



Citizen-Centered Approaches
to State and Market



Nepal: From Stalemate to State-Building

October 2009

Institute for State Effectiveness

600 New Hampshire Ave NW
Suite 900
Washington DC 20037

+1 (202) 298-5959
info@effectivestates.org

© 2014

Nepal: from Stalemate to State-building

October 2009



Introduction

Nepal's politics have reached a stalemate. A creative resolution of the stalemate could produce the pathway to stability, peace and security, while failure to reach political consensus could deepen the crisis, thereby marking a descent into a vicious circle of instability, disorder and insecurity. The slow pace of progress by the Constituent Assembly is a reflection of this political situation. Progress on constitution making, therefore, is not likely without agreement on a core set of constitutional principles that could underpin the process. At the same time, however, rights and freedoms have become divorced from the obligations and commitments they entail, which has raised expectations for the constitution to unreasonable levels.

Both the quality of governance and the problems with the economy are also related to this political impasse. A shift in governance, however, is discernable, with the President, the Prime Minister and various key ministers now emphasizing the need to build the authority of the state through institutions. A segment of entrepreneurial Nepali businessmen has access to global knowledge and networks, but the absence of political agreement on the enabling environment for the private sector is depriving the country of economic dynamism and jobs. The gap between the people and the political elite is growing with issues ranging from food security, cholera, inflation, and peace not receiving sustained attention from politicians and the authorities. While there is agreement on identification of key issues, there is little progress in terms of defining options and creating mechanisms to secure political agreement on the resolution to key challenges.

In this paper we will take stock of each of the above issues in more detail from a state-building perspective and conclude with a series of recommendations on the creation of mechanisms through which the international community can support positive change. A reactive "holding pattern" can be avoided through shared analysis and concrete and achievable plans for forward movement in specific sectors or on targeted issues. The recommendations below are preliminary, but could form the basis for positive change if implemented with care.

A Citizen Perspective

There is a growing gap between the discourse of rights and the reality of delivery in Nepal, which is fuelling high expectations that seem unlikely to be met. As a result, the majority of Nepalis now feel that the country is going in the wrong direction. The peace dividend has not been realized and ordinary people are concerned with serious issues- food security, inflation, strikes- that are simply not registering within the discourse of the political elite. Indeed, while the risk of systemic violence of the sort experienced during the war may have decreased, human insecurity for the average Nepali seems to be increasing with the proliferation of armed gangs and criminal groups. Moreover, the citizen perspective has become fragmented. It is no longer a view of joint Nepali citizenship as it appeared to be after the Jana Andolan II, but a view of specific segments of the population which often compete against each other and can be mutually exclusive, with the risk of polarization, identity politics, and the increase in ethnic identities that this entails. In the Terai, citizenship papers can now be obtained more easily, but rather than supporting a sense of inclusion the Madheshi are again demanding rights that are neither feasible nor affordable.

A useful step would be for donors to support a citizenship agenda, and communicate to the government and people of Nepal that there must be a balance between rights and obligations within the new state as framed in the constitution. There are elements of citizenship to be built upon- communities are extremely active at the village level and are engaging constructively with the market, whether in the form of labor, remittances, or goods. Yet while Nepalis participate in joint management of resources in the community, this is only because government provision of services has been so poor, and while they are discovering the market, politicians have either impeded economic development or, in the case of the Maoists, distrusted it.

If the new constitution can bring together the diversity of voices that have emerged into a coherent process for state restructuring, and generate a vision that unites the population, real progress is feasible. The largest impediment to this process is not technical capacity, which exists throughout Nepal at all levels and in all sectors, but the absence of a political agreement that would allow for tangible progress.

Political Dynamics

There are no neutral voices in Nepal. The country is over-politicized- all aspects of governance from administration to economics to law are affected by the presence of political parties and subordinated to political interests. From the central bureaucracy and large businesses to district level administration, this has become a central issue. There is now a new appreciation of the relative strength of the various political parties that can either result in a stable or unstable equilibrium in the system. Both the entry and departure of the Maoists from government has reduced fear. In government they were not able to change the system fundamentally and the creation of the multi-party government has indicated that a government can also be formed in their absence. Indeed, the alleged corruption of Maoist ministers while they were in power has, in a perverse way, been reassuring to the political elite, as it has normalized them within the existing political milieu. There are still two discourses surrounding the Maoists- a public political discourse centered on the use of force and the threat of a return to the jungle; and a private discourse among leaders based on the idea of reaching agreement on political rules. The public discourse from the other political parties centers on the Maoist threat, while in fact the political elite in private discourse indicate that fear has actually diminished, and there is room for political bargaining. Thus an equilibrium of sorts has emerged, but the overall trust in the intentions of the various interlocutors is weak. Three key conclusions can be drawn from this:

