

# Study of Supreme Court Judgments on Foreign Employment and Human Trafficking 2022



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## Table of Cases

### I. Human Trafficking Cases

S.N.	Dec.no.	NKP Volume Year	Case name
1	7432	46(9) NKP 2061	Uttam Lama v. HMG
2	7437	46(9) NKP 2061	Renuka Paudel et. al. v. HMG
3	7525	47(4) NKP 2062	HMG v. Rajesh Lama
4	7571	47(7) NKP 2062	Suresh Lama et. al v. HMG
5	7812	49(1) NKP 2064	Rajkumar Pandey v. GoN
6	7878	49(9) NKP 2064	Ram Prasad Sitaula et. al. v. GoN
7	7996	50 (7) NKP 2065	GoN v. Sher Bahadur Lama et. al
8	8014	50(9) NKP 2065	GoN v. Parasnath Pathak
9	8073	51(2) NKP 2066	GoN v. Rabindra Silwal
10	8166	51(6) NKP 2066	GoN v. Khemraj Pandey et. al.
11	8208	51(8) NKP 2066	Phulmati Shrestha v. GoN
12	8429	52(7) NKP 2067	Rahdev Hajara Dushad et. al v. GoN
13	8732	53(12) NKP 2068	Rup Bahadur Kshetri et. al. v. GoN
14	8804	54(4) NKP 2069	Tej Bahadur Rana Magar v. GoN
15	8858	54(7) NKP 2069	GoN v. Jyoti Rai
16	8947	55(1) NKP 2070	GoN v. Shanti Oli Sarki et. al.
17	9064	55(10) NKP 2070	GoN v. Dinesh Pariyar (Sanman Nepali), Kale Damai
18	9308	56(12) NKP 2071	Udhhav Prasad Acharya et. al v. GoN
19	9333	57(1) NKP 2072	Goma Paanchkoti v. GoN
20	9346	57(2) NKP 2072	Lokbahadur Karki v. GoN
21	9496	57(11) NKP 2072	Lakpa Tamang v. GoN
22	9525	58(1) NKP 2073	Yogbahadur Lama v. GoN
23	9621	58(6) NKP 2073	GoN v. Prakash Ojha
24	9643	58(7) NKP 2073	GoN v. Puspa Tamang et. al.
25	9677	58(9) NKP 2073	GoN v. Som Bahadur Tamang
26	9684	58(9) NKP 2073	GoN v. Lakpa Sherpa et. al.
27	9824	59(6) NKP 2074	Bhagirath Dahal, Nirmala Dahal v. GoN
28	9868	59(8) NKP 2074	GoN v. Shanti BK
29	9935	60(1) NKP 2075	GoN v. Sanumaya Rai alias Soniya
30	9943	60(1) NKP 2075	Gyanudevi Rana v. HMG
31	9958	60(2) NKP 2075	GoN v. Sukumari Lama et. al
32	10025	60(6) NKP 2075	Tara Bahadur Basnet v. GoN
33	10052	60(7) NKP 2075	Dipendra Pathak v. GoN

34	10070	60(8) NKP 2075	GoN v. Shankar B.K.
35	10090	60(9) NKP 2075	GoN v. Thagbahadur Sunar
36	10118	60(10) NKP 2075	Yangchen Tamang alias Nurbi v. GoN
37	10190	61(2) NKP 2076	Bedbahadur Magar v. GoN; Bire Tamang v. GoN
38	10193	61(2) NKP 2076	Raj Kumar Sonar v. GoN
39	10229	61(2) NKP 2076	GoN v. Rajendra Mandal et. al.
40	10242	61(4) NKP 2076	Basant Pariyar v. GoN
41	10266	61(5) NKP 2076	Basant Rawal v. GoN
42	10274	61(5) NKP 2076	GoN v. Shobha Baadi
43	10349	61(9) NKP 2076	Shyamkumar Ram v. GoN
44	10410	61(12) NKP 2076	GoN v. Ram Prasad Gurung
45	10412	61(12) NKP 2076	GoN v. Binod Dhakal et. al.
46	10496	62(5) NKP 2077	Baijanath Yadav v. GoN
47	10544	62(7) NKP 2077	GoN v. Binod Rishidev et. al; Binod Rishidev v. GoN
48	10596	62(10) NKP 2076	GoN v. Muna Magar Meche
49	10602	62(10) NKP 2077	Maaya Pariyar et.al. v. GoN
50	10617	62(12) NKP 2077	Bishnu Thapa v. Kumari Lama

## II. Foreign Employment Cases

S.N.	Dec. no.	NKP/ Case no.	Name of the Case
1	9046	55(8) NKP 2070	Satish Shah v. GoN
2	10487	62(4) NKP 2077	Thakur Ghale et. al. v. Current Shareholder of Worldwide Asian Manpower Service Pvt. Ltd. Laxmi Gurung
3	10243	61(4) NKP 2076	GoN v. Tikamaya Sunuwar (Tiwari)
4	10017	60(2) NKP 2075	Bhawani Kafle Tuladhar v. GoN
5	9674	53(1) NKP 2068	Gyanbahadur Budhathoki et. al v. GoN
6	7182	45(1) NKP 2060	GoN v. UdayBahadur Shrestha and Jagadish Bahadur Shrestha
7	10399	61(12) NKP 2076	GoN v. Bishnu Prasad Neupane et. al.
8	9536	58(1) NKP 2073	GoN v. Director of Shristi Overseas Employment Services Pvt. Ltd. Dhruba Bahadur Adhikari et. al.
9	9939	60(1) NKP 2075	GoN v. Yogendra Bahadur Tamang
10		071-CR-1456;0839;1212	Gyanendra Sunar et. al v. GoN by the FIR of Kumar Sunar
11		070-CR-0842	GoN v. Jhalakbahadur Basnet et. al
12		070-CR-0657	GoN v. Batukrishna Karki, Kedar Bahadur Karki and Aatma Ram Karki

13		072-CR-2043	Khaman Singh Gurung v. GoN
14		070-CR-0420	GoN v. Mohan Bastola
15		072-CR-0089	GoN v. Director Mission Overseas Pvt. Ltd. Tek Bahadur Gurung et. al.
16		071-CR-0838; 071-CR-1631	GoN v. Girilal Gautam et. al. ; Girilal Gautam v. GoN
17		070-CR-0594	Dinesh Singh Kuwar v. Shyam Shahi
18		071-CR-1391	GoN v. Yogendra Shah et. al.
19		068-CR-0954	GoN v. Shankar Prasad Chapagain
20		071-CR-0468	GoN v. Renumaya Darnal and Sukram Tamang
21		069-CR-0293; 0359	GoN v. Gurudatta Paudel from Greenaashish Overseas Pvt. Ltd now known as Reliable H.R. Solution Pvt. Ltd.
22		071-CR-1133	GoN v. Kamal Rhymajhi
23		070-CR-0867	GoN v. Rang Kumar Neupane
24		071-CR-0951	GoN v. Raju Budhathoki, Laxman Regmi
25		072-CR-0609	GoN v. Hikmat Tulaachan
26		072-CR-1170	GoN v. Golimaya Hayu Magar
27		070-CR-1308	GoN v. Lal Bahadur Tamang
28		073-CR-1448	Chitra bahadur Karki v. GoN
29		072-CR-1741	Prajwal Kumar Bajracharya v. GoN
30		070-CR-0637	GoN v. Ram Bahadur Gurung
31		070-CR-0769	Ashok kumar Sunuwar et. al. v. GoN
32		072-CR-1719	Sunil Kumar Lama v. GoN
33		072-CR-1953	GoN v. Janak Waiwa
34		070-CR-1624	GoN v. Dambar Bahadur B.K.
35		071-CR-0658	GoN v. Ranabahadur Bogati
36		073-CR-1238	Tika kumari Thapa v. GoN
36		071-CR-0235	GoN v. Bishnu Bahadur Karki
38		070-CR-1097	GoN v. Pahalman Bohora
39		071-CR-0214	Bimal Karki v. GoN
40		072-CR-0444	GoN v. Chitra Bahadur Gole
41		071-CR-1607	GoN v. Director of Paramount College and Applied Engineering Sarita Pandit et. al.
42		070-CR-1174	Binod Gautam v. GoN
43		070-CR-0374	GoN v. Bhanu K.C. Bhanubhakti
44		069-CR-0667	Gyanu Gurung v. GoN
45		072-CR-0442	GoN v. Kamal Gharti, Yam Bahadur Gharti
46		072-CR-0447	GoN v. Rudraman Shrestha
47		075-CR-0638	GoN v. Daya ram Pudasaini

48		075-CR-0669	GoN v. Nima Tamang
49		075-CR-0088	GoN v. Director of United Consultant and Training Center Pvt. Ltd. Shardakumar Magar
50		071-CR-0713	GoN v. Uddhav Guragain

# **Chapter One**

## **Background of the Study**

### **I. Introduction**

Every year millions of people from Nepal migrate to foreign destinations in search for work and better employment opportunities. A large section of this migrant population come from a very lower social economic background and are desperate to find any work available to sustain a living for themselves and their families. In these endeavors to migrate abroad in search of work, some migrant workers are successful in securing proper work with minimum payment. However, the vulnerable section of the community sometimes ends up being in labor exploitation and with no remedies and legal recourse.

The Government of Nepal has enacted Foreign Employment Act 2007 to protect the rights and interests of workers going for foreign employment. In addition to this, the Human Trafficking and Transportation (Control) Act 2007 to control the acts on human trafficking and transportation has been in place. While the Foreign Employment Act governs the labor migration process and includes the procedural part to be followed by the workers and the recruiting agencies, further providing compensation to the workers in case of exploitation including fraud and non-payment of salary, the Human Trafficking and Transportation (Control) Act provides preventive measures on human trafficking and provides higher punishment for the crime of human trafficking than in the cases related to foreign employment.

While there exist legal provisions and dedicated institutional mechanisms<sup>1</sup>, individuals migrating abroad in search of better employment opportunities have been falling prey to human trafficking and foreign employment frauds, mainly due to unsafe foreign employment. Various reports show that foreign employment has been used as a means of human trafficking, resulting in the worst form of exploitation. Due to the huge access barrier for these victims of trafficking, forced labor and other offenses to approach the state institutions seeking judicial remedy, even those that somehow secure access to these institutions isn't able to secure proper remedies. Moreover, despite the trend indicating the nexus between the offences of foreign employment and human trafficking,

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<sup>1</sup> Foreign Employment cases are dealt by the Department of Foreign Employment and adjudicated in Foreign Employment Tribunal and Human Trafficking and Transportation cases are dealt by Anti Human Trafficking Bureau and adjudicated by the court system.

the legal mechanisms in place however, have not been able to establish the correlation between these two offences.

As studies on the judicial trend has not been conducted and no data is available regarding this, the concept of this research was conceived with the interests of the organization to investigate the decided cases in Offences related to Human Trafficking and Foreign Employment and understand the judicial trend and decision-making process. The research was undertaken to understand the judiciary's interpretation, nature of the offences, *raison d'etre* in those decisions and the evaluation and admissibility of the evidence furnished in those cases.

## **II. Objectives of the Study**

The objectives of the research are as follows:

- a. To understand the judicial trends in the decisions given by the Supreme Court on offences related to Human Trafficking and Foreign Employment.
- b. To understand the international standards followed by the Supreme Court in its decisions.
- c. To identify the practical problems survivors, victims, and stakeholders face during the judicial administration starting from the filing of complaint to the finality of decision.
- d. To draw recommendations to reform the justice system, especially on the cases related to trafficking in person (TIP) and foreign employment.

## **III. Organization of the Study**

The Study is organized into four major sections. The introduction section provides a preliminary background to the study. The legal framework section explains the legal framework in existence that addresses the offences related to Human Trafficking and Foreign Employment. The third section is concerned with findings. The findings are categorized into three sections viz. findings from personal interviews with victims of foreign employment, findings from judgments analysis of decisions made by Supreme Court in foreign employment cases, and findings from judgments analysis of decisions made by Supreme Court in human trafficking cases. The final section is concerned with providing recommendations and concluding statements of the research.

## **IV. Methodology**



There were two approaches that were adopted to conduct this study. The first approach was a desk analysis of 50 judgments on Human Trafficking Offenses and 50 judgments on offenses related to Foreign Employment. During the desk analysis, some key factors and variables were identified, the judgments were then coded, and the data entered into the SPSS software to analyze these variables. The cross-tabulation of certain variables has also been carried out to observe any pattern if exists among the judgments. Further, the scope of the research was expanded to include stakeholder's interviews and interviews with survivors of Human Trafficking and victims of Foreign Employment as well.

Further, 200 victims of offences related to Foreign Employment were approached and interviewed through the questionnaire-survey method at the Department of Foreign Employment from April to August 2022. The 200 victims were selected through convenience sampling by employing enumerators to the Department of Foreign Employment and requesting the migrant workers to participate in the survey. The data collected were then input into an excel sheet and a descriptive statistic was presented. Similarly, 12 survivors of Offences related to Trafficking were personally interviewed and their responses were recorded and analyzed. In addition to this, 18 stakeholders from multiple institutions including Courts, the Department of Foreign Employment (DoFE), the Foreign Employment Tribunal (FET), the Human Trafficking Investigation Bureau, the Office of Public Prosecutors, Civil Society Organizations, Journalists were interviewed to gain insights into the problems of judicial administration.

### **Decision Selection Model**

All 28 judgements that has been published in Nepal Kanoon Patrika following the enactment of Human Trafficking and Transportation (Prevention and Control), Act, 2064 was retrieved from the website of Nepal Kanoon Patrika for the purpose of this research. Similarly, 22 latest judgements since the enactment of 2043 Act were selected and analyzed for the purpose of this research. 9 judgements on Offenses related to Foreign Employment published in the Nepal Kanoon Patrika and 41 judgements selected randomly from the Bulletin published from 2075 B.S. to 2079 B.S. were analyzed. After a thorough reading of all these decisions and judgements, some important variables related to evidence and presence of victims, statement of witnesses, confessions, time taken for the judgement were identified, tabulated and analyzed with the help of SPSS software.

## Chapter Two

### Legal Framework on Human Trafficking and Foreign Employment in Nepal

The provision related to human trafficking was included in Chapter 11 of Muluki Ain 2020. With the rise in human trafficking cases, the government enacted a separate act to control the acts of human trafficking. In the same way, the Nepal Government enacted the Foreign Employment Act to enhance safe, orderly, and decent foreign employment and to protect the rights and interests of the workers going for foreign employment.

#### A. Muluki Ain, Part-4, Chapter 11, *Jiu Maasne Bechne ko Mahal*

Nepal's first provision on Human Trafficking was in Mahal 11 of Part 4 of the Muluki Ain, *Jiu Masne Bechneko Mahal*. *Jiu Masne* translates to destruction of one's body and '*bechne*' translates to the sale of the body. Four acts had been defined as a crime under this chapter

- (a) Taking a person outside the country with a purpose of selling such person (No. 1)
- (b) Buying or selling a person (No. 1)
- (c) Trying to separate a child under the age of 16 or a person of unsound mind or removing them from the guardianship or protection of their guardian without the consent of their guardian (No. 2)
- (d) Causing someone to be a *Kamara/Kamari/Slave* or bonded labour (कमारा, कमारी, बाँधा) (No.3.)

The punishment ranged from 3 years to 10 years for (d), 10 years for (a), 20 years for (b) and a fine of only 500 (Five Hundred Rupees) or 3 years imprisonment for (c). This law did not define the crime as trafficking or transportation or had any definitions with regards to what bonding someone or making them a slave meant.<sup>2</sup> The Muluki Ain provided compensation for the survivor of the offense described in (d) above.

#### B. Human Trafficking (Control) Act, 2043<sup>3</sup>

The Human Trafficking (Control) Act was then enacted in 2043/07/24 which did not exactly repeal Chapter 11 of the Muluki Ain but did state that in the matters regulated by the Act, the Act would

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<sup>2</sup> Muluki Ain, 2020 B.S. (11<sup>th</sup> amendment in 2059/06/10)

<sup>3</sup> Human Trafficking (Control) Act, 2043, (जिउ मास्ने बेच्चे कार्य (नियन्त्रण) ऐन, २०४३), Act no. 15 of the Year 2043, enacted on 2043/07/24 [hereinafter "2043 Act"]

prevail over Muluki Ain.<sup>4</sup> This Act in Sec 4 defined the following four acts as trafficking and Sec 8 defined the punishment:<sup>5</sup>

Act of Trafficking	Punishment
(a) Buying or selling a person for any purpose	10 to 20 years imprisonment
(b) Taking a person across the border for buying or selling	5 to 10 years imprisonment
(c) Getting a woman to engage in prostitution by any means of coercion, force, undue influence, or any other means	10 to 15 years imprisonment
(d) Conspiracy, Aiding, Abetment or Attempt to any of the acts described in the list above	5 years imprisonment

### a. Special Provisions

The Act provided that the police had to take the permission of the court immediately after an FIR or complaint of the crime of trafficking was filed and the police could carry out the investigation only after such authorization.<sup>6</sup> Similarly, the Act introduced the provision of **certifying the statement of the survivor** of such an offense 24 hours within the statement recorded at the District Attorney’s Office. This provision is the most important subject matter discussed and deliberated in the case laws of Human Trafficking and Transportation which shall also be discussed in detail in this report.

Section 7 of the Act provided the matters on **burden of proof** stating that if a person who is not a close relative or guardian is caught taking a woman out of the country and a complaint is received

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<sup>4</sup> *Uttam Lama v. HMG*, 46(9) NKP 2061, Dec no. 7432; the principle was affirmed in the case where an incident that had occurred after the enactment of 2043 Act had been prosecuted and punished under the act ignoring the principle of retroactivity of criminal law [Note that Judge Balaram KC however wrote a long dissent, dissenting on the subject matter.]

<sup>5</sup> Till 2043 Act, the term used for trafficking was *Jiu Maasne Bechne*.

