join the various national laws; and

- The Northern Territory undertook to implement the National Gas Law only.

45. The implementing legislation was enacted by each jurisdiction as a law of that jurisdiction within its territorial limits and made special provision for the application of the National Gas Access (Western Australia) Law. The Commonwealth legislation, the *Australian Energy Market Act 2004* (Cth), applies the national laws in offshore areas of

each State and Territory and the Western Australian law in respect of offshore pipelines in that State.

46. Cooperative arrangements may evolve and sometimes in a rather untidy way. The history of the regulation of corporations in Australia provides a case study for a succession of different cooperative arrangements endeavouring to effect national consistency.

47. In 1961, under a Uniform Companies Act Scheme, each State Parliament passed a Companies Act which mirrored the terms of the Companies Act of every other State. The law in each State had application only within the territorial limits of its jurisdiction. State judicial power over companies was exercised by the courts of the States. There was thus a mosaic of similar laws throughout the country rather than one law covering the whole country. The scheme was simple in concept, but susceptible to the development of differences over time because of pressures brought to bear upon particular State legislatures.

48. In 1981 the Uniform Companies Act Scheme was replaced by another co-operative scheme based upon the *Companies Act 1981* (ACT) enacted by the Commonwealth Parliament for the Australian Capital Territory in reliance upon its power to make laws for the territories under s 122 of the *Constitution*. Each of the States passed a Companies Code which reflected the provisions of the Commonwealth Act. The Scheme was overseen by a Ministerial Council for Companies and Securities and a national regulator, called the 'National Companies and Securities Commission', which worked in conjunction with State regulatory authorities.

49. In 1989 the Commonwealth, acting unilaterally in reliance upon its power to make laws with respect to corporations under s 51(xx) of the *Constitution*, passed the *Corporations Act 1989* (Cth). That imposed a national scheme of corporate regulation established by a federal law. It established an Australian Securities Commission (ASC) under that Act. In 1990, the High Court held elements of the Act invalid because the Commonwealth did not have power to make laws about the incorporation of companies.[4] Following that decision the Commonwealth Parliament enacted the *Corporations Act 1989* (ACT) and the *Australian Securities Commission Act 1989* (ACT), each being a law for the

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4 *New South Wales v Commonwealth* (1990) 169 CLR 482.

Australian Capital Territory. The States each passed their own statutes which applied the provisions of the ACT Acts, designated as the Corporations Law and the ASC Law respectively, as laws of the respective States. The States also purported to confer jurisdiction on the Federal Court and the State Supreme Courts with respect to civil matters arriving under their Corporations and ASC laws. In 1999 the High Court struck down so much of the legislation as purported to confer jurisdiction on the Federal Court with respect to matters arising under the State laws.[5] The difficulties caused by this invalidation of the cross vesting of State jurisdiction to the Federal Court were compounded by decisions of the High Court concerning scheme laws which conferred functions under State law upon Federal authorities such as the Commonwealth Director of Public Prosecutions and the Australian Securities and Investments Commission.[6]

50. The invalidation of the cross vesting arrangements under the cooperative corporations scheme led, ultimately, to another cooperative solution whereby the States referred to the Commonwealth the power to make laws in terms of the texts of a proposed *Corporations Act 2001* (Cth) and an *Australian Securities and Investments Commission Act 2001* (Cth). These Bills largely reflected the terms of the former Corporations Law and ASIC Law. Each State also referred to the Commonwealth power to make laws with respect to:

> The formation of corporations, corporate regulation and the regulation of financial products and services ... to the extent of the making of laws with respect to those matters by making express amendments to the corporations legislation.

The latter reference had effect only to the extent that the matter was not already a subject of Commonwealth power. There was a five year sunset clause for each reference.

Conclusion — the centralising effect of cooperative federalism

51. Cooperative federalism as appears from the Australian experience and no doubt from other national experiences, tends to be a work in progress. It is to be expected that

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5 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 556 [54] (McHugh J)..

6 *R v Hughes* (2000) 202 CLR 535, see also *Byrnes v The Queen* (1999) 199 CLR 1; *Bond v The Queen* (2000) 201 CLR 213*; McLeod v Australian Securities and Investments Commission* (2002) 191 ALR 543. See also Alex de Costa, *'The Corporations Law and Cooperative Federalism after R v Hughes*' (2000) 22 Syd Law Review 451; James McConvill and Darryl Smith, 'Interpretation and Cooperative Federalism; *Bond v The Queen* from a Constitutional Perspective' (2000) 29 Fed Law Review *75.*

developing federations will learn by experience. Some initiatives will be found to be defective or able to be improved in the light of experience.

52. There are some caveats attaching to cooperative federalism. It is designed to serve objectives which go well beyond those achievable by the exercise of central legislative power and the separate exercise by States or Provinces of their powers. However, it may have a tendency to centralise power despite the inter-governmental agreements and supervisory arrangements involved in its implementation. Every topic which is treated, even if by agreement, as one requiring cooperative action becomes potentially a topic of which it can be said that it is best dealt with at a national level. Once a topic has been accorded national significance in this way, it becomes difficult for participating governments to withdraw from the arrangements and allow fragmentation to be substituted for a unified approach. Cooperative arrangements based on inter-governmental agreements and ministerial councils also raise questions about the accountability of the Executive Governments to their Parliaments and the precise location of responsibility for the administration of the schemes.

53. Cooperative federalism is not an end in itself. It is a means to an end — the better exercise of legislative and administrative powers to achieve better national laws and practices than would be achieved if all governments simply went their own way under the constitution. It is important, of course, to prioritise the areas in which cooperative mechanisms should be established and implemented. There are no doubt many competing priorities in this area for Nepal and a desire to explore the ways in which they may best be defined and addressed. It is a pleasure to be at this conference and to be able to participate in that discussion.