- i) The Maoist party, previously seen as a single strategic force with a unified agenda, is now neither seen by others or necessarily by itself as demonstrating that same force;
- ii) The other political parties, particularly the Nepali Congress and the United-Marxist Leninist Party (UML), have demonstrated their staying power and a capacity for matching the Maoists within the formal processes of governance;
- iii) There is now an appreciation by both the Maoists and the other political parties that they will be competing within the political system for the next ten-to-twenty years, which is in turn affecting their approach to decision-making.

Recent analysis such as the August 2009 report by the International Crisis Group¹ reflects the negative aspects of this new balance of forces and conveys an eminent sense of collapse. While this cannot be ruled out, the key actors themselves do not give an indication that they are thinking of this as the potential endgame. The pattern of the last three years demonstrates that there has been a repeated cycle of near-collapse followed by last-minute resolution of significant political issues which has bred a new appreciation for the mutual strengths and weaknesses of leadership among the political elite, and indicated a resilience in the system. However, goals have been set without clear agreement on the process by which to reach those goals, and clarifying this process has been costly for the Nepali society and economy. In the current situation, there is an agreement on the perception of India as the dominant external actor setting limits on the field of maneuver for political actors. This should not be construed as the ability to impose a script and an order on Nepal- as this is not the case- but rather influence the direction, pace and reach of the various parties to affect the situation.

The appreciation of the new situation and filtering of current challenges has produced tensions within the political parties as well as between them. This has brought out the fact that there are differences between the incentives of party leaders as individuals, the party leadership and the lower-level party actors. The

¹ *Nepal's Future: In Who's Hands?* Asia Report No.173, 13 August 2009, International Crisis Group, available at: <http://www.crisisgroup.org/home/index.cfm?id=6269&l=1>

different factions within parties mean that there are now as many agreements outside as within. It also means that there are increasing divergences between actors in terms of the way in which they judge party strengths and weaknesses, and control of party workers is not always assured from the political elite downwards.² The top (leadership) and bottom (citizens) are for different reasons now finding that pressure is building for political stability. The mid-level party activists, however, have different incentives within each political party and this is creating a dangerous gap in the middle. Law has been subordinate to politics, rather than politics to law- this transition needs to take place imminently if Nepal is to fill this gap and reach political agreement to move past the current stalemate.

The Nepali Congress (NC)

The senior NC party figures are seeking a preparatory convention in 2009 and a full convention in March 2010. These meetings will be extremely pivotal, given that there is now a clear distinction between the agenda as seen by G.P. Koirala and the leadership group within the party directly below him. The Central Committee, both in public and in private is making statements differentiating between the positions of the party and the leader.³ As a result there are three scenarios for the near-term future of the NC: i) dynastic succession; ii) democratization and renewal through successful integration of competing views and ideas; iii) slow but systematic marginalization, with loss of support to regional movements and other political parties. If the party could be convinced to bring forward the party convention to this year, this would be helpful in at least identifying which of these three options is most likely.

The United Communist Party of Nepal (UCPN) Maoists

The Maoists face a choice between i) seizing power through a revolutionary movement or adhering to the political and peace processes; ii) seizing the state through the political process and restructuring it according to their own ideas; or iii) embracing a pluralistic system, agreeing on the rules of the game and pushing their agenda through both cooperation and competition with other political forces. The issue that currently creates mistrust is that even when the leadership talks in terms of working within the political system the other political parties see this as a cover for efforts to subvert the state. The Maoist convention early next year- the first in 18 years- will be a critical indicator of how the party will evolve moving forwards.

The Communist Party of Nepal, United-Marxist Leninist (UML)

The UML is the party that has gone furthest in terms of internal democratization, with competition between two key leaders resolved through an internal democratic process.⁴ Occupying key posts in the government has created its own tensions within the party with three potential outcomes: i) an unstable coalition of interests, with one segment of the party leaning towards the NC and the other towards the Maoists; ii) the UML as a mediating force that plays the indispensable broker between the other two main parties and can produce agreement on the rules of game; iii) the third party that can outmaneuver the other two by becoming the critical centrist force, balancing stability and change.