<sup>6</sup> Sec 5 of 2043 Act.

that the purpose of such travel is for selling, then the person caught has the burden of proof to show that the travel was not for the purpose of trafficking. Similarly, the burden of proof that the certified statement is false was also shifted on the defendant.

### **C. Human Trafficking and Transportation (Control) Act, 2064 (2007)<sup>7</sup>**

The Human Trafficking and Transportation (Control) Act, 2064 [hereinafter the 2064 Act] replaced the Human Trafficking (Control) Act, 2043. This Act tried to expand the scope of Human Transportation and Trafficking. However, after the enactment of this Act, we can note that there has been a lot of confusion in distinguishing the crime of Trafficking and Transportation.

Further, the earlier law classified the forcible engagement of an individual into prostitution as one of the crimes separately, but this Act defined it as an act of trafficking. This has caused a lot of confusion which shall be demonstrated in the examples and case laws cited below. Following the enactment of this Act, we see that most convictions concern Transportation rather than Trafficking. This may also be because of active police intervention, where the process of trafficking does not occur due to the intercept of the police and concerned stakeholders in the transportation phase. While this has made the process of punishing anyone with the intention of trafficking much easier, there is ambiguity and confusion as to which charge is appropriate for anyone found crossing the border with the intention of trafficking a person. Section 4 of this Act deals with the definition of the crime of trafficking and transportation in Sub Sections 1 and 2 respectively.

Section 4(1) has defined four acts as trafficking viz.

- (a) selling or purchasing a person for any purpose.
- (b) using someone into prostitution, with or without any benefit
- (c) extracting human organs except otherwise determined by law and
- (d) going for in prostitution.

There used to be ambiguity on the matter of interpretation of the fourth crime of going for in prostitution. The Nepali print of the Act, which is considered the original and the authentic copy of the Act criminalized बेस्यागमन, however the definition of Besyagaman is not given in the Act. There was a split among scholars in defining Besyagaman where one line of approach was that only the act of availing the prostitution services as a customer was criminalized, whereas the other

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<sup>7</sup> Human Trafficking and Transportation (Control) Act, 2064, Act no. 5 of the Year 2064, enacted on 2064/04/08

line of approach suggested that it was criminalized for both the sex worker and the customer. But recently a Supreme Court judgement clarified that the woman who engages in prostitution in Nepal cannot be punished, or the act is not punishable as a crime for women involved in sex work.<sup>8</sup> Notwithstanding this, however, causing someone to engage in prostitution or keeping someone for the purpose of engaging them in prostitution or to go for in prostitution is criminalized.

Section 4(2) has defined two broad activities falling under the crime of Human Transportation viz.

- (a) taking a person out of the country for the purpose of buying and selling
- (b) taking anyone from his/her home, place of residence or, from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurements, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.

This indicates that there must be three elements to prove the crime of transportation: the person must be taken away from their place of residence or home to a different place; by any means that range from coercion, inducement to threat; and the taking away must be for the purpose of exploitation or to engage the person in prostitution.

Section 2 (e) supplements the provision with the definition of exploitation as an act of keeping a human being as a slave and bonded and this word also includes removing human organs except otherwise provided by prevailing law.

While Section 4 defines the crime, Section 15 on punishment gives a clear picture of what sort of activities are punishable and prohibited and how severe the crime is. Hence, Section 4 must be read in conjunction with Section 15 to understand the degree and severity of the offense and to clearly identify what sort of acts are punished.

<b>Section</b>	<b>Act</b>	<b>Punishment</b>
15(1)(a)	Buying or selling a human being	20 years imprisonment and fine of 200,000 Rupees

<sup>8</sup> *Bishnu Thapa v. GoN*, 62(2) NKP 2077, Dec no. 10617.

15(1)(b)	Forcing into prostitution with or without financial benefit	5-10 years imprisonment and fine of 50,000 to 100,000 Rupees
15(1)(c)	Extracting human organs except otherwise determined by law	10 years imprisonment and a fine of Rs. 200,000 to 500,000
15(1)(d)	For a person engaged in prostitution	1-3 months imprisonment and a fine of 2,000-5000 Rupees
15(1)(e)	For transportation of human being for buying, selling and engaging someone in prostitution (1) Taking a person out of the country Taking a child for the purpose out of the country (2) Taking a person from one place to another place within the country Taking a child for the purpose stated within the country	(1) 10-15 years imprisonment and a fine of 50,000 to 1,00,000 Rupees 15-20 years of imprisonment and a fine of 100,000 to 200,000 Rupees. (2) 10 years imprisonment and a fine of 50,000 to 1,00,000 Rupees 10-12 years of imprisonment and a fine of 100,000 Rupees.
15(1)(f)	Taking a person for exploitation Within the country Outside the country	1-2 years imprisonment 2-5 years imprisonment
15(1)(g)	Except for e and f, a person committing offence under clause (b) of Section 4(2)	7-10 years imprisonment
15(1)(h)	Provocation, conspiracy, attempt, abettor	Half out of full punishment envisioned for the offence of human trafficking and transportation
15(2)(a)	If same person is involved in buying and selling and forcing into prostitution, with or without any benefit	Punishment under both offences
15(2)(b)	If same person is involved in buying or selling or forcing into prostitution with or without benefit in an offence under Sec 4(2)(b)	Punishment under both offences

15(2)(c)	If same person is involved in an offence under Section 4(2)(b) of and in transporting a human being from one place to another place within Nepal or outside the country for the purpose of buying, selling or forcing into prostitution, with or without any benefits;.	Separate punishment for each offence
15(3)	If an offence under Sec 3 is committed by person holding a public post	25% additional punishment
15(4)	Protector or guardian of the offender or under the relationship under Incest	10% additional punishment
15(5)	Repeated offender	1/4 <sup>th</sup> additional punishment for every offence

**a. Compensation**

Section 17 of the Act states that the survivor is entitled to compensation from the offender which shall be **not less than half** of the fine levied as punishment to the offender.

**b. Incentive**

The Act has also created incentives from the Rehabilitation Fund established under Sec 14 for people reporting the crime which is equivalent to 10% of the fine levied as punishment under Sec 15.

**c. Moral Turpitude**

Committing a crime of Human Trafficking or Transportation may be considered as committing an offense against moral turpitude, if the prosecutor demands it to be so under Section 22 of the Act

**d. Burden of Proof**

The Sec 9 of the Act states a person accused of an offence under the Act shall have the burden to prove that s/he has not committed the offense. This is different from the burden of proof in the 2043 Act such that the burden is entirely shifted to the defendant in this case.

**e. Certification of the statement**

The Act provides that the police can immediately take the "survivor" of the crime under Sec 6 of the Act to the court to certify the statement implicating a perpetrator. Such statements are recorded in the police, read aloud in presence of the survivor, district judge and is certified in the district court. The section clarifies that it may be taken as evidence even if the survivor does not appear in the court in the course of further court proceeding.

#### **D. Foreign Employment Act, 2007**

The Foreign Employment Act 2007 is the major law that deals with the offenses related to Foreign Employment. This Act empowers migrant workers to file criminal complaints before the Department of Foreign Employment (DoFE) or the District Administration Office (DAO), against recruitment agencies and individual agents. As the cases related to foreign employment are state criminal cases, DoFE investigates and prosecutes the cases. The cases of foreign employment follow summary court procedure which states that cases need to be solved within ninety days of the defendant's statement.<sup>9</sup> The complaints are investigated by a complaint investigation unit established within DoFE.<sup>10</sup> DoFE has the right to investigate, prosecute, and adjudicate compensation cases (non-payment or less payment of salary and other matters related to recruitment agencies). The complaints made by the migrants and their families are registered in DoFE's registration and investigation section. DoFE has the authority to decide the cases concerning compensation and even revoke the agencies' license to operate.

DoFE deals with complaints against recruitment agencies whereas serious allegations<sup>11</sup> against the individuals and recruitment agencies are registered in FET. The cases registered in FET are adjudicated after examining the necessary evidence. Regarding the decision by DoFE, the unsatisfied party can lodge an appeal to the Government of Nepal and regarding the decision by

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<sup>9</sup> Section 10(1), Summary Procedure Act 1972.

<sup>10</sup>Sarah Paoletti, Eleanor Taylor-Nicholson, Bandita Sijapati, Bassina Farbenblum, Migrant Workers' Access to Justice at Home: Nepal, Open Society Foundation (2014), available at: <https://www.opensocietyfoundations.org/publications/migrant-workers-access-justice-home-nepal> (27 November 2021, 5:44 pm); Laxman Singh Kunwar, 'Foreign Labour Migration and Governance in Nepal,' Journal of Population and Development. 2020.

<sup>11</sup> Jurisdiction has been defined based on the offence and punishment determined under the Act. The offences defined under Section 43 (Carrying foreign employment business without license), Section 44 (Sending workers by licensee without obtaining permission), Section 45 (Sending minors for foreign employment), Section 46 (Sending workers to the countries not opened by Government), Section 47 (Concealing or altering document or report), Section 52 (Sending workers by licensee on personal basis) of Foreign Employment Act 2007 falls under the FET's jurisdiction. Section 43. Section 64 of Foreign Employment Act states the jurisdiction of FET.



the FET, the unsatisfied party can appeal to the Supreme Court within 35 days of the date of such decision.<sup>12</sup> After, the final judgment is to be enforced/ implemented by the concerned district court.

The punishment defined under the Foreign Employment Act 2007 is presented below:

S.N	Offence	Punishment	Compensation	Time limitation
1.	<p><b>Section 43- Individual</b></p> <p>1. Running a foreign employment business without permission</p> <p>2. Gives false assurances or tempting to hire someone for foreign employment or</p> <p>3. Not sending their clients abroad after receiving fees.</p>	<p>3-7 years in prison &amp; up to 300,000-500,000 fine.</p> <p>Half of the punishment if the offense is not sending abroad.</p>	<p>The amount taken from the victim and 50 percent of the compensation will be paid to the victim and the expenses incurred while going abroad will be paid.</p>	Any time
2.	<p><b>Section 44- Institutional</b></p> <p>Sending any worker abroad without</p>	<p>3-7 years in prison &amp; up to 300,000-500,000 fine.</p>	<p>The amount taken from the victim and 50 percent of the compensation will be paid to the victim and</p>	Any time

<sup>12</sup> Section 66, Foreign Employment Act 2007.

	<p>obtaining permission from Department</p> <p>Collects any amount by giving false assurance or showing enticement that the licensee would engage any person in foreign employment but does not send that person abroad.</p>	<p>License of the licensee shall be revoked</p>	<p>the expenses incurred while going abroad will be paid.</p>	
3.	<p><b>Section 45</b></p> <p>If any licensee sends any minor for foreign employment in contravention of the Act.</p>	<p>3-7 years in prison &amp; up to 300,000-500,000 fine.</p>		<p>Any time</p>
4.	<p><b>Section 51</b></p> <p>If any licensee fails to return the amount according to Section 20(2) within the time set forth in that section or refuses to provide compensation provided under Sec 36(2)</p>	<p>Fine of NRs. 1,00,000 (One hundred thousand rupees) and revoking the license</p>	<p>Amount or compensation returned or provided to the concerned worker from the cash deposit made by licensee pursuant to Section 11</p>	<p>One year from the date of action.</p> <p>In case of a worker who has gone for foreign employment, within one</p>

5.	<p><b>Section 52</b></p> <p>If any licensee send any worker on personal basis in contravention of Sub Section 3 of Section 21</p>	<p>Fine of one hundred thousand rupees to three hundred thousand rupees or with revocations of license or with both punishments</p>	<p>N/A</p>	<p>year from the date of arrival of the worker in Nepal from abroad.</p>
6.	<p><b>Section 53</b></p> <p>4. Licensee collecting visa fees where free visa has been received or collects fees or costs in excess of the fees or costs.</p>	<p>Fine of one hundred thousand rupees</p>	<p>The licensee to return such fees not to be charged or such excess fees or costs in excess of the fees or costs as prescribed.</p>	
7.	<p><b>Section 55</b></p> <p>If any licensee, after making a contract with any worker for work in a company, engages the worker in work for remuneration or facilities lower that or in another company for a work of such nature as is different</p>	<p>One hundred thousand (100,000) rupees fine</p>	<p>To pay the shortfall amount of such remuneration and facilities.</p>	

	<p>than that specified in the contract or does not engage the worker in the work for which the worker has been sent for foreign employment but engages the worker in another work or engages the worker in work for remuneration and facilities less than the remuneration and facilities offered previously.</p>			
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As per the Act, the District Administration Offices (DAO) can also register any complaints regarding foreign employment.<sup>13</sup> A mandate has been given to the Chief District Officer (CDO) to deal with individual cases.<sup>14</sup> On the cases related to individuals, DAO can mediate and provide compensation to the victim. On cases related to manpower agencies (institutional cases), DAO refers the case to DoFE within seven days of the registration of the complaint.

**E. International Conventions Related to Human Trafficking and Foreign Employment**

Nepal is a party to various international conventions related to Human Trafficking and Foreign Employment. As per Nepal Treaty Act 1990, the provisions of the treaty which Nepal is a party to shall be enforceable as good as Nepalese laws.<sup>15</sup> Nepal has, however, not ratified, the International

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<sup>13</sup> Section 21(A)(2), Foreign Employment Act 2007  
<sup>14</sup> MoLESS, ‘Nepal Labour Migration Report 2020,’ Government of Nepal, 2020.  
<sup>15</sup> Section 9(1), Nepal Treaty Act 1990, In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament, inconsistent with the provisions of

Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the only UN convention related to the protection of rights of migrant workers. Besides, various ILO conventions have been ratified. The international conventions against human trafficking (trafficking in person) and conventions related to the protection of the rights of workers are given below:

- i) UN Convention for the Suppression of the Traffic in Person and of the Exploitation of the Prostitution of Others
- ii) The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)
- iii) C029 Forced Labor Convention 1930
- iv) C098 Right to Organize and Collective Bargaining Convention 1949
- v) C100 Equal Remuneration Convention 1951
- vi) C105 Abolition of Forced Labor Convention 1957
- vii) C182 Worst Forms of Child Labour Convention 1999

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prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.

## Chapter Three

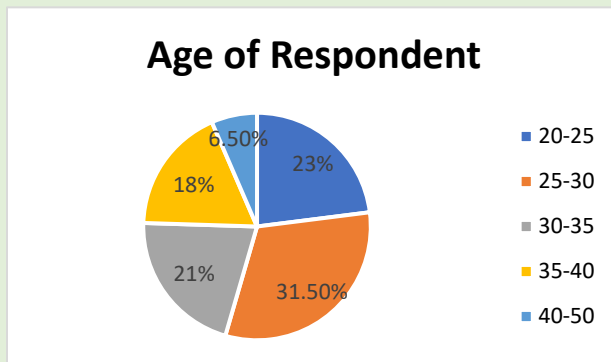
### Findings

#### I. Findings from Interviews with Victims of Foreign Employment Offenses

As elaborated in the methodology section, 130 aspirant migrants and 70 returnee migrants were interviewed to understand their experience with the administration of justice process involving issues relating to migration for work. Of them, 140 migrants had registered their complaint at the Department of Foreign Employment and 60 were in the process of doing so. The interviews were carried out with the migrant workers who were present in the Department of Foreign Employment with problems relating to foreign employment.

#### A. Demography of the Respondents

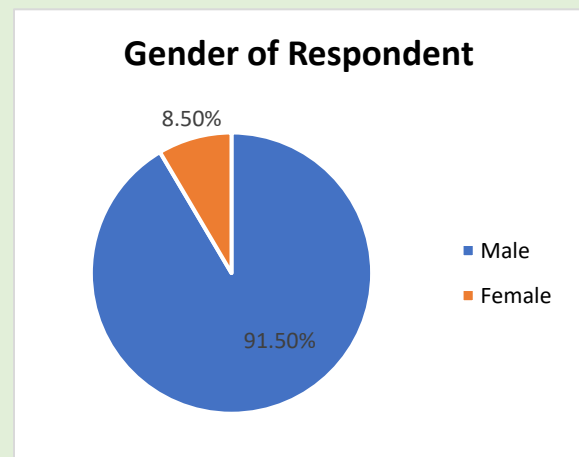
##### a. Age Group of concerned Respondents



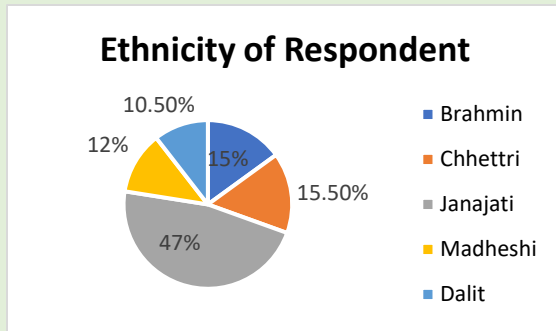
Among the 200 Respondents, 31.5% of them belonged to the Age Group of 25-30, 23% from the 20-25 age group, 21% from the 30-35 age group, 18% from the 35-40 age group and 6.5% from the 40-50 Age Group.

##### b. Gender of the Respondents

Among the 200 respondents, 91.5% were male and 8.5% were female. Statistics have shown that the frequency of male migrant workers is much higher among the migrating population.



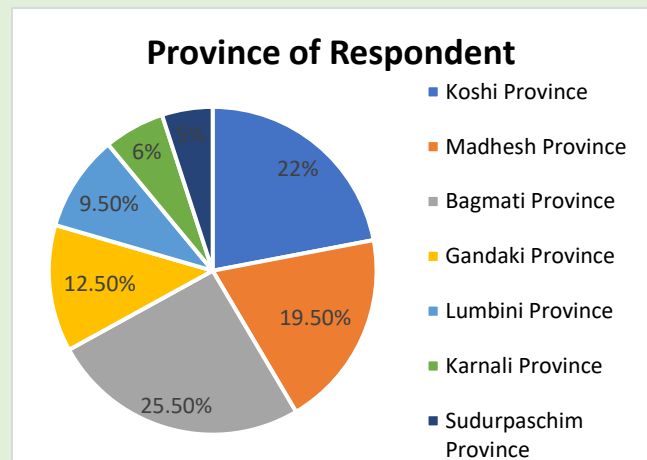
### c. Ethnicity of the Respondents



It was seen that around 47% of the respondents belonged to Janajati (Indigenous) Community. Following this, there were 30.5% from Brahmin Chhetri community, 12% from Madheshi Community, and 10.5% from Dalit Community.

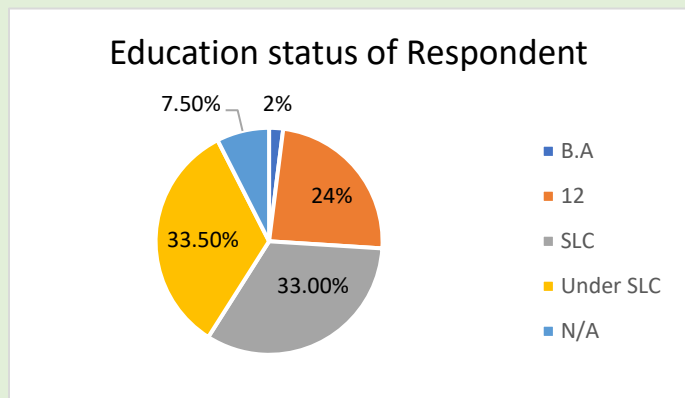
### d. Province of the Respondents

It was seen that the highest number of Respondents belonged to Bagmati Province: 25.5%, 22% belonged to Koshi Province, 19.5% belonged to Madhesh Province, 12.5% belonged to Gandaki Province, 9.5% from Lumbini Province, 6% from Karnali Province, and 5% from Sudurpaschim Province.



### e. Education Status of the Respondents

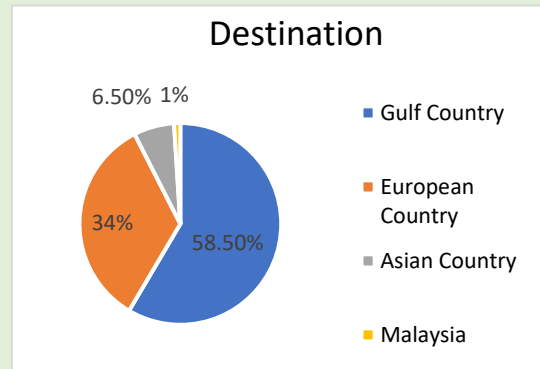
Of 200 respondents, 33.5% respondents had not completed the Secondary Education Examination (SEE), 33% had completed SEE, 24% had completed their high school or (10+2), and only 2% were undergraduates. 7.5% of the respondents did not reveal their education level.



## B. Destination, Nature of Work and Skills

### f. Destination

The maximum number of respondents were either traveling to or from the Gulf: 58.5%; 34% to or from European countries, 6.5% from Asian Countries except from Malaysia, and 1% from Malaysia.

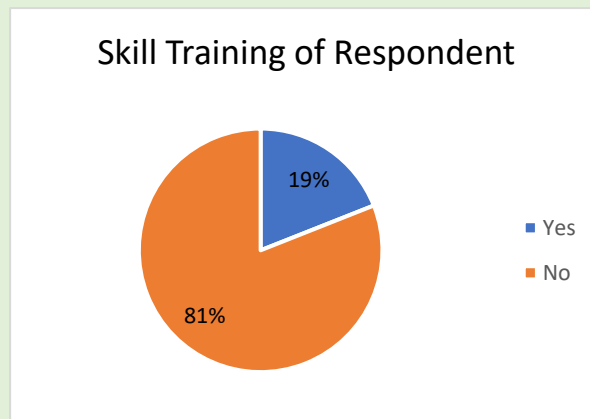
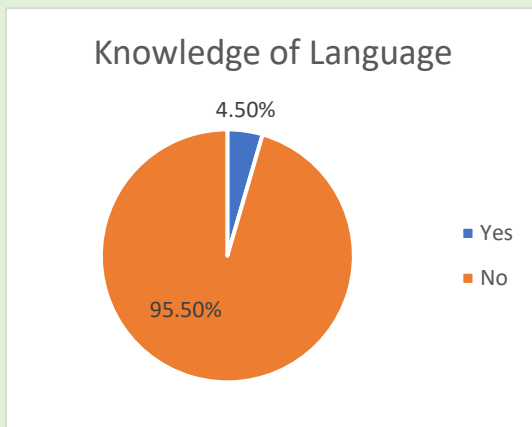


### g. Nature of Work

It was seen that the maximum number of respondents were going for work as laborers, unskilled manpower. Some of them stated that they either worked or are trained in the Hotel Management sector, Packaging, Beauticians, Mechanical Work, Drivers, Bike Riders, Cleaners, Factor Workers, Agriculture, Operator and so on.

### h. Skills and Language Training

It was seen that around 81% of the respondents did not receive skill-related or skill-based training. Similarly, 95.5% lacked knowledge of the language of their destination countries.

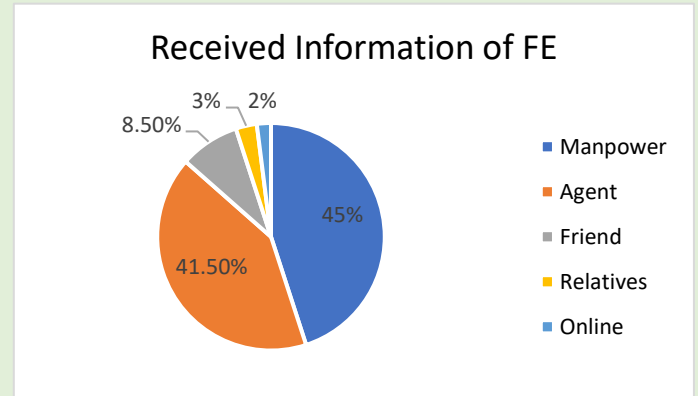




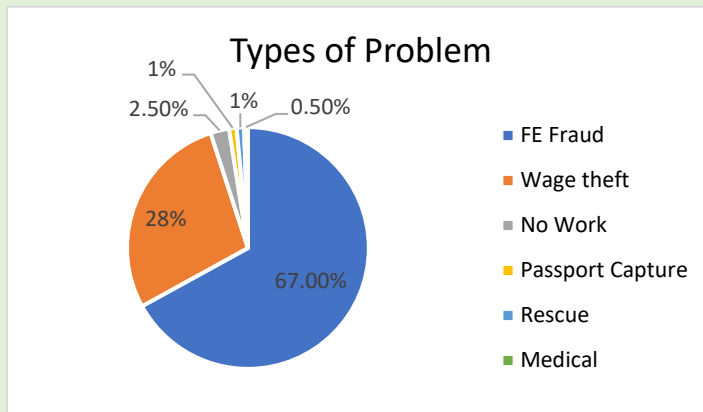
### C. Knowledge of Foreign Employment

#### i. Information about Foreign Employment

Of the 200 respondents, 45% shared they had received information about Foreign Employment from Manpower Agencies, 41.5% from Agents, 8.5% from their Friend Circle, 3% from Relatives and 2% from Online Mediums. The data reveals that despite the agents being legally disregarded, agents have been directly/indirectly actively involved.



#### j. Nature of the Case

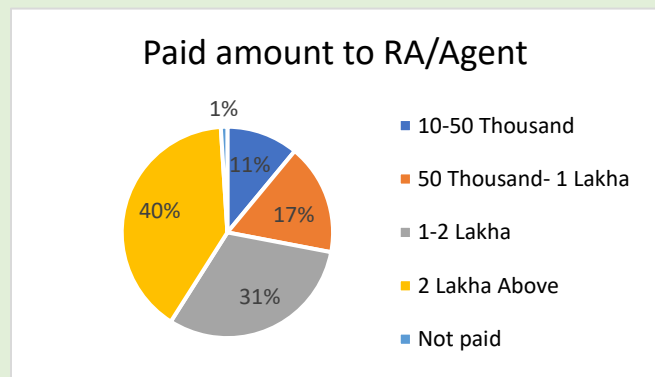


It was seen that around 67% of the respondents had problems related to Foreign Employment Fraud, 28% of them had problems related to Unpaid Wages or Lower Wages, 2.5% of them did not get work as per the contract, 1% related to withholding of passports and travel documents and 0.5% had

problems related to Medical problems. Various other researches and reports also state that most of the victims fall prey to foreign employment fraud.

#### k. Amount Paid to Recruitment Agencies or Agent.

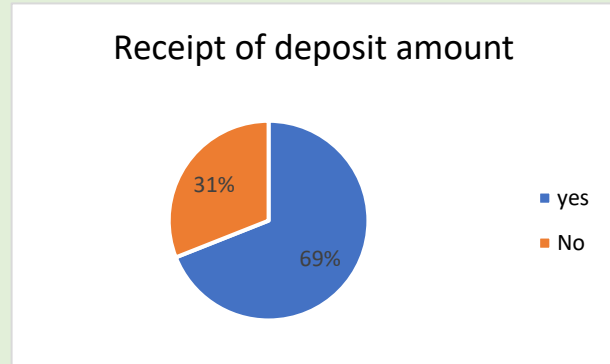
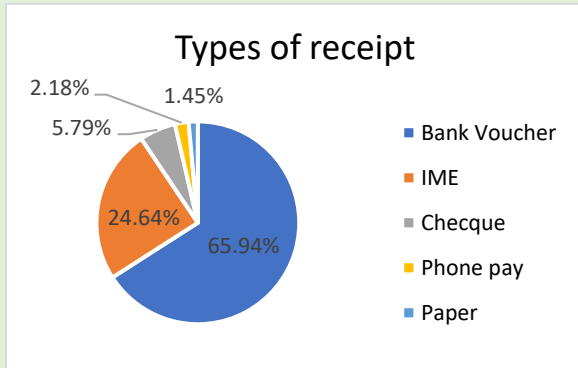
It was seen that 40% of the respondents had paid more than 2 lakh Nepali Rupees. Similarly, 31% had paid 1lakh – 2 lakh Nepali Rupees. Similarly, 17% had paid 50 thousand



rupees to 1 Lakh Rupees and 11% had paid 10-50 thousand Rupees and 1% had not paid any amount. In 2015, free visa free ticket policy was initiated by Government of Nepal but the data shows that only 1% individuals have been able to benefit from the policy.

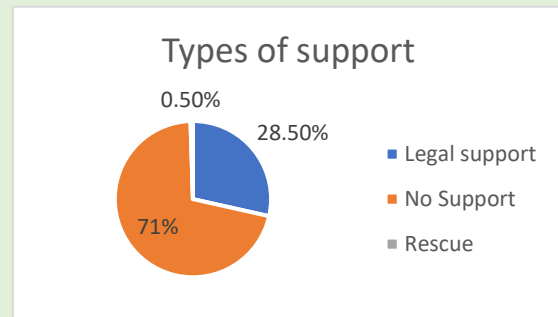
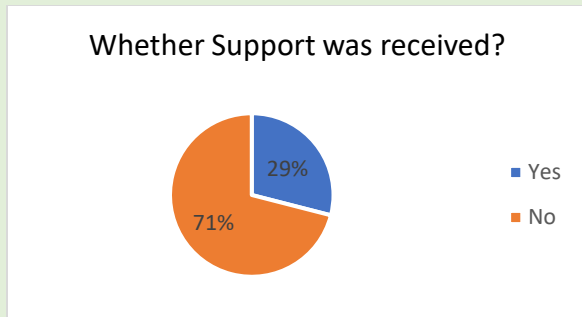
**l. Evidence concerning payment of Recruitment Fee**

69% of the respondents responded that they had evidence of payment, whereas 31% revealed that they had no proofs of having paid the concerned amount. From among the respondents that had evidence i.e. from the 69%, 65.94% had proof of Bank Vouchers, 24.64% had IME Vouchers, 5.79% had cheque given by the defendants, 2.18% had proofs of amount being sent through FonePay and 1.45% had Receipts of Payment. Increase in awareness level and various others might be the reasons for increase in evidence of the workers.



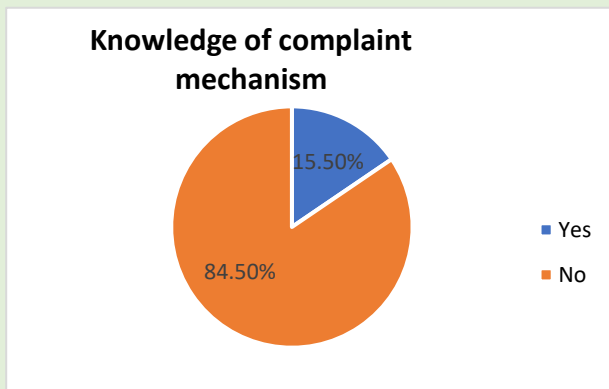
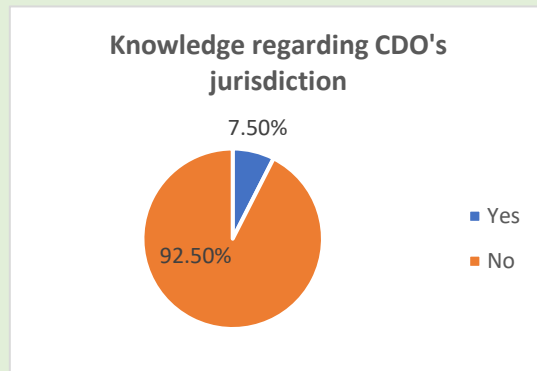
**m. Nature of Assistance received by Migrant Workers.**

71% of the respondents responded that they received no assistance when they faced problems related to Foreign Employment and 29% of the respondents responded that they received assistance. Of the 29% that responded positively, 28.5% had received Legal Support and 0.5% had been rescued but 28.5% responded that they had not received any support. Huge percent of the migrant workers have not received any assistance.



**n. Awareness about the institutional mechanism**

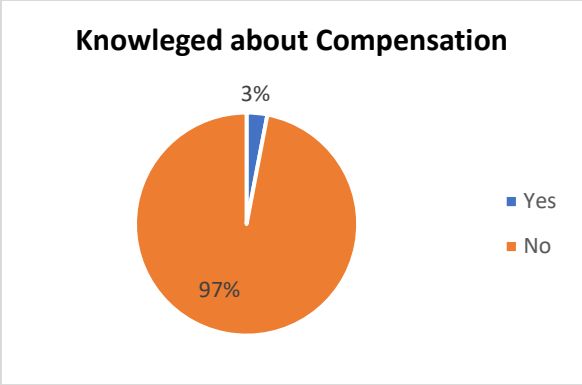
When the respondents were asked about the knowledge on the jurisdiction of the District Administration Office to receive complaints on matters related to Foreign Employment, 92.5% revealed that they had no clue that even DAO could receive complaints. Despite various programs conducted by the governmental and non-governmental sector, and the prevalence of Migrant Resource Centre (MRC) in various districts, migrant workers are unaware about the legal provisions that has been in place since 2015.



Similarly, upon being asked if they had knowledge about the complaint mechanism, 15.5% of the respondents were aware of institutions in which they could file a complaint after they had migrated for work and cheated on thereafter. The data and figures reveal that the awareness programs should include the legal proceedings and action plans of the

government.

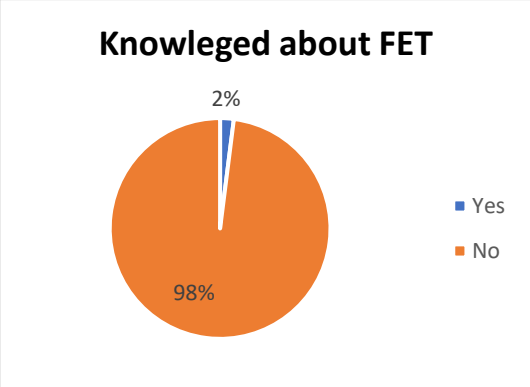
**o. Knowledge about Compensation**



As the migrant workers have come to DoFE to file complaints, it shows that they have faith upon the department and are aware about the remedies. However, 97% of the respondents had no clue about the legal provision concerning the remedy of compensation that were available to them.

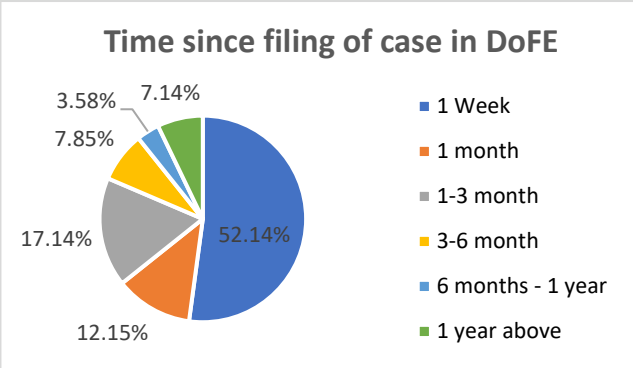
**p. Knowledge about the Existence of Foreign Employment Tribunal**

98% of the respondents did not know of the existence of the specialized Tribunal – Foreign Employment Tribunal, to hear cases related to Foreign Employment. Similarly, none of the respondents were aware of the punishments for offenders in the cases related to Foreign Employment. It can be analyzed that this situation is due to the centralized mechanism in foreign employment cases and inadequate counseling to the victims.