The Madhesi Parties

An equilibrium has emerged between the three main political parties, but the Madhesis and other ethnic based groups could disturb this equilibrium, as they are not treated as equal players and have demonstrated the capacity for disruption. The Madhesis are now accommodated within the key power

² It is unclear at times whether the parties control factions that sometimes carry out actions in their name, or whether the Maoist leadership is in total control of its cadres.

³ The open secret is that Koirala would like to see his daughter become President of the party and Prime Minister or Deputy Prime Minister of the country. Early agreement between Koirala and Prachanda would not be seen as beneficial to the party, so it remains to be seen whether Koirala as the dominant, hereditary leader can still impose his will.

⁴ The Prime Minister is currently a former leader of the party who lost elections in two constituencies, is not a member of the Constituent Assembly, and had not openly backed the Chairman of the Party.

structures as individuals, with a significant number CA members and cabinet posts (49% of the cabinet is Madhesi in origin), but have also not seen movement on the fundamental problems in the Terai. This is in part due to their inability to articulate a clear agenda. As a distinctive regional series of movements, they have also not been able to claim the same space at the national level as the main political parties.

The formal structure of these political organizations is only a façade. Underneath are more complicated amalgams of interests- legal, semi-legal and outright criminal- which explain the funding arrangements, fields of maneuver, and material resources that a party can yield. While the parties have a relatively good understanding of their own dynamics of this sort, there are no compelling analyses of each others' submerged interests. Allegations of corruption and intimidation against some Maoist ministers, to raise resources for the party or for themselves, particularly complicate the situation. From a comparative perspective, three scenarios for change can now be identified:

- i) Agreement on a state-building strategy through a set of rules that can bind political forces, consolidate authority and lead to agreement on institutions that are separated from the immediate interests of each political force;
- ii) A stalemate (the "Lenin Tango"), through which one step forward is followed by two steps back and none of the underlying causes of instability and conflict are resolved;
- iii) Violence as a result of confrontations to resolve the issue through force. This may be through the use of official organizations to enforce the authority of the government or the growth and use of armed forces against the government and other groups.

Given that option iii) was used during the monarchy, and that option ii) the stalemate, has characterized the past three years since the Jana Andolan II, the ground may now be fertile for option i). An appreciation of the fact that scenarios ii) and iii) are still very possible is important, however.

The Legal Perspective

The Interim Constitution specifies that by May 2010 a new Constitution must be in place, with six month extension possible based on the declaration of a national emergency. This means that timing is critical and the coming months are pivotal for the rule of law agenda in Nepal. Discussions with major stakeholders indicate the following key legal issues to be noted by the international community:

- i) There is a consensus among stakeholders and participants in the process that the absence of an agreement on a series of constitutional principles has significantly hampered the workings of the Constituent Assembly. The current process, through which ten constitutional working committees are drafting reports to feed into the larger constitution, has become the articulation for differences between political parties rather than a mechanism for reaching consensus. Only six of the committees have finished their reports as of the end of September, with four outstanding. While various of these should be finished soon, all of the drafts suffer from significant issues and the reconciliation committee has the unenviable task of bringing these drafts together into a coherent whole;
- ii) The Chairman of the Constituent Assembly has gained widespread respect through his intelligence and ability to mediate between competing interests. Moreover, a number of prominent legal thinkers have been brought into the process, ensuring that the capacity exists to move forwards in terms of the writing of the constitution if political consensus emerges. In this sense the current timeframe does not pose an obstacle, but this does again highlight the need for political agreement;

- iii) The Interim Constitution was more of an inclusive social treatise than a legal document, and hence it has proven difficult to implement many of the provisions in practice. As of now, the difference between the constitution as the source of other laws, and lawmaking as a more dynamic process has not been firmly established or agreed upon. The net result is that the new constitution is becoming seen as the panacea for Nepal's problems rather than merely as the embodiment and basis for a rule of law agenda over the medium-to-long-term.