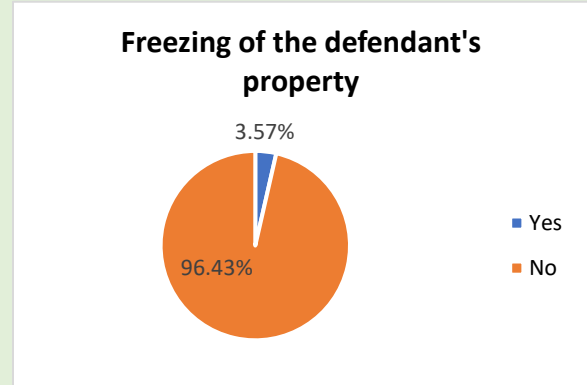
**q. Time passed since the complaint had been filed at the DoFE**

When the respondents were asked about the total time that had passed since they had filed a complaint at DoFE, 52.14% responded that they had filed the case a week earlier and 12.15% had filed the case a month before the survey was taken. Similarly, 17.14% of the respondents had filed the case before 1-3 months, 7.85% had filed 3-6 months before and 3.58% had filed 6 months-1 year before. There were 7.14% of the respondents whose case had been registered for more than a year. The investigation process has also been taking a long time in some cases.



**r. Information on freezing of the property of offenders**

140 respondents were asked whether they had requested to freeze/seize the property of defendants for the purpose of investigation. To that 96.43% revealed that no such proceedings were made, making it difficult for the victims in many cases to retrieve compensation even after the final judgment.



## II. Findings from the Supreme Court Judgments: Analysis on Foreign Employment

### A. Destination Countries

The study of the 50 decisions selected randomly mentioned above revealed that the number of migrant workers to the Gulf and Malaysia, Afghanistan and Israel are higher. The following table represents the destination countries that are the subject matter of the case. For proper distinction and categorization, the countries in the Gulf and Middle East Arabic countries and Malaysia, Afghanistan and Israel are included in one list. Similarly, North American Countries (Canada, USA, Brazil, Haiti) are put together. Similarly, Europe, Africa, New Zealand and Australia and Asian Countries like Singapore, Japan. Korea and Macao are kept under one category.

Gulf and Middle East Arabic Countries plus Malaysia, Afghanistan and Israel	17
North America (Canada, USA, Brazil, Haiti)	14
Asia (Singapore, Japan, Korea, Macao)	7
Europe	6
Africa	1
New Zealand and Australia	2

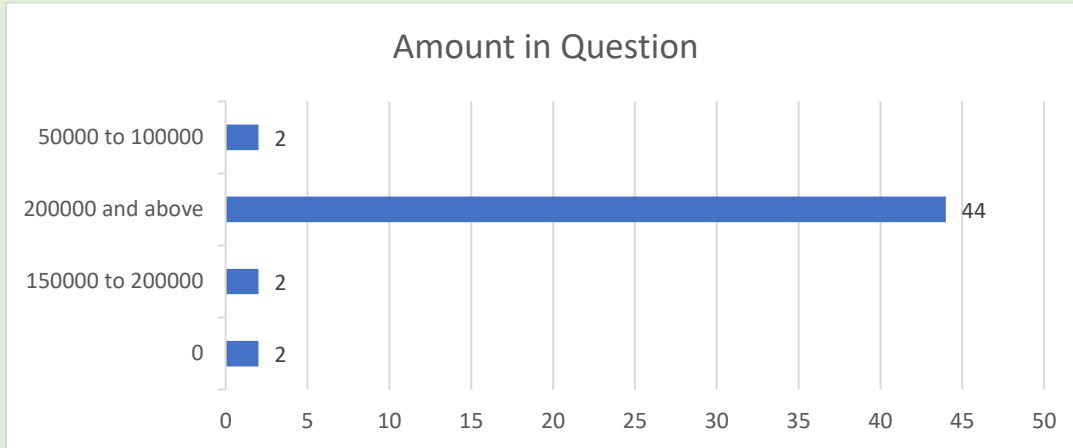
Gulf and Malaysia have been the major destination of the Nepalese Migrant workers. However, the judgments show varied number of destination countries. This might be because the amount in question are higher in other destinations than the Gulf and Malaysian destination.

### B. Amount in Question

The criteria we used to divide the amount in question was 0-50,000; 50,000-1,00,000; 1,00,000-1,50,000; 1,50,000-2,00,000 and 2 lakhs and above. Surprisingly, there were no cases in which the amount of question was between 1 lakh and 1.5 lakhs. While there are 6 cases within 0-2 lakhs limit, most of them have multiple victims and when adding up the total amount of question, the amount increases. The chart reveals that in 44 cases, the amount in question was much higher than 2 lakhs. There were few cases in which the amount in question was less than 2 lakhs but because there would be higher number of victims, the total amount in question would be much higher than 2 lakhs. The average amount in question would range from 8-10 lakhs.

Despite the free visa free ticket policy in place since 2015 in the Gulf and Malaysia, victims have paid hefty amount of money. Moreover, the amount taken to send people off the developed countries is usually high. Since, the number of cases with regards to the developed countries was

higher, the average amount in question was also high. Another reason that can be speculated from this trend is that, mostly the people that report complaints to DoFE and have their case carry on till the Supreme Court are the ones that have both access and awareness to the legal system and have a great amount in question. It can also be seen that when there are smaller amounts in question, it is usually a group of people collectively banding together to bring the fraudulent license holders into the realm of justice.



### C. Number of Defendants

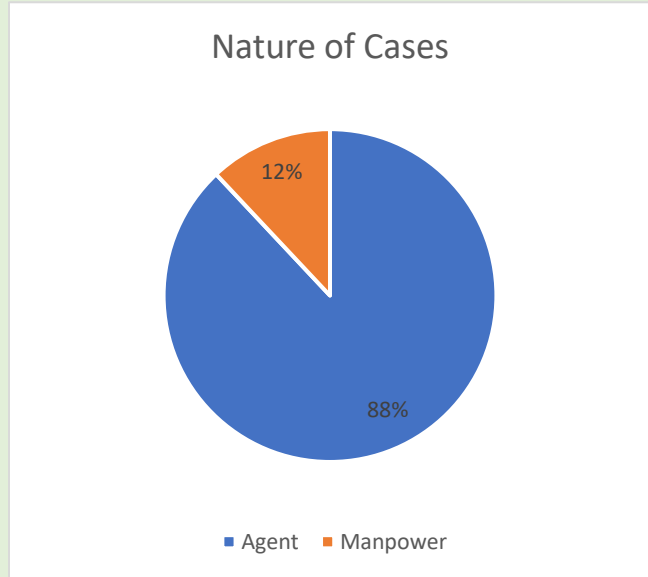
In the offences related to Foreign Employment, we see that most charge sheet are individual. Thus, there are 28 cases in which the defendant charged is only one individual. Similarly, in 12 cases there were 2 defendants, in 3 cases the defendants were three and there were 7 cases in which the defendants were more than 4. In these 7 cases, we see that the charge sheet has been filed against all the directors of the recruiting agency. This data may be because of the maximum number of individual cases.

No. of Defendants	In Cases
1	28
2	12
3	3
4 or more	7

### D. Nature of Cases

Similarly, with the exception of a few cases, most cases that were studied for the reason were concerned with individual foreign employment fraud prosecuted and convicted under the Sec 43 of the FEA.

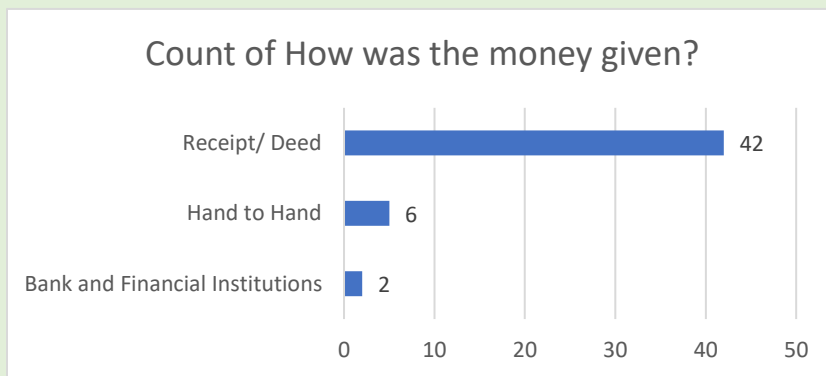
As stated earlier, mostly the defendants in these cases are agents who do not have any license to send people for employment abroad. These people sometimes identify as agents of certain manpower companies and sometimes are common people making promises to send individuals to a more attractive destination. It was seen that agents were mostly involved in sending people to the Gulf and destinations in the West. There were also some Manpower companies involved in



the cases. Of the total cases studied in 88% of the cases, the charged individuals were agents and in 12% the individuals carried out transactions through manpower companies themselves. This data matches with other studies and reports as well.

**E. Nature of Transactions and Convictions**

Unlike in the cases of Human Trafficking, some pattern can be identified in cases of offenses in Foreign Employment. The pattern is mostly concerned with convictions and how the transaction has occurred. Initially, we need to understand the medium of transaction. In most cases, the



transaction occurs through cash transfer with a documentary deed signed or by furnishing a certain receipt of payment. The courts have awarded compensation and the amount in question only when

there is a clear documentary evidence establishing the transaction. There is some exception to the rule i.e., the court is seen to have granted compensation and amount in question also when the defendant has confessed before the Department and if it is substantiated properly by testimony. But mostly, in absence of documentary evidence of receipt, the charge has not been established. Another method of transaction is through bank accounts, though very rarely used, the transfer of



money into bank accounts is accepted as a mode of transaction. But the data below reflects that mostly, transactions do not take place through banking or financial institutions.

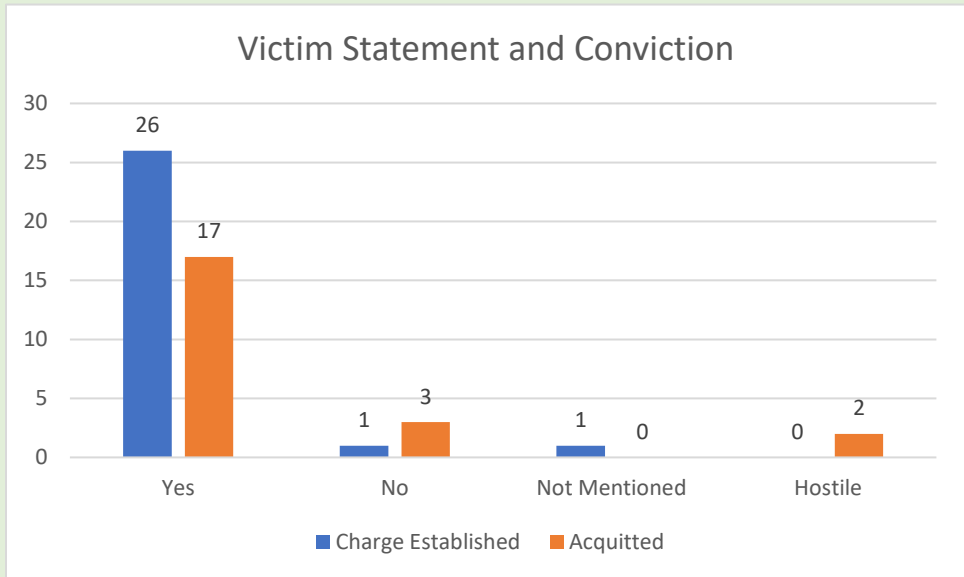
The relationship of convictions by Tribunal when the medium of transaction is receipt is tabulated below. We see that when there is only a hand-to-hand transaction with absence of any documentary evidence, the acquittal rate is much high. There is only one conviction that had taken place only because the defendant had made a confession in the Department. Similarly, there is also an acquittal in Banking Transaction, and it is only because it was seen that the money was entirely transferred to another individual who was not caught.

How was the money given?	Decision by Tribunal		Total
	Charge Established	Acquitted	
Receipt/Deed	26	16	42 (84%)
Hand to Hand	1	5	6 (12%)
Bank and Financial Institutions	1	1	2
Total	28 (56%)	22 (44%)	50

This data also shows that in 28 cases (56%) charges were established and 22 cases (44%) were acquitted by the Tribunal in the total 50 cases studied.

#### **F. Victim Statement and Conviction**

Another pattern that can be noticed and consistent in the decisions on foreign employment is the relationship between victim statements and conviction. The variable that has been cross-tabulated with convictions is the statement given by victims and whether their being hostile and being present in the tribunal had any correlation with a conviction made by the Tribunal.

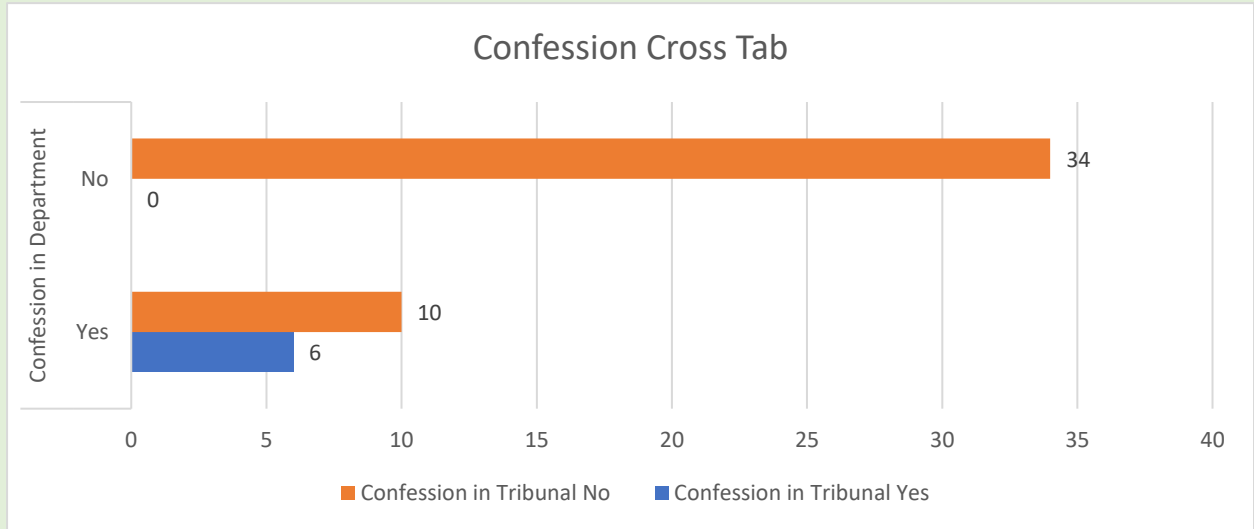


This data shows that convictions are much higher when victims have come and testified in the Tribunal with 26 convictions when the victims have come and testified in the court. Further, when the victims

have not appeared in the Tribunal, only in one of the three cases have the charge been established. Finally, when the victims were hostile in their statement in the Tribunal, the court has acquitted the defendants in two cases.

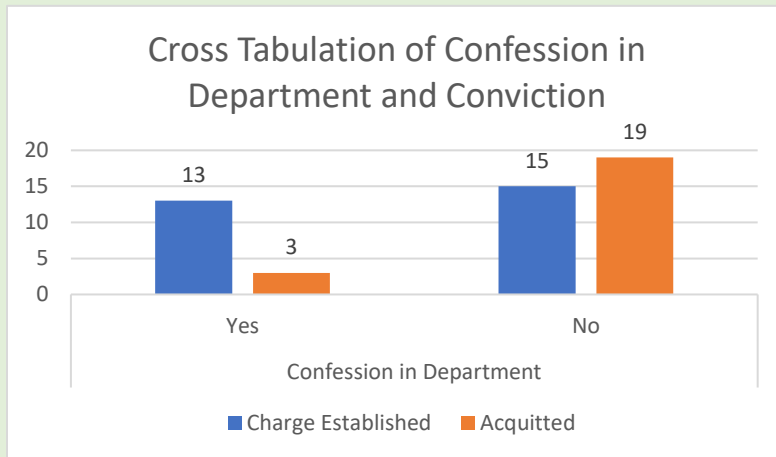
**G. Confession and Conviction**

The first data presented here is the cross tabulation between the confession in the department and the tribunal. Please note that the partial admission of facts or transactions has not been considered



as Confession for the purpose of this analysis. From the data we can see that in 34 cases, individuals did not confess in the department whereas 16 individuals have confessed in the department.

Of the 16 individuals that have confessed in the department only 6 have confessed in the Tribunal and 10 have again denied their statement in Tribunal.



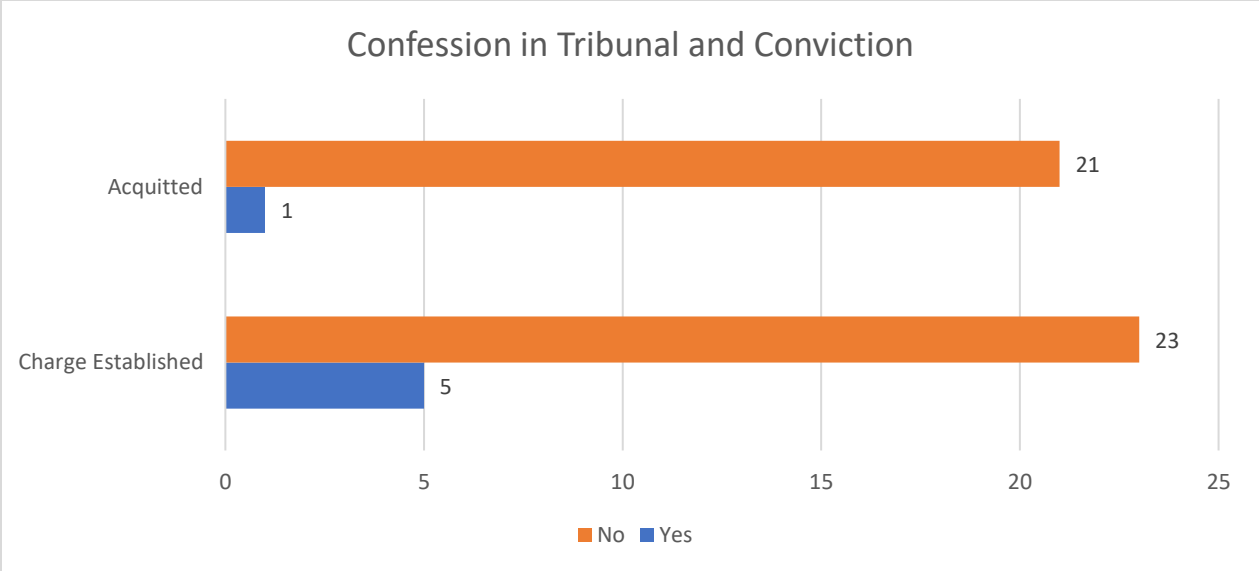
The following table tries to understand the correlation between confessions and conviction.