The constitution in Nepal must become the platform for a rule of law program that defines the limits of acceptable behavior, the arrangements through which authority is exercised, and how a shift can be made in practice from a dynastic order to a republic. It is the set of rules from which other rules will be derived, and from which the rights and obligations of Nepali citizens will stem. A key part of this is the level, form and functions of governance which should be at the heart of the discussions on federalism (but are currently not receiving the analysis they require- see below). The future is not foreseeable, and opportunities and limits change over time- therefore it is also critically important that the constitution includes a mechanism for changing, modifying and interpreting rules rather than locking competing interests into a fixed dynamic.

Governance

There are the beginnings of a technical space of governance in Nepal. While this is not to be over-emphasized, it is a positive change over the past year or so. Despite the ongoing political problems, neither the Prime Minister nor other key ministers are giving any indication that their departure is imminent, and this is allowing for a certain confidence to seep into the planning processes. In turn, the approach adopted in the sectors outlined below (security, energy, public finance) through setting objectives, ensuring cabinet approval and then implementation, can provide some lessons to be applied in other areas.

Institutions

Nepal has a set of organizations with specific functions and mandates in place, which by law or tradition are invested with the authority and provided with the resources to carry out certain functions. The manner in which these organizations are managed is both conditioned by their past and the nature of their leadership and management. Presently there may be an emerging trend that certain functions are being managed as part of a reassertion of the authority of the state rather than as the exercise of the personal or political preference by those in charge. Should this be the case going forwards, the international community may have the opportunity to partner with the government on a program to gradually help rebuild the authority of the state by focusing on core state functions.

The office of the Presidency, for example, has emerged as a mechanism for checks and balances. Certain duties were assigned to the Presidency in the Interim Constitution, including to monitor, manage and supervise the army. Thus when Prime Minister Dahal dismissed the army chief without the President's consent, the President reversed this decision (on the appeal of 18 of the 24 parties), resulting in the resignation of the Prime Minister and the departure of the Maoists from government.⁵ Judgment of the decision aside, the point is that when an office is vested with an authority, the manner in which that authority is exercised matters. In this case a distinction was drawn between the authority of the state as represented by the President, and the authority of the executive branch as represented by the Prime Minister. The incident has revealed that constitutional principles are at stake and will need to be spelled out clearly in the forthcoming constitution to ensure clear interpretation.

⁵ Currently the issue is with the Supreme Court and part of the ongoing discussions between the Maoists and the other parties is how to provide a resolution to the issue in parliament.

Indeed the behavior of the army more broadly supports the distinction between government authority and the state. The army obeyed the democratic government after Jana Andolan II, and did not question the decision of the parliament to abolish the monarchy, thereby sealing the fate of the king. It then pledged allegiance to a Maoist Prime Minister as head of the Executive branch of government, a remarkable adherence to rules, given the history between the Maoists and the armed forces. This again highlights the fact that rules have become entrenched. The recent uneventful retirement of the army chief General Katawal, and his replacement with General Gurung, took place according to the defined rules and demonstrates further that in the realm of a key state function- security- the strength of the institutional system is apparent.

Our discussions with a number of key politicians in government indicated this distinctive emphasis on reassertion of the authority of the state. While this could easily disappear with the departure of a small number of individuals from their positions, it is nonetheless worth noting and exploring its possible implications. This emphasis on governance has not arrived at the expense of politics, but through forging political consensus, which must be expanded if Nepal is to move from stalemate to state-building.

Security

The five security action plans now under implementation by the Home Ministry, while not without problems, demonstrate to some degree the technical delivery of security as a state function.⁶ The process has been based on consultations inside and outside the government, the formulation of clear objectives by the ministry, and tight management and monitoring of the outcomes. We witnessed the roll-out of these same five plans at the district level and saw its verification both by the human rights community and by the business community. While no-one is calling this a fundamental change as yet, there is a consensus regarding its current reality and potential significance. The challenges regarding deepening the process are going to be in four areas in particular:

- i) The predominant presence of armed groups in the Terai. The manner in which these groups are identified, brought within a rule of law framework, and disarmed by government authorities will have significant implications;⁷
- ii) The extent to which Maoist cadres in general and the Young Communist League (YCL) in particular continue to use violence against other political actors, businesses and the state will test the credibility of the government;
- iii) The extent to which cartels, labor unions and illegal armed gangs question or permit the consolidation of authority is going to be significant both in terms of short-term security issues and long-term political-economy issues;
- iv) The extent to which individuals within the law and order machinery can trust in the sustainability of the programs to assert their authority and overcome entrenched corruption- without trust that the programs will be maintained, commitment will be lacking;
- v) Resources, both material and in terms of political support, morale and trust in the government. At the district level, the lack of even rudimentary equipment, and the immense burden caused by official visits of ministers undermines the ability to put the plans into effect.

⁶ The five plans focus on: urban crime, drugs and human trafficking; the security situation in the Kathmandu valley; the disarmament of the 109 identified armed groups in Nepal; highways and essential services; and coordination between the government and political parties and the government and civil society on security issues.

⁷ A useful exercise for the home ministry would be to map exactly where these 109 armed groups are, how big they are and what level of threat they present to the state.

Energy

There is a national consensus- among the political elite, the business classes and the people- on the critical importance of the energy sector. The Maoists also understand the benefit of a common approach to energy issues and significant progress could be made with India on the sector. This makes energy unusual in Nepal and win-win solutions are quite achievable if an appropriate approach is adopted. The critical questions are whether:

- i) This consensus can be translated into a concrete program for expansion of micro-hydro over a 5-to-15 year duration, and whether the donors will make a firm commitment to the provision of power to rural Nepal through a government-led program, and can provide a framework to ensure safe and reliable transmission;
- ii) The various stakeholders can arrive at a framework for governance of the sector that is technically and economically feasible and politically acceptable to the major political forces in the country, and whether all the parties to the government can commit themselves to seek a political risk guarantees from international organizations such as the Overseas Private Investment Corporation (OPIC) to assure potential investors of the enabling environment for investment;
- iii) A level playing field can be created for energy development. Under previous governments, permissions have been granted to a significant number of entrepreneurs for the production of power. There is a consensus within the business community, however, that Nepali entrepreneurs can at best mobilize \$500 million for the sector and that they simply lack the financial resources to develop the vast potential of the country in terms of hydro-electricity. Moreover, concessions have in the past been used illegitimately as a mechanism for securing equity by way of connecting entrepreneurs with regional and foreign investors. Whether fair rules can be created for Nepali investors remains a significant challenge;
- iv) Expectations of the communities in the areas with micro-hydro potential are extremely high, and the balance between profitability, local participation and benefits will need to be clearly established and communicated with the population;
- v) Given existing treaties and the significance of the future Indian market for electricity, an agreeable framework can be reached, based on coherent feasibility studies, that ensures both that Nepal has the necessary infrastructure in place and that beneficial contractual arrangements are put forth.

Public Finance

While the budget process is currently proving problematic, public financial management has improved in Nepal over the past fiscal year based on reforms pushed through by Finance Minister Bhattarai, existing capacity within the system, and incentive programs that are to some degree motivating staff. Key public finance issues are the following:

- i) The government is able not only to collect revenue, but has also demonstrated a significant increase in revenue collection ability, which was 54% higher this year than last. The revenue target is now Rs 76 billion and analysis indicates that this will be met;
- ii) An emerging constellation of capable individuals, in the Vice-Chairman and the members of the Nepal Planning Commission, the Chief Secretary and the Finance Secretary, is in place which would allow a set of goals agreed politically to be turned into bureaucratic mandates and delivered upon operationally;

- iii) The worrying trend however, is the nature of social commitments (such as pensions, civil service wages, payments to widows etc) and the medium to long-term consequences of these from an affordability perspective, that have not yet been adequately addressed.⁸ These commitments have risen to over Rs 10 billion in the most recent budget and there does not yet seem to be a recognition that entitlements are easy to create but extremely difficult to remove;
- iv) The constraints on capital expenditure are still in place, with expenditure in the last fiscal year not as high as expected, although the Ministry of Finance has now coordinated with line ministries to ensure the development of expenditure timelines, instigated various procurement reforms such as e-bidding, and developed three year budget allocations to ensure predictability through a Medium-Term Expenditure Framework;⁹
- v) The education sector has acquired a SWAp framework through which governance arrangements are now in place, so that donors and government can focus on delivery. If movement from planning to implementation on the SWAp in the health sector can be consolidated, and other SWAPs can be developed in key sectors such as rural roads, this will improve donor coordination and government effectiveness significantly.