We can see that there is not much relation between Confession in the Department and Conviction. Still there is a very slight relationship.

Of 16 confessions in the department, in 13 cases the charge has been established. Similarly, in 19 cases where confession has not been made, the tribunal has acquitted the defendant. But despite the absence of confession in department the Tribunal has convicted in 15 cases.

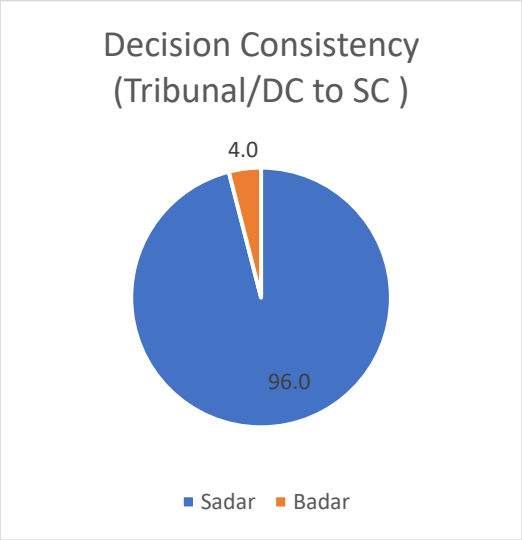
With respect to confession in Tribunal and Conviction, we can see one<sup>16</sup> anomaly in which the court has acquitted even when the defendant confessed in the Tribunal. In this case, the acquittal was on the ground that the direct transfer of money and retrieval of the money could not be traced and that the defendant in question was not said to have kept money for his own use. But in the Tribunal, he had confessed that he had brought visa from the company he was working in and he didn't know that he was not allowed to do so under the law.

<sup>16</sup> *GoN v. Dambar Bahadur B.K.*, Case no. 070-CR-1624, Decided on 2075/09/19.



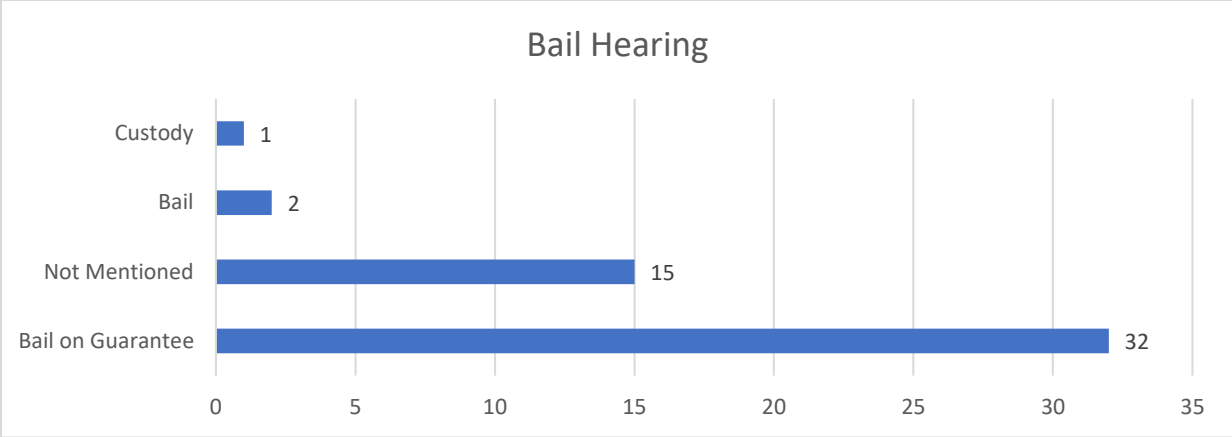
**H. Decision Consistency**

Another variable that was studied was the consistency in the decisions. This data represents the number of decisions by Tribunal that were upheld by the Supreme Court. In Nepal, when the decision is upheld by the court hearing the Appeal, the term “Sadar” is used. Therefore, if the decision made by the Tribunal has been upheld by the Supreme Court, the decision is said to have been “Sadar”. Whenever the court has upturned the decision it has been concluded as “Badar”. It was seen that only four cases (8%) of 50 cases were overturned by the Supreme Court, one on the matter of conviction where the court has convicted the defendant upturning the Tribunal's decision, and three on the matter of acquittal, where the court has acquitted defendants in two cases, and in one some of the defendants have been acquitted.



Otherwise, we can see that the Supreme Court in most instances has agreed with the decision of the Tribunal. This is a good practice in terms of trust in the justice system and uniformity in the justice delivery process.

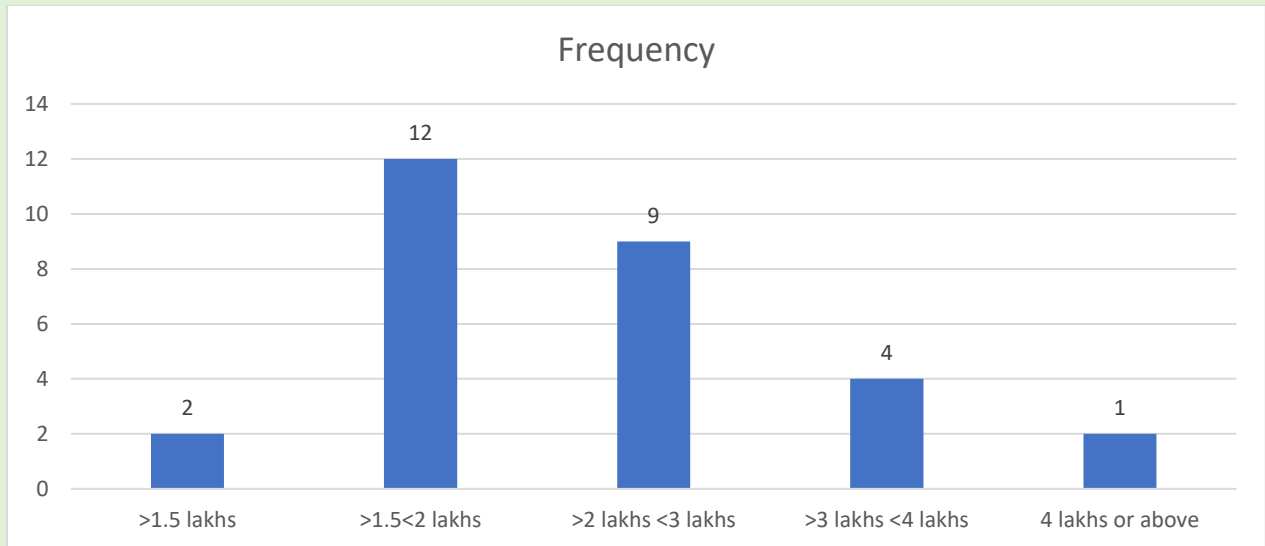
**I. Custody and Bail**



An important element in the study of criminal cases is whether the court has put individuals in custody during the trial process. While the department also can put people in custody, maximum number of judgments did not contain matters on whether the defendant was kept in custody during the trial process, so data was not collected on the subject matter. We see that because the charge sheet in itself would contain charges warranting less than 5 years imprisonment, the Tribunal is seen to have granted Bail on Guarantee in most cases. While doing this, some defendants seem to have fled and missed the *taarekh (case date)* during the trial phase. Usually, the guarantee was determined based on the amount in question and when the amount has been high involving multiple victims, it is almost as if the perpetrator was detained.

**J. Fine and Compensation**

In almost all convicted cases, fine and compensation has been imposed. We see that compensation usually is calculated as 50% additional to the amount in question and that is the compensation that has been awarded in all cases where compensation has been issued. The rate of fines in the convictions have been tabulated below.



In two cases the compensation granted has been less than or equal to 1.5 lakhs. In 12 cases the compensation has been 1.5 to 2 lakhs. In 9 cases it is between 2 lakhs and 3 lakhs. In 4 cases, it is between 3 lakhs and 4 lakhs and finally in one case the compensation is 4 lakhs or above.

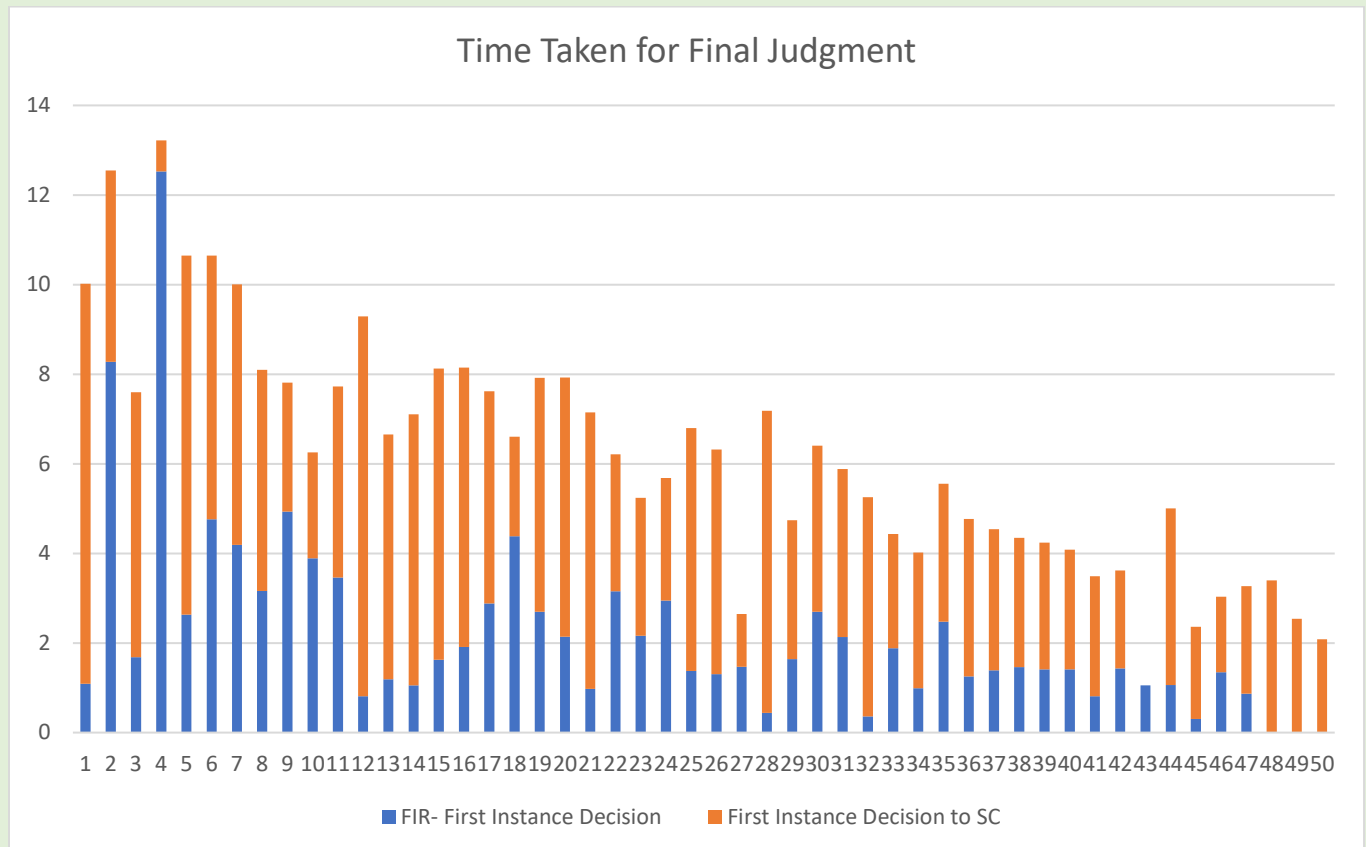
#### **K. Time Taken in Decision Making Process**

This table contains a representation of total time taken for a decision to be made on an offense related to Foreign Employment. In this chart too, the cases are arranged horizontally on the basis of the date of FIR in linear ascending order, oldest first to newest. The blue color in the stacked bar is the time taken from FIR to judgement on the first instance by Foreign Employment Tribunal and the red color represents the total time difference between the SC decision and final instance decision. Since there were only 5 decisions that went to the Appellate Court, the data is ignored in this report.

We can see that it takes 5 years in average for a decision to be final after the FIR is filed. But we can also see a decreasing trend for total time taken for decision to be final, which is quite an achievement. Please note that the data for 47-50 cases do not contain value on time taken from FIR to First Instance Judgement because the date of the First Instance judgement was not available in the decision.

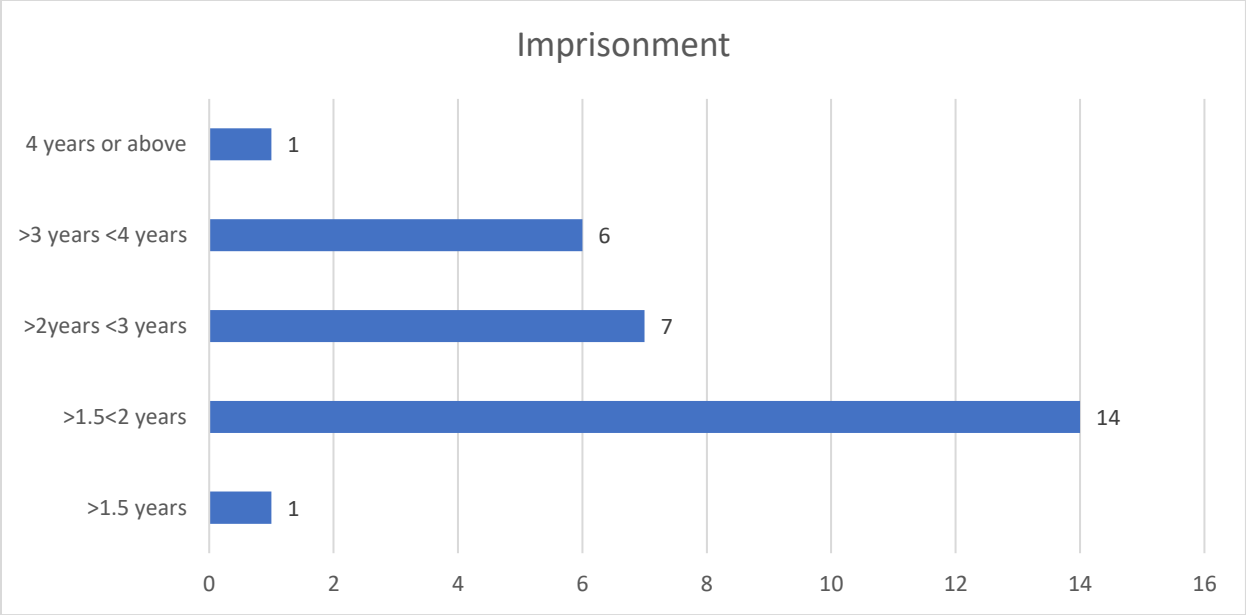
One important factor that must be noted here is the maximum punishment the court has rendered in Foreign Employment Offenses is only 4 years which is also very rare with frequency of only 1. The most common sentence for crimes of foreign employment is 1.5 to 2 years. But if the final

judgement in the Tribunal takes more than 5 years, then the option to appeal at the Supreme Court would be pointless. So that must be very diligently considered. Despite the legal provision to follow summary court procedure in foreign employment cases, the period indicates that this has not been followed. We can see that the maximum number of years taken for the final decision in Foreign Employment cases has been 10.3 years in *Government of Nepal v. Uday Bahadur Shrestha and Jagadish Shrestha*. Similarly, the minimum amount of time taken has been 8 months.<sup>17</sup>



## L. Punishment to the Defendants

<sup>17</sup> *Thakur Ghale et. al. v. Current Shareholder of Worldwide Asian Manpower Service Pvt. Ltd. Represented by Laxmi Gurung*, 62(4) NKP 2077, Dec no. 10487.



Similarly, the maximum imprisonment has been between 1.5 to 2 years in 14 cases. In 7 cases, defendants were sentenced between 2 to 3 years and in 6 cases, they were sentenced between 3 years and 4 years and only in 1 case they were sentenced above 4 years. Section 43 and Section 44 of the Foreign Employment Act provisions for maximum 7 years of imprisonment, but the judicial trend and the judgments reveal that in no case the court has provided judgment of maximum punishment.



### III. Findings from Supreme Court Judgments Analysis on Human Trafficking Cases

#### A. Initiation of the Case

Section 4 of the Muluki Criminal Procedural Code states that any person may provide the “First Information Report” or notice of a crime if they come to be aware of it occurring. However, the practice shows that the FIR is drafted and turned in on behalf of survivor irrespective of whoever is notified first of the occurrence of the incident. The chart details from whom the first information of the incident had been received.

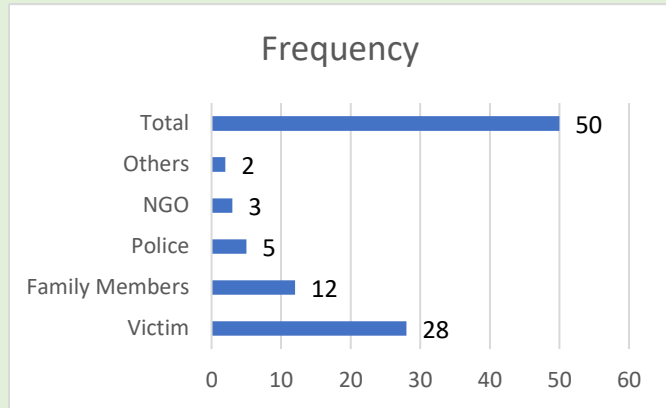


Figure 1: Who files the Case

Of the 50 cases analyzed in this research, it was found that 28 were filed by the survivors themselves, 12 were filed by the family members of the Survivor, in 5 police had raided and caught the traffickers en route, and the remaining were filed by other entities. As we shall read in the later parts of the report, the testimony of the survivor is considered one of the most important evidence in Human Trafficking and Transportation cases, but interestingly in two cases<sup>18</sup>, the court has convicted perpetrators of the crime even the survivors have been absent from the justice administration process.

#### B. Number of Survivors

We see that in most cases there are single survivors. Since Human Trafficking is a deception crime, it could have been easier to trap gullible people when they are alone and deceive them. The frequency of the number of cases lower with the increase in the number of survivors in an offense. Of 50 cases analyzed, in 32 cases there was a single survivor. In contrast the number of defendants in each case is frequently more than two.

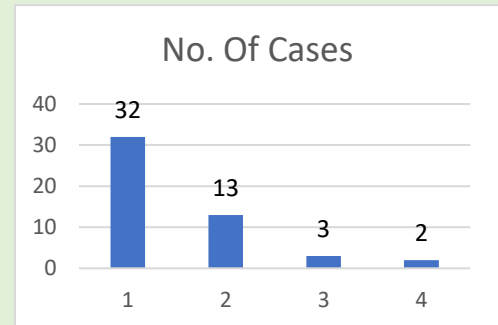
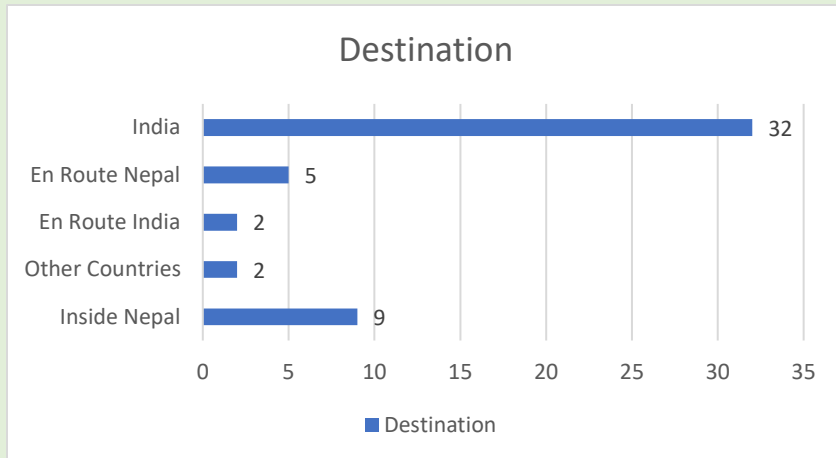


Figure 2: No. of victims in each cases

<sup>18</sup> Uddhav Prasad Acharya et. al. GoN, 56(12) NKP 2071, Dec no. 9308.

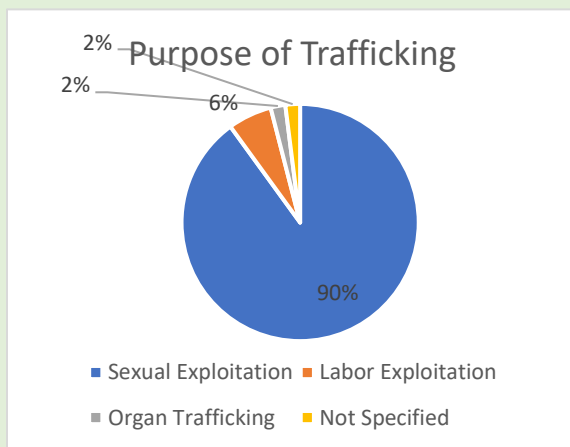
### C. Destination



Confirming the public narrative, most human trafficking cases relate to women survivors being trafficked to brothels in India. Of 50 cases studied, in 32 cases women were trafficked to India. In 2 cases women were rescued on the way to

India whereas 5 women were found being trafficked to a part in Nepal itself. 9 women were trafficked inside Nepal or forcibly engaged in prostitution and of the two women that were trafficked in other countries besides India, one was trafficked to Saudi whereas another was trafficked to Kuwait.

### D. Purpose of Trafficking



Of the total 50 cases, there was one case in which a group of young minor girls were sold to circuses.<sup>19</sup> There were two cases in which the accused was planning to take the survivors for work in India. There was one case in which a man was kidnapped and sold and threatened that his organs would be harvested.<sup>20</sup> There was one case in which a child was kidnapped and sold and the purpose was not revealed.<sup>21</sup> Rest of all the cases (90%) pertained to

sexual exploitation specifically in prostitution. Lack of conceptual clarity on human trafficking and exploitation might be the reason, more cases on sex trafficking has been initiated.

<sup>19</sup> *Phulmati Shrestha aka Thuldidi v. GoN*, 51(8) NKP 2066, Dec no. 8208.

<sup>20</sup> *GoN v. Binod Dhakal et. al.*, 61(12) NKP 2076, Dec no. 10410

<sup>21</sup> *GoN v. Rajendra Mandal et. al.*, 61(2) NKP 2076, Dec. no. 10229.

However, in our interview with the survivor, we came across two men whose kidney was almost being trafficked. While this would fall under the crime of Organ Trafficking, the concerned survivors had some reservations with the justice system. One of them even expressed that he should have been allowed to sell his kidney for money and it was unjust that the police forcefully caused him to file a case.

#### Case Story

Babarmahal 99, was staying with his grandfather and grandmother in Sarlahi district. He ran away from his home to come to Kathmandu and started working as a labor. In the course, he met with a lady who convinced him to work as a driver. For that, the lady took him for a blood check-up, and later, persuaded him to sell his kidney for 5 lakh rupees and a mobile phone worth Rs. 50,000/-. "The police coerced me to write the FIR. Nothing should be against the victim's desire," he stated.

#### E. Financial Contribution

Except in two cases, none of the survivors paid money before being trafficked. However, since the research also extended to interviews of survivors, we learned that there were a number of people that had paid up some money to travel to an unknown destination.

#### Case Story

Kha, was convinced by the defendants that he could earn hefty through import export business in Australia. But he was left stranded in Mongolia via India. He was rescued by his sisters. He has not registered his case yet. "The compensation amount is less, so I have not filed any complaint," stated the victim.

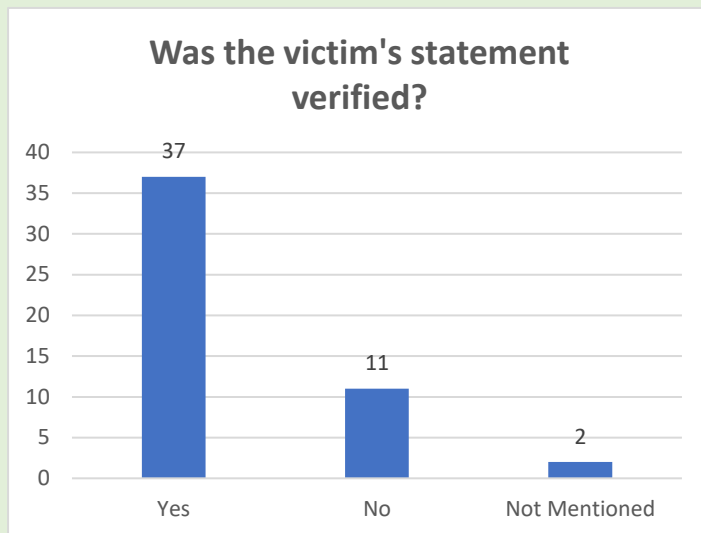
However, they expressed their disappointment when they learnt that they wouldn't be able to recover the amount they invested to end up getting trafficked.

Further, in another story, one of them was even reluctant to submit the FIR because of the fear of not recovering the amount in question.

#### F. Certified Statements and whether the survivor's statements were Hostile

As mentioned earlier in the Section on Legal Framework, the survivors of Human Trafficking statements are immediately certified at the court after a day or two of filing of the First Information Report. This system has been in place since the enactment of the 2043 Act. Despite the fact that these statements are not cross examined and merely one-sided statements, they are statutorily considered as one of the most important source of evidence.

In 11 judgments, the statement of the survivors were not certified. In two judgments, it was not mentioned whether the statements were certified. In all the rest cases (37), the statement of the survivors was immediately certified at the court.



We can see that there are two types of precedents on the matters of whether the certified statement of the survivor can be used as important evidence or not. The first approach<sup>22</sup> is even when the survivor is hostile in the court, if the certified statement talks about the *actus reus* in detail, the court admits it as an important evidence and convicts on the very grounds. The court also states that unless proved otherwise, it would be unreasonable to assume that the survivor was under coercion by the police to falsely accuse someone of such heinous crime in front of the court and the judge.<sup>23</sup> The court also identifies that the survivor may not potentially be found later to bring into trial, hence due to the essence of the time. A very apt example of this tendency of the court is in *Parasnath Pathak et. al case*.<sup>24</sup> In some cases, the court has even convicted people based on

<sup>22</sup> *Lok Bahadur Karki v. GoN*, 57(2) NKP 2072, Dec. no. 9346; The case analyses that the system of certification of statement was inserted into the Act given the sensitive nature of the case as well as the potential inability of the survivor to appear before the court and testify during trial due to some socio-economic circumstances. The court clarified that usually it is the most vulnerable section of population, vulnerable financially and socially, that fall survivor to cases of trafficking.

<sup>23</sup> *Rupbahadur Kshetri et. al. v. GoN*, 53(12) NKP 2068, Dec no. 8732

<sup>24</sup> *GoN v. Parasnath Pathak et. al*, 50(9) NKP 2065, Decision no. 8014; The court states that a person cannot be acquitted with an application turned in 4 years after the certified statement. Further the court states that after the Charge sheet has been filed and statement has been recorded, no evidence shall be evaluated or obtained without the order of the court. Further, affirming District Court's decision, even though the crime could not be completed due to interference of the police and since they had not yet crossed the border to convict on transportation, the Court convicts them of attempt to trafficking. However, it is unclear why the court reduces the punishment of five years to two years even though there is a discretionary authority on the court to ascertain the punishment. This approach has been carried on in number of cases.

hearsay, even when survivor has not been found and statement made before the police even if they reversed their testimony in court.<sup>25</sup>

In contrast, in the second approach the court has straight forward denied the validity of the certified statement on the grounds of absence of any corroborative evidence to support the statement clarifying that the certified statement can only be taken as evidence if they are supported by corroborative evidence. In the case of *GoN v. Bed Bahadur Magar and Bire Tamang*<sup>26</sup> in particular, the SC does not even talk about the burden of proof principle at all.

The first decision by Supreme Court to acquit the accused despite the presence of certified statement is the case of *GoN v. Rabindra Silwal*<sup>27</sup>, which has been cited and referenced by all the subsequent cases. The factual circumstance of this such that the defendant had a proper alibi and other evidences disproving the certified statement and the survivors despite being actively looked for had disappeared and a malice by the FIR filer had been established. This aspect has been completely ignored by subsequent decisions like in *GoN v. Ram Prasad Gurung*<sup>28</sup>, *GoN v. Shobha Badi*<sup>29</sup> and *Jyoti Rai*<sup>30</sup>, despite the detailed narration by the survivor on the circumstances of the crime, the court has acquitted the defendant when the survivors were hostile. Jyoti Rai's case in particular is interesting because it is the only case that dealt with 'human trafficking' in the sense of Palermo Protocol.

To conclude, the inconsistency of the practice with regards to Certified Statement has at times even led accused, who from a plain reading of the facts alone seem guilty have been evicted. The proper distinction and distinguishing from such inconsistency of practice is absent in judgements made in present days has become of utmost importance.

A comparative of the results of convictions from SC and DC shows that while District Court has acquitted only 1 individual when the survivor was hostile, SC acquitted three individuals when the survivor was hostile.

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<sup>25</sup> *Uddhav Prasad Acharya et. al. v. GoN*, 56(12) NKP 2071, Dec no. 9308.

<sup>26</sup> *Bed Bahadur Magar v. GoN and Bire Tamang v. GoN* 61(2) NKP 2076, Dec no. 10190

<sup>27</sup> *GoN v. Rabindra Silwal*, 51(2) NKP 2066, Decision no. 8073.

<sup>28</sup> *GoN v. Ram Prasad Gurung*, 61(12) NKP 2076, Dec no. 10410.

<sup>29</sup> *GoN V. Shobha Baadi*, 61(5) NKP 2076, Dec no. 10274.

<sup>30</sup> *GoN v. Jyoti Rai*, 54(7) NKP 2069, Dec no. 8858.

		District Court's Decision					Total
		Acquitted	Transportation	Trafficking	Both	Organ Trafficking	
Survivor	Yes	1	3	1	0	1	6
Hostile	No	1	11	10	2	0	24
	Survivor didn't Appear in Court	2	5	5	0	0	12
	Not Mentioned	0	4	4	0	0	8
Total		4	23	20	2	1	50

		Supreme Court's Decision					Total
		Trafficking	Transportation	Acquitted	Both	Organ Trafficking	
Survivor	Yes	1	1	3	0	1	6
Hostile	No	11	6	6	1	0	24
	Survivor didn't Appear in Court	4	6	2	0	0	12
	Not Mentioned	4	2	0	1	0	8
Total		20	15	11	2	1	50

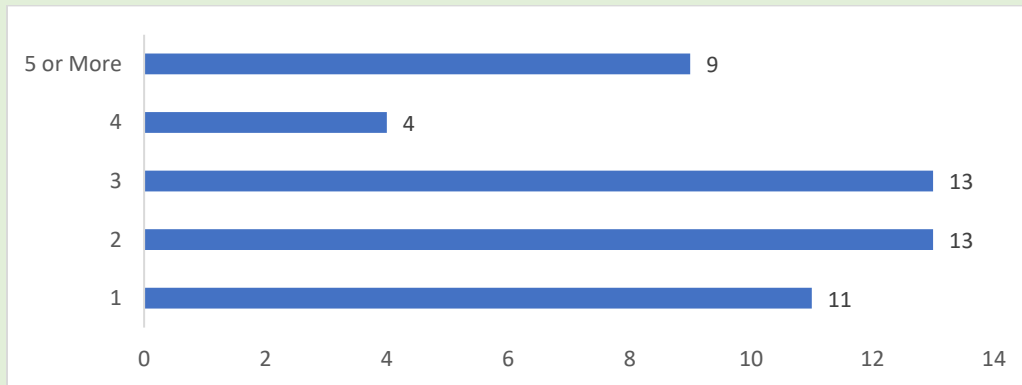
**G. No. Of Defendants and whether they were Caught**

Since Trafficking is mostly an organized crime where more than 1 individuals were involved, it becomes difficult to arrest all the perpetrators and to identify their level of participation in the Case, especially in the absence of confessions and denial of participation in the crime in itself. It was seen that in 50 cases, in 41 cases perpetrators were arrested and only in 9 cases all the defendants could not be arrested.

Were the Perpetrators Caught?

All Caught	41
Partially	9
Total	50

Further, we can see that most crimes are committed in groups involving 2-3 people. Of the total cases, the following data was collected and the maximum number of defendants was 8.



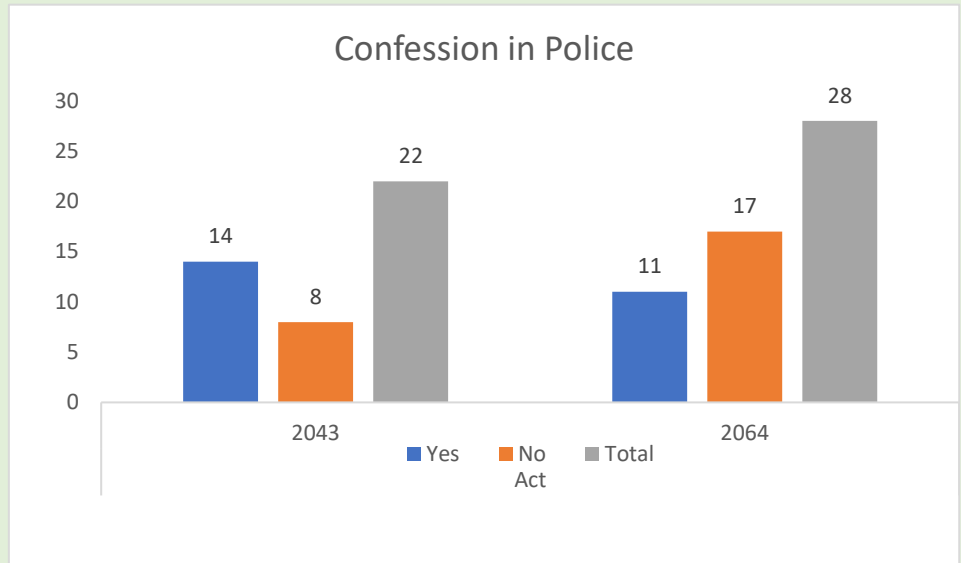
We can also note that mostly the perpetrators were someone the survivors knew from the neighborhood or from their own village or lovers turned traffickers. Of 50 cases only in 5 cases the defendants were strangers.

#### Case Story

Babarmahal (Dha) wanted to go abroad after completing her higher studies. "I have known the perpetrators. They convinced me to send me to Canada," she stated. But, she was sold to India. She was bonded and mentally tortured. She was rescued with the help of her relatives. But as the defendant has not been arrested, her case has not moved any further.

#### H. Confession

It is a common understanding in Nepal that the defendants are mostly tortured, and confessions are extorted from them, but we can see that in most of the cases of Human Trafficking, the defendants have only admitted to some of the facts. In the chart,



admissions to certain facts, like “I took her for work, I am taking the survivor to marry” have not been categorized as confession. Hence, we can say that the confession has not necessarily been extracted. Among 22 judgments decided on the basis of 2043 Act, defendants in the 14 judgments have confessed to the police and among 28 judgments of the 2064 Act, 11 have confessed their crime.