Development

One of the unique assets in Nepal is the strength of the community sector, from forestry to micro-hydro to communication. Community management has shown enormous success and resilience, and a serious case can be maintained that Nepal has reversed the tragedy of the commons. The issue for development, therefore, is not micro-level cooperation, where thousands of examples are clear, but the macro-level collaboration that is undermining micro-level processes. A great deal of resilience in the country is related to the roles of the community sector in both filling the gaps in state provision of services and the lack of development of the market. While the demands to make investment inclusive have grown greater by the year, supply has proven difficult in practice, as the government has failed to articulate a clear vision of the economic system, or delineate the roles to be performed by the state. Key observations on development, therefore, would include the following:

- i) The disparity between the discourse and the delivery of services has grown in Nepal as a result of two key factors: the absence of an agreement on a common minimum program and the failure to address economic governance both generally and within specific sectors, as described above;
- ii) The economy remains heavily remittance dependent, with remittances totaling around Rs 200 billion in the current fiscal year (25% of GDP), and increasing over 65% in the first half of 2008-numbers that do not include remittances from India.¹⁰ The number of Nepalis working in India is estimated at between 6-7 million, thereby indicating that economy is even more remittance dependent than officially assumed;

⁸ The Nepal Peace Trust Fund may also be setting up recurrent costs that will subsequently over-burden the Treasury. Pressure should be placed on the Trust Fund to ensure transparency and avoid duplication of core state functions by existing ministries.

⁹ The Nepal Planning Commission is also likely to produce a prioritized framework by February 2010. The recent World Bank study on the construction industry includes some useful recommendations for action in this area, which would help to ease the expenditure constraint.

¹⁰ Nepal is falling into something of a remittance trap, whereby demand for accountability may be decreasing as remittances increase to pay for goods and services, in turn reducing the pressure on the government to fulfill state functions. Remittances do not seem to have been affected as much as feared by the global economic downturn, but any significant decline in remittances going forward would have a significant destabilizing effect.

- iii) India has emerged as the largest donor with current annual assistance estimated at \$120 million, although a review has not yet been carried out by India, Nepal or the international community to assess the impact of Indian assistance. Of India's portfolio of around 300 projects, 200 or so are administrated by local procedures at the district level (not central government). The remaining 100 projects are approved by the government, implemented by the Embassy, treated as turnkey projects, (mainly focused on large-scale infrastructure) and then handed over to the government of Nepal upon completion. As India does not have a foreign aid bureaucracy, the projects are directly managed from the Embassy in Kathmandu without any overheads for management taken in Delhi;¹¹
- iv) A series of macro-level reforms that took place in the early 2000's have created a capability within the Nepali bureaucracy to manage an expanding revenue collection program and trace expenditures. During the same period, the banking sector in Nepal was modernized in terms of its infrastructure and capabilities, and consequently the bulk of remittances are transferred through legitimate banking channels;
- v) Nepal has a number of creative entrepreneurs that could have spearheaded a job creation agenda and scaled-up their activities over the past three years. The absence of the enabling environment, the power of the unions and uncertainty regarding property rights, however, have prevented these entrepreneurs from generating legitimate wealth. Nepal's banks have not been able to price risk and as a result their lending has become more conservative, and now requires property as collateral. Simultaneously a trend has emerged that not only favors capital intensive investments but denies support to labor-intensive projects given what is perceived as the inevitable cost of labor disputes.

Recommendations

Concrete progress in Nepal requires agreement upon, and implementation of a number of key actions across the political, legal, governance, and development domains as outlined above. These recommendations include the following:

On Political Dynamics:

The high-level political mechanism proposed by G.P. Koirala and currently under discussion in Kathmandu may be useful as a forum for dialogue among the leaders within the three main parties (if it is supported through a capable secretariat or working committee). However, an agreement based on the discussions of leaders who are not necessarily in synch with their parties and may be making decisions for personal rather than collective benefit will not be lasting. In order for political agreement to endure, the necessary consensus has to be built within and across all political stakeholders. Therefore, recommendations to the international community on political dynamics at this stage include:

- i) *Develop Consensus on Progress.* Move to verify the possibility of each of the three scenarios outlined above (progress; stalemate; regression); establish consensus on the drivers of each potential outcome; and coordinate signaling to the Nepali actors regarding the desirability of the first option. This requires the creation of a donor/diplomatic/NGO mechanism to meet regularly, which would analyze the political situation in terms of emerging patterns and potential outcomes. This would, in turn, avoid personality driven reporting and ensure coordination between analysis and action;
- ii) *Ensure Comparative Understanding.* Develop an understanding of the key issues and formulate a set of options regarding how these issues have been resolved in other countries and how they might be resolved in Nepal. This comparative analysis will allow Nepal's external partners to