We can see that there were higher confessions in police when 2043 Act was in place as compared to confessions when 2064 Act was enacted.

Confession in Police and District Court Conviction Cross-tabulation							
		DC Conviction					Total
		Acquitted	Transportation	Trafficking	Both	Organ Trafficking	
Confession in Police	Yes	2	10	12	1	0	25
	No	2	13	8	1	1	25
Total		4	23	20	2	1	50



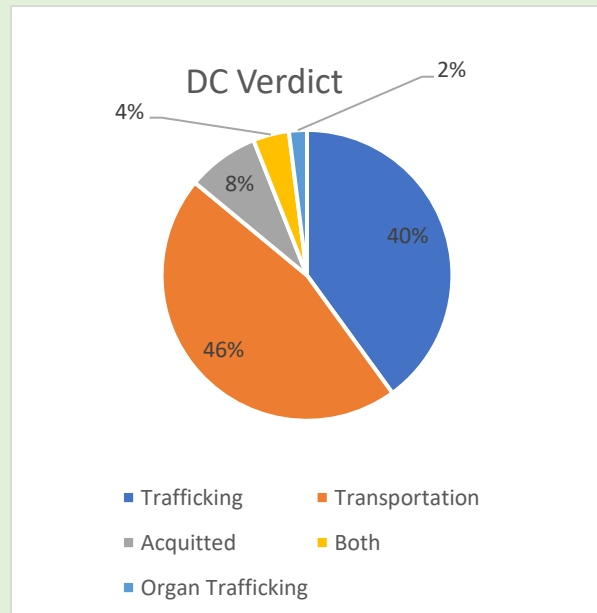
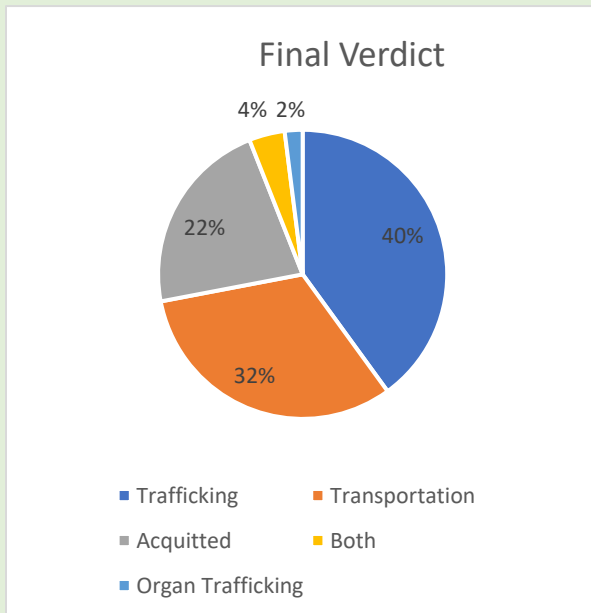
In this data we see that even if there was no confession in the police, the court has convicted individuals. Similarly, even when individuals have confessed, acquittal has taken place in District Court.

However, if we are to do a comparative with the Supreme Court conviction, Acquittal when Confession was not made in Police is much higher increasing from 2 to 9.

Confession in Police * Final Conviction Cross-tabulation							
		Final Conviction					Total
		Acquitted	Transportation	Trafficking	Both	Organ Trafficking	
Confession in Police	Yes	2	9	12	2	0	25
	No	9	7	8	0	1	25
Total		11	16	20	2	1	50

### I. Conviction Rate

We see the following conviction rate in the District Court. Only in 8% of the cases there was acquittal whereas in 92% cases, the District Court has convicted.



Whereas in the Supreme Court, the acquittal rate is relatively higher with 22% (11 cases) being acquitted as compared to only 8% in District Court. The data and figures show that the Supreme Court's decision is inconsistent in Human Trafficking case in comparison to the decisions provided in the Foreign Employment cases.

Decision in District Court	Appeal Court	Supreme Court
Sadar	30	32
Angsik, Changed the Punishment	12	7
Badar	8	9
Not appealed to Supreme Court	-	2

### J. Decision Discrepancies

There used to be a belief in Nepal, also enunciated in multiple Judicial Commission's Reports that the consistency of judgment would lead to realization of fairness and justice in the country<sup>31</sup> but we see a lot of changing of decision from the District Court, Appellate Court and the Supreme Court.

This data shows that there is almost 50% change of judgements, in punishment, fine or even convictions in the final verdict when the case comes from lower court and becomes final. A detailed study reveals that the frequency is much higher after the enactment of the 2063 Act especially at the level of District Court and Appellate Court. It is necessary to conduct a separate research on its reason.

### K. Cross tabulation of Appeal Court Judgement parameters and Act.

		Act		Total
		2043	2064	
Appeal Court Conviction	Sadar	19	11	30
	Acquitted	0	1	1
	Angsik/ Partial	1	11	12
	Badar	2	5	7
Total		22	28	50

<sup>31</sup> Prakash Wasti, *Hamro Kanuni Itihasko Nalibeli (Kirkal dekhi 2078 Saal Samma)* (Romanised from Devanagari, Paravi:Kathmandu, 2022).

This shows that in 11 cases, the judgement had to be changed in 2064 Act and despite the higher number of precedents from 2064 Act, the number of judgements that were confirmed are much lower in 2064 Act.

Until the 2043 Act was in place, the crime of trafficking, transportation and prostitution had clear definitions. Hence, a person convicted of trafficking would be convicted of so by the same section until the case reached the Supreme Court. However, we can see that after the enactment of the 2064 Act, there are many confusions with regards to the use of proper Section for punishment under trafficking, transportation as well as exploitation and Supreme Court has failed to provide proper definition of the crime committed.

Before the 2064 Act was enacted, all the cases in which the survivor testified that she had been sold to a Brothel in India, or engaged in prostitution in Nepal, the court would convict the accused of trafficking or prostitution under the Section 4(a) or 4(c) of the 2043 Act. The convictions under Sec 4(b) for Transportation were much low. But after the enactment of 2064 Act, the convictions under transportation is much higher. It is also because of the police's intervention at the border or on the transit multiple times after the enactment of 2064 Act.

While the crime of transportation is a part of an attempt to the crime of trafficking, to make convictions possible and to fulfil the 'preventive' purpose of penal system, transportation has been defined as a separate crime since 2043 Act itself. Further, it was argued that since the crime of trafficking was hard to prove due to its transnational character, crime of transportation had to be defined to bring more delinquent individuals, procurers within the scope of this Act.

In addition to this another difficulty comes with regards to the organized nature of the crime. Since there are multiple actors involved, there are multiple stages in the crime. Some of the actors may help in crossing the border, some in transporting outside the border. Some women are used to convince the survivors. Because of the organized nature of the crime, it is difficult to distinguish the stages for each perpetrator and define their crime precisely.

One of the examples of such confusion with regards to the definition of the crime is the case of *GoN v. Binod Rishidev et. al.*<sup>32</sup> Despite the police confession stating explicitly that the defendants had asked for money of such sale and the testimony of the survivor of having heard that she was sold, the court punishes them for only 8 years. In contrast, the court has convicted people caught en route to Sikkim of transportation and punished for 10 years without any witness testimony or handover. Thus, there still is a confusion with regards to what crime would construe a transportation and what crime would be defined as an attempt. In similar cases, the perpetrators are seen to be convicted sometimes with transportation and sometimes with trafficking. In *Lok Bahadur Karki et. al.*, the court ruled that the removal of a person from one's place of residence with an intention of engaging them in prostitution or exploitation would in itself construe a crime of transportation. Whether they reach the destination or not is irrelevant for the completion of crime and hence, if someone is caught en-route, they can be convicted for transportation itself.<sup>33</sup> In contrast, in *Goma Paanchkoti v. GoN*<sup>34</sup>, the court convicted the defendant of attempt to Transportation, when she was caught en route to India in Tehrathum.

Again, in *GoN v. Shankar B.K.*<sup>35</sup>, the court convicted the defendant of attempt to transportation when they were caught en route in Naagdunga.

In the case of *Karbir Shahi v. GoN*, three different judgements are given by the District Court, High Court and Appellate Court. The District Court convicted the defendants of transportation for exploitation, Appellate Court overturned and convicted them of engaging the women in Prostitution according to the 15(1)(b) and imprisoned them for 10 years and SC again Supreme overturned the decision and punished them for attempt of prostitution.<sup>36</sup>

Further, we see that in one of the cases<sup>37</sup>, a clear case of cyber pornography, extortions, rape was prosecuted under the Human Trafficking Act, but was acquitted both by District and Appellate Court. Finally, the Supreme Court convicted him citing multiple International Conventions that mandated the protection of women as vulnerable population, from CEDAW to ICCPR, ICCESCR,

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<sup>32</sup> *GoN v. Binod Rishidev et. al.*, 63(7) NKP 2077, Dec no. 10544.

<sup>33</sup> *GoN v. Bahadur Karki et. al.*, 57(2) NKP 2072, Dec no. 9346 ¶ 6.

<sup>34</sup> *Goma Paanchkoti v. GoN*, 57(1) NKP 2072, Dec no. 9333

<sup>35</sup> *GoN v. Shankar B.K.*, 60(8) NKP 2075, Dec no. 10070

<sup>36</sup> *Karbir Shahi v. GoN*, 60(2) NKP 2075, Dec no. 9958

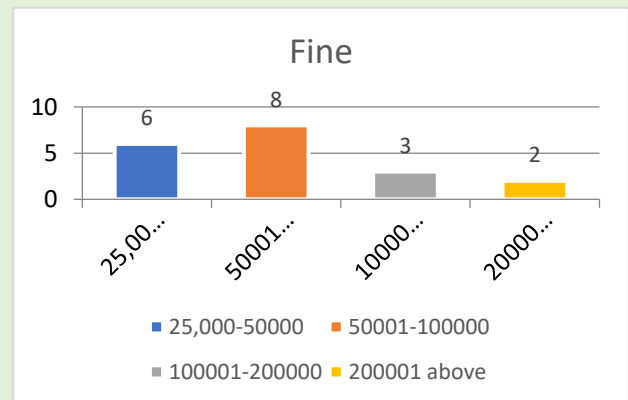
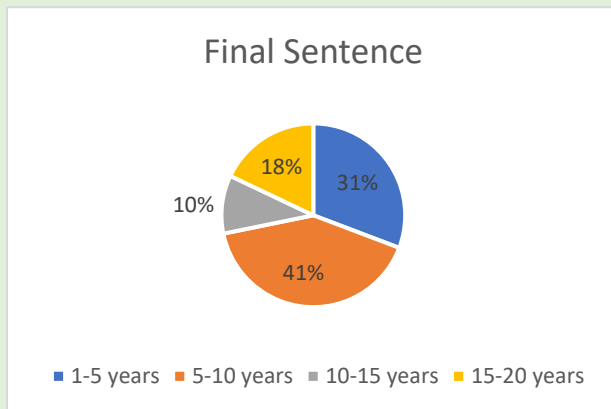
<sup>37</sup> *GoN v. Prakash Ojha*, 58(6) NKP 2073, Dec. no. 9621.

but the punishment is only 5 years, and the nature of the crime does not show that “trafficking” had taken place in real sense.

Similarly, in the case of *Basant Rawal*<sup>38</sup>, despite the cruelty of the offence committed by the defendant, the Appellate Court had acquitted the accused stating that the victim's family members had been hostile. The Supreme Court convicted the accused of transportation but only for the purpose of ‘exploitation’ with the minimum punishment of 5 years. The crime was atrocious as she was kept as bonded labor in their home and abused continuously. The court even mentions the term ‘forced labor’ but due to lack of statutory provision cannot convict the accused of so. This also shows how the definitions of crime has not been clarified after the enactment of 2064 Act and much work has to be done in this regard.

These inconsistencies are also evident from the fact that a lot of cases decided after the enactment of 2064 Act have been made “Angsik Badar” in Appellate Court level and Supreme Court where the charge has been corrected and changed. This was not the case when 2043 Act was in place. This requires the court to maintain a proper consistency and actually distinguish between the various types of cases.

### L. Imprisonment, Fine and Compensation

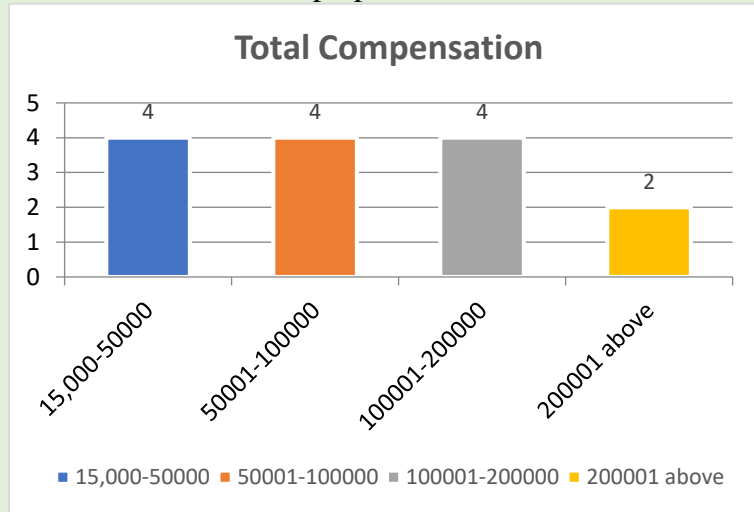


In this we see that of total 39 convictions, 41% were sentenced to 5-10 years imprisonment, whereas, 31% were sentenced to 1-5 years, 10% to 10-15 years and finally 18% to 15-20 years.

<sup>38</sup> Basant Rawal v. GoN, 61(5) NKP 2076, Dec. no. 10266.

Similarly, of total 39 convictions, only in 19 cases perpetrators were fined. The range included here is fine per one perpetrator. We can see that in 6 cases, perpetrators were fined from NRs. 25,000- 50,000; in 8 cases 50,000 to 1,00,000, in 3 cases 1,00,000 to 200000 and 2 cases more than 2,00,000.

In terms of compensation, only in 14 cases compensation is seen to have been granted. The compensation has been calculated on the basis of compensation received by survivor



from the perpetrator. To that end, in 4 cases each compensation from NRs. 2,00,000 and above, Rs. 1,00,001-2,00,000 and 2,00,000 and 50,001 to 1,00,000 is given whereas, in 2 cases survivors have been compensated with NRs. 15,000-50,000.

The provision on Compensation in Nepal for survivors of Human Trafficking and Transportation was only provisioned after the enactment of 2064 Act. The Compensation is one of the major issue dealt by the decisions on Human Trafficking. In two<sup>39</sup> cases, the court has cited a number of international conventions and practices to provide the survivors with compensation. Compensation has even been awarded retrospectively and constitutional provisions have also been cited and interpreted to award compensation.

Further, in three<sup>40</sup> cases, directive orders have been issued, where the court has elaborately talked about several international sources including Conventions, and Declarations with regards to granting Compensation in Human Trafficking and Transportation Cases. In the first<sup>41</sup> case, the

<sup>39</sup> *Lok Bahadur Karki et. al. v. GoN*, 57(2) NKP 2072, Dec. no. 9346; *Bhagirath Dahal et. al. v. GoN*, 59(6) NKP 2074, Dec no. 9824.

<sup>40</sup> *Lok Bahadur Karki et. al. v. GoN*, 57(2) NKP 2072, Dec. no. 9346; *Bhagirath Dahal et. al. v. GoN*, 59(6) NKP 2074, Dec no. 9824; *Tara Bahadur Basnet et. al. v. GoN*, 60(6) NKP 2075, Dec no. 10025

<sup>41</sup> The case then cites the Article 3(2) and Article 19 of **Convention on the Rights of Child, 1989**<sup>41</sup> and talks about the responsibility of the state to protect the children of their nations. On the basis of this obligation, the precedent then cites the Para 12 and 13 of the **Declaration of Basic Principles of Justice for Survivors of Crime and Abuse of Power**<sup>41</sup> and the European practice of granting compensation according to the **Convention on the Compensation of Survivors of Violent Crime, 1988**<sup>41</sup>. The case also cites the Polish, Indian, Bangladeshi, Japanese, English, Canadian, American and Australian Practice and derives two methods for giving compensation: (a) Through the fine paid by the

economic condition of the accused was such that the defendant claimed that they were unable to pay the compensation to the survivor who was a minor. In that regard, the court analyzed the international conventions and practice on the issue of compensation and states that the major purpose of compensation is “Survivor Recovery”.

To conclude, talking about multiple principles, the court issues an order to pay the survivor of the present case from the public fund first and then retrieve such money from the offender later, and issues a directive order to the Office of PM and Council of Minister to make provision to make sure that the survivor’s in cases like this receive compensation immediately from a fund established by the state upon the decision being implemented and then later on retrieve the amount from the offender’s assets by taking necessary actions.

In the second<sup>42</sup> case, while the event had taken place before the 2064 Act was enacted, the survivor had suffered grave violations in Saudi. Instead of taking the fine, the Court orders the payment of the fine as compensation to the survivor based on multiple international principles on survivor compensation. The court does so on the basis of UN Draft Convention on Justice and Support for Survivors of Crime and Abuse of Power, 2009, ICCPR, CEDAW, UN Declaration of Basic Principles of Justice for survivors of crime and abuse of power, 1986. Further the court also takes reference of the Crime Survivors’ Rights Act, 2004. 18 U.S.C. § 3771 of the United States of America as well as a case law established by the American Supreme Court in *Payne v. Tennessee*.