¹¹ Chinese assistance is also going to be extremely significant. The creation of a forum for regular discussions between the World Bank, Asian Development Bank, DfID and the Indian and Chinese would be useful.

provide constructive input on key concerns such as federalism and restructuring the state. Outputs could take the form of succinct notes outlining the concrete range of options for progress as the basis for dialogue between actors. Discussion and coordination will be particularly important with India, which is now the most significant external stakeholder in Nepal;

- iii) *Generate Fora for Discussion.* Facilitate interactive fora for the political elite and other groups, to ensure that concerns and interests are heard and mechanisms for bridging differences created. These meetings could take the form of issue-centered workshops of leaders from across the major parties that are facilitated by neutral interlocutors with comparative understanding. The idea is to ensure that issues are understood from the bottom-up and summarized in official forums in a way that allows for consensus;
- iv) *Broker Honestly.* Explore the possibility of whether a member of the international community can serve as an honest broker among the top political leaders. This may be the UN in this case, if the agreement can be put in place, but could also be a representative from another international diplomatic mission or high-level NGO. The resources of the Club of Madrid, for example, could be deployed constructively in this way.¹²

On the Legal Perspective

Recommendations to the international community on legal issues at this stage include:

- i) *Analyze Comparatively.* Conduct in-depth comparative analysis of what provisions a constitution should and should not contain, the balance and framework of rule for the process, and the means by which to ensure successful implementation. This can take place through analysis of historical constitutional-writing processes, in Latin America, South Africa and other post-conflict contexts, and by allowing those involved with the constitutional process in Nepal to interact with members of other constitutional committees elsewhere. Constructive international advice through the best constitutional minds and engagement of relevant statesmen would also significantly assist the process;¹³
- ii) *Ensure Consensus.* Establish a mechanism to create consensus on key constitutional provisions with a focus on: developing ideas for the resolution of key issues in theory; facilitating interaction between top-party leaders and mid-rank party activists on feasible options; framing agreed options as legal principles; mobilizing the parties and the Constituent Assembly to support the key general principles; and spur discussion on the subsidiarity of provisions to ensure constitutional workability;
- iii) *Use Constitutional and Legal Language.* It is imperative that all constitutional provisions can be legally interpreted to avoid nebulous language that could prove problematic and ensure that the meaning and intent of the constitution is not in doubt. The members of the Constituent Assembly would benefit from intense interaction with knowledgeable experts on the difference between constitutional provisions and slogans, and how to translate slogans into concrete ideas that can be bound within a legal framework.

On Governance Issues

Recommendations to the international community on governance issues at this stage include:

- i) *Create a Technical Space of Governance.* Maintain the distinction between the authority and functions of the state and the role of political parties and actors. A systemic approach is required rather than a focus on political debate and individuals. Efforts should be made to ensure dialogue

¹² <http://www.clubmadrid.org/cmadrid/index.php?id=1>

¹³ On the broader issues of building multiple identities, generating national dialogue, developing visioning exercises, and creating cross-cutting ties, ISE can share comparative experience from across other contexts.

revolves around the functions, levels and forms of government, rather than personalities, and builds on the emerging practice in sectors such as security, energy and education in support of medium-term performance of functions;

- ii) *Support Political Consensus.* Agreement on sectors such as energy and infrastructure can be secured by offering a range of options to translate general agreement into more concrete policy and program level agreements. This requires the use of language that is accessible and readable and documents that present a variety of potential options succinctly rather than verbose off-the-shelf recommendations;
- iii) *Boost the Community Sector.* Assist in securing a political agreement on the role of the community sector by both documenting the evidence, ensuring increased coordination of donor interventions, and exploring mechanisms to scale up these programs both horizontally and vertically;
- iv) *Cost Programs.* Frame a dialogue on the balance of rights and obligations through systematic analysis and implications of entitlements that are being created and their affordability over the medium to long-term. In addition, external partners could offer concrete options for overcoming the capital expenditure constraints that prevent the utilization of both foreign and domestic resources;
- v) *Catalyze the Energy Sector.* The lowest hanging fruit in the energy sector is a scaling up of micro-hydro. The three key donors- the World Bank, Asian Development Bank and DfID- could explore a common approach to make a 5-to-10 year commitment to expand the provision of electricity to communities. Realization of such a promise will require a private-public partnership in manufacturing, research and development, and management, to ensure feasibility.

On Development Issues

The focus of development must be on Nepali citizens and requires very careful thought as to exactly what is being delivered to which groups. The discourse on inclusion needs to transition from highly abstract rhetoric to a problem-solving approach through a clear knowledge from which to work and a focus on areas where progress is most possible. Therefore, recommendations to the international community on development issues at this stage include:

- i) *Map Assets and Capability.* A great deal is expected of the state and the private sector in Nepal without a good understanding of what their capabilities are to deliver. Were the strengths and weaknesses clearly understood in the public, private, community and non-governmental sectors, programs could be more easily developed or adapted.¹⁴ Again, clear notes targeted to specific audiences that provide the basis for discussion would be a welcome first step;
- ii) *Draw Implications.* Some form of restructuring of the state is going to happen in Nepal. Therefore it is important to understand the existing ideas articulated by the various parties on this issue and draw the implications of these in the short and medium-term. Form alone does not solve the problems of function and lessons need to be learned and applied from ineffective and effective forms of federalism elsewhere. Federalism is only being thought about in terms of the center and some sort of autonomous entities across the country at present, but will also involve the relationship between the municipality, district, and village. Some powers will be concurrent and others distinctive- and this in turn has implications for decision rights at each level;

¹⁴ The Prime Minister has developed 12 focus sectors with 30 projects and 36 indicators. The donors could use the type of process outlined above to support a prioritization of these plans.

- iii) *Develop Coherent Urban and Agricultural Approaches.* Cities in general and cities in the Terai in particular require a great deal of further thinking and a policy approach for urban development, growth and governance that is feasible. Nepalganj and other border cities, for example have huge potential and very specific problems, and donors need to understand what can be done, how drivers of growth can be brought together and how potential can be fulfilled. In terms of agriculture, market-based land reform needs to be thought through more coherently- tea plantations, for example, are an area where long-term cooperatives could be developed. Careful analysis of these issues would provide a basis for action;
- iv) *Support the Rule of Law.* Finally, if a rule of law agenda is going to put into effect, there needs to be a renewed focus on the significance of rule making, rule interpretation and rule enforcement through support for the courts and other mechanisms of dispute settlement. Without trust in the law it will be extremely difficult to bring the government, private sector and the non-governmental sectors within framework of rules that can govern interactions and behavior.

Conclusions

The Jana Andolan II provided an open moment for significant change in Nepal. That window of opportunity is still open, but has been rapidly closing- time is running out to come to the necessary political agreements and make the relevant changes to policies, programs and organizations. The past is still very much present in Nepal- from the distant, hierarchical decision-making of the political elites to the deep problems suffered by ordinary Nepalis on a daily basis. The process now should be forging the shape of a wealthy, inclusive 21st century state, not dealing with the same problems as the transition to democracy nearly 60 years ago. It is the Nepali way to allow problems to reach breaking point, before settling on a rushed solution to prevent crisis. The current set of problems, however, are going to require less short-term thinking and much longer-term agreement on collaborative answers, with a definition of national interests that are broader than any one political party.

There has been a failure to agree on formal rules, but informal rules have emerged and are becoming bounded. This makes the current stalemate potentially productive if it can be harnessed by the key actors in the right ways. The risk of systemic security problems of the sort experienced previously have also declined, and there is some movement, from a state-building perspective, to identify state functions that can be delivered technically and not politically. Moreover, once political agreement is arrived at internally, there is no question that Nepal's external partners- including OECD bilateral donors, multilateral organizations, China and India- will be willing to provide the necessary support to catalyze positive change. This support should focus on: legal issues, to ensure comparative understanding and interpretation of the new constitution; governance issues, through creating a clear space for the performance of state functions and prioritizing, costing and carefully designing programs in key sectors; and development, through mapping capacity and assets, catalyzing an understanding of the form and functions of a future state, and ensuring the rule of law becomes the framework for future decision-making and behavior. The capacity and willingness to generate stability and prosperity exist in Nepal, but a failure to reach a political consensus is preventing the Nepali people from fully understanding or capitalizing upon this fact. The recommendations outlined here could help to catalyze positive change and overcome narrow identities in service of a broader agenda. Progress will not be easy, but the international community has a critical role to play in facilitating agreement and ensuring that this becomes the basis for a medium to long-term state-building agenda that will finally allow Nepal to fulfill its significant potential.