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offenders and (b) from a public fund established by the government. Emphasizing that the second system was more pertinent the court recognizes the necessity to establish a separate fund for provisioning for survivor as compensation. <sup>42</sup> *Bhagirath Dahal et. al. v. GoN*. 59(6) NKP 2074, Dec no. 9824; The FIR states that she had been sexually exploited, tortured without payment of any salary and her landlord had informed her that he had bought her from Nepal. She had escaped from the landlord and come to Nepal. Since the incident had taken place before the 2064 Act came into force, the conviction is for Human Trafficking under the Sec 8(a) of the 2043 Act. Since the survivor had stated that she had been sold for 2 lakhs, This decision also cites the decision by the Supreme Court in *Lok Bahadur Karki et. al v. GoN*. The court awarded the survivor compensation based on the principles of justice by analyzing international practices in this regard. Further, the compensation is awarded from the defendant against the principle of retroactivity of criminal law. In doing so the Court has again taken reference of principles of victimology, ICCPR, CEDAW, Declaration of Basic Principles of Justice for Survivors of Crime and Abuse of Power 1985, British, EU, American, Australian, and Indian practice to award compensation to the survivor. The court awards the survivor compensation from the fine paid by the defendant which they were supposed to pay as the ‘bigo’, amount in question received from sale to the court.

Similarly, in *Tara Bahadur Basnet et. al. v. GoN*<sup>43</sup> and *Shanti B.K. v. GoN*<sup>44</sup>, the court again talks about Survivor Compensation.

In the personal interview with survivors, two of them expressed their disappointment with the absence of providing reparations to the victim in terms of amount in question when they have made financial contribution with respect to trafficking for exploitation. One of them even shared their reluctance to file an FIR in the fear of not receiving the amount in question back.

### **M. Reference to International Law, Foreign Legal Sources and Directive Orders**

As it has been discussed in the Section on the Compensation above, it was noted that of 50 judgments on Human Trafficking, only 6 judgments<sup>45</sup> cite International Laws, Conventions. In two of these cases<sup>46</sup>, it was cited to recognize the right of the survivors to compensation. In the absence of adequate legal provisions in facilitating or ensuring that due compensation is available, the cases are seen to have referenced to multiple international declarations, not as binding commitments, but as persuasive authority. Besides, Nepal is party to various international human rights conventions including Forced Labor Convention 1930, UN Convention on Transnational Organized Crime 2000 as well as regional convention like the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002. However, the court has

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<sup>43</sup> *Tara Bahadur Basnet et. al. v. GoN*, 60(6) NKP 2075, Dec no. 10025; The actus reus, trafficking act in this case had occurred before the enactment of the 2064 Act, the survivor was not entitled to compensation. Thus, again analyzing the retrospective effect doctrine and *Calder v. Bull* decision, the court grants compensation to the survivor from the public fund. In this case, the District court itself recognized the necessity of the Survivor to deserve compensation but both the District Court and the High Court could not grant compensation. However, the Supreme Court while recognizing that the 2043 Act which is the Act that was applicable in this case and that it would be unfair to impose punishment of compensation on the survivor and considering the condition of the survivor in being affected by HIV, ordered the government to pay 3,00,000 (Three Lakhs Rupees) as a compensation following a survivor justice and compensation perspective. This was a directive order directed to the Ministry of Children, Women and Social Welfare.

<sup>44</sup> *GoN v. Shanti BK*, 59(8) NKP 2074, Dec no. 9869, In this case, the court tries to clarify that the compensation amount to be given is not half the fine, but the Act only provides a limit on the minimum. The court is critical of the practice that mostly, the courts have been awarding compensation equal to only half of the fine, when they could aware more compensation as well. It had to do so because the main perpetrator of the crime was not caught, and the defendant was only an accomplice to the offense. Noting the socio-economic circumstance of the offender, the court awarded a compensation of NRs. 15,000.

<sup>45</sup> *Lok Bahadur Karki et. al. v. GoN*, 57(2) NKP 2072, Dec. no. 9346; *Bhagirath Dahal et. al. v. GoN*, 59(6) NKP 2074, Dec no. 9824; *Basant Rawal v. GoN*, 61(5) NKP 2076, Dec. no. 10266; *Suresh Lama et. al v. GoN*, 47(7) NKP 2062, Dec no. 7571; *Phulmati Shrestha aka Thuldidi v. GoN*, 51(8) NKP 2066, Dec no. 8208; *Uttam Lama v. HMG*, 46(9) NKP 2061, Dec no. 7432

<sup>46</sup> *Lok Bahadur Karki et. al. v. GoN*, 57(2) NKP 2072, Dec. no. 9346; *Bhagirath Dahal et. al. v. GoN*, 59(6) NKP 2074, Dec no. 9824;



mentioned the Palermo Protocol on Human Trafficking once to denote the evolving and expanding definition of the crime, but it has not been actually used as when the Protocol was quoted, Nepal was yet to be a party to the Protocol<sup>47</sup>.

Secondly, international sources have been cited in three instances, once to reference the definition of Human Trafficking by citing "UN Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others"<sup>48</sup> on child labour, exploitation, children trafficking<sup>49</sup> and secondly on the retroactivity of law and to declare instances where law can be applied retrospectively<sup>50</sup>. Of them, only in two<sup>51</sup> cases the court has issued directive orders.

#### **N. Time taken for the final judgment**

In this chart 48 judgments have been represented in a linear order based on the date of their FIR registry. The time taken from FIR to DC judgement is represented in blue, DC to AC judgement is represented in orange and AC to SC is represented in Grey. From this chart, what we can observe is with the exception of a few cases the highest time taken for final judgement is AC to SC represented by grey portion. The time taken from FIR to DC is mostly decreasing with a few increases in the middle. The time period from DC to AC is much lower in comparison to the other series. Two judgements have been not been included in this graph because one of them did not contain the date of their District Court Decision and other did not contain the date of their High Court Decision. We can see that the average time taken is 7 years. What this data can tell us is we need to figure out a method to reduce the time taken in decision at the Supreme Court. In *Baijanath Yadav*<sup>52</sup>, it had almost taken 18 years for the judgement to be delivered whereas the decision has been finalized in 2 years in *Jyoti Rai*<sup>53</sup>.

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<sup>47</sup> *Basant Rawal v. GoN*, 61(5) NKP 2076, Dec. no. 10266.

<sup>48</sup> *Suresh Lama et. al v. GoN* 47(7) NKP 2062, Dec no. 7571.

<sup>49</sup> *Phulmati Shrestha aka Thuldidi v. GoN*, 51(8) NKP 2066, Dec no. 8208.

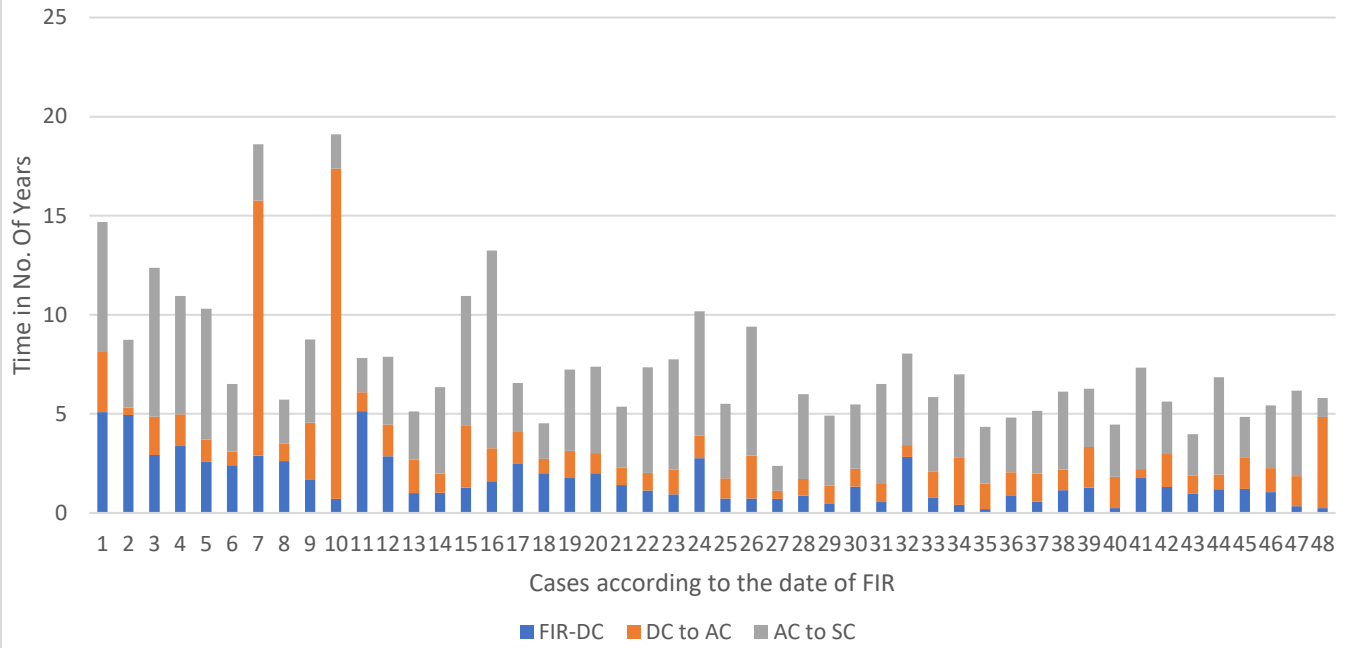
<sup>50</sup> *Uttam Lama v. HMG*, 46(9) NKP 2061, Dec no. 7432

<sup>51</sup> *Lok Bahadur Karki et. al. v. GoN*, 57(2) NKP 2072, Dec. no. 9346; *Bhagirath Dahal et. al. v. GoN*, 59(6) NKP 2074, Dec no. 9824.

<sup>52</sup> *Baijanath Yadav v. HMG*, 62(5) NKP 2077, Decision no. 10496

<sup>53</sup> *GoN v. Jyoti Rai*, 54(7) NKP 2069, Dec no. 8858.

## Time Taken for Final Decision in Human Trafficking and Transportation Cases



#### IV. Summary of Findings

This section aims to summarize findings of previous section and also includes the inputs from stakeholder's interviews.

##### A) Foreign Employment Cases

1. In some cases, we also see that victims are in search of employment opportunities and at times have already travelled abroad while the case is in trial.<sup>54</sup>
2. In most cases when the defendant is brought before the Department they partially admit to the offence and agree to turn in the remaining amount in given due time.
3. In most confessions, we see admission to borrowing the money but declining that the money was taken for the purpose of foreign employment.<sup>55</sup>
4. Despite the summary procedure being followed, the time taken for decision is still very high averaging almost 5 years. The time taken for judgment execution is has not been added, which is much tedious.
5. Another interesting finding in Foreign Employment cases is the discernible pattern with similar facts, similar treatment by the Tribunal and most often, decision upheld by the Supreme Court. This could in some way also be indicative of the fact that when specialized tribunals are empowered to handle similar cases, there will be a higher chance of maintaining consistency in the judgments.
6. The centralized justice system has made it difficult for the victims to file cases and for the follow-ups. Even when the complaints are filed through the CDO office, it is difficult to furnish evidence and hence victims are bound to come to the capital at the DoFE to file the case.
7. Despite the provision to compensate the victim from the defendant's property, the defendant's property has not ceased since the investigation period which has made it difficult to compensate the victim.
8. The judgment execution process is carried out by District Court and is completely dependent on the victim's ability to provide accurate information of the defendant's

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<sup>54</sup> *Gyanbahadur Budhathoki et. al. v. GoN*, 53(1) NKP 2068, Decision no. 9674.

<sup>55</sup> *Bhawani Kafle Tuladhar v. GoN*, 60(2) NKP 2075, Dec no. 10017. Also affirmed in *GoN v. Ganesh Bam Malla*, 541 SC Bulletin, Baisakh 2<sup>nd</sup> issue, p.42. The Supreme Court has noted the rising tendency of people including the matter of foreign employment even when the transaction is of a general matter in deeds.

property. Further, due to the case magnitude at the District Court, execution is slow and less prioritized.

9. The burden of adducing evidence related to identity and residence of the perpetrator lies on the victim. Due to increase in communication through social media and phone calls, tracing the identity and residence of the perpetrators have become much difficult.
10. One of the major problems is the absolute reliance on documentary evidence for conviction when most offenders attempt to erase or remove all traces of transactions. More often, the principal offender tries to erase the traces of the transaction by not providing a proper bank account for transaction or by using middle men or third party accounts which again creates a burden on the victims to trace the identity of the offenders.
11. The recruitment agencies use multiple agents and hence it is difficult for the migrant workers to trace the recruitment agency they are paying the amount to.
12. Significant majority of people are still unaware of the mechanisms to file a complaint. They do not know which entity they can go to lodge a complaint or lack access to those institutions. Victims who are abroad for foreign employment are unaware of the complaint mechanisms to seek remedy or recourse through Embassies or diplomatic entities.
13. The Supreme Court has taken notice of a recent trend that has developed regarding the inclusion of “for Foreign Employment purposes” in documents of general transactions. In these cases, the general cases related to fraud also get filed which makes it difficult to find actual victims.
14. Inadequate training for the investigation officers of DoFE affects their ability to distinguish the cases of trafficking for exploitation and Foreign Employment Fraud. This has led to impunity in trafficking cases where Foreign Employment under exploitative conditions takes place.
15. Comparatively, the statement recorded by the Tribunal and the DoFE are more comprehensive than the statement recorded by Police, there is still a lack of due process in following through and recording an honest verbatim statement.
16. The lack of proper involvement of the competent investigating officers and field investigation makes the investigation process much weaker.

17. There is still a lack of conceptual clarity on the statutory distinction between human trafficking and offenses related to foreign employment. This has led to reluctance in prosecuting as well as in decision-making in the forced labor cases in destination countries.

### **B) Human Trafficking Cases**

1. The necessity of the presence of victims to initiate the case makes it difficult for investigations where victims have moved on to a different jurisdiction or are reluctant to stay cognizance of the court.
2. There is no proper recording of the statement of the victim, witnesses or even investigating officers. There is the absence of virtually facilitated statement-taking mechanisms.
3. The victims are still coerced and threatened to not take actions against the perpetrators.
4. There is a reluctance amongst the police officers as well as prosecutors to take up a case of trafficking when foreign employment element is involved.
5. The evidential standards regarding burden of proof of the defendant are also inadequate and ambiguous. There is no proper distinction and declaration even in the precedents established by the Supreme Court.
6. The definition of crime of trafficking and transportation is vague and unclear and there is lack of conceptual clarity resulting in inconsistency in the interpretation of crimes.
7. The crime, the punishment, fine, or compensation keeps on changing when the case is appealed and moves from one court to another.
8. The evidence collection process is guided by the parties statement and the value of witness statement is largely undermined.
9. The compensation in Human Trafficking does not take into account the amount the victims pay while being solicited for work.
10. The victims are reluctant to seek enforcement measures due to lack of faith in the system.
11. Compensation is awarded only after the finality of decision in Supreme Court which takes 7 years in average to reach finality.

## **Chapter Four**

### **Conclusion and Recommendations**

#### **Conclusion**

The study has shown that the cases related to foreign employment and human trafficking have close interlinkage with each other. There is a thin margin when foreign employment cases can easily switch to trafficking in person. Despite the implementation of the Foreign Employment Act 2064 and the Human Trafficking and Transportation (Control) Act 2064, the study of the judgments reveals the delay in justice as the time taken to reach the final decision is prolonged. Comparatively, the cases related to human trafficking are much more extensive and have taken a longer period to reach a final decision.

The findings have revealed that the judgments in human trafficking cases are more in favor of the victims than the judgments in foreign employment cases. In 56% of foreign employment cases, the defendants have been convicted and 78% have been convicted in human trafficking cases. However, the judicial activism in a few judgments related to human trafficking to provide compensation to the survivors is commendable. The judgments refer to victim protection and have provided judgments from a victimology perspective. Despite this, the time taken for judgment execution and the compensation received by the victims and survivors after the final decision should be taken into consideration. While the judgments of the Foreign Employment Tribunal are more predictable, there are more discrepancies in human trafficking judgments.

#### **Recommendation**

##### **Common Recommendations**

- a. Massive Awareness campaigns and capacity-building training for survivors, migrant workers, and judicial actors must be initiated nationwide in order to provide knowledge about complaint mechanisms, remedies, and awards.
- b. Proper training should be provided to investigating officers, judges, and prosecutors, especially regarding the international conventions, to expand the scope of trafficking in person.

- c. The government of Nepal should initiate the Law Reformation program to reform the Foreign Employment Act 2007 and the Human Trafficking Act 2007 to expand the scope of the definition of crime, improve compensation for victims, and address forced labor offenses that occur in destination countries.
- d. Reformation in Nepal's judicial system is necessary in order to reduce the time taken in decision making process.
- e. Nepal Government should reform the investigation process of government criminal cases including trafficking and foreign employment cases. There should be a clear responsibility distinction between investigating and prosecuting officers. Proper field investigations, proper maintenance of oral evidence, utilization of online investigation, and allocation of adequate resources to the investigation officer must be prioritized.
- f. Investigating officer must immediately request the court to hold the assets of the defendant if there is reasonable ground for suspicion.
- g. Referral and Coordination between the Human Trafficking Investigation Bureau and the Department of Foreign Employment should be enhanced and expansion in case referral practice to other agencies who provide related service to victims is required.
- h. The complaint-receiving mechanism must be modern and advanced creating a proper transcription and verbatim record of the statements made by the victims and witnesses. Recognition of digital evidence - Video and Audio Statements and their transcription and recording - must be encouraged.
- i. The government should initiate orientation programs for judicial officials (judges, government attorneys, officials of DoFE, and the police) on the concept and linkage between human trafficking/ migration/ smuggling of migrant and forced labor and the application of relevant law.
- j. Further research is needed to study deeply on implementation of the Foreign Employment Act and Human Trafficking and Transportation (Control) Act including the study of judgment execution status.
- k. Nepal Bar Association, Nepal Police, and Civil Society Organizations should prioritize foreign employment and trafficking laws in their legal literacy program.

1. The courts must take into account the past standards that have been developed in light of evidentiary value of certified statements and create at least a non-exhaustive list. These standards must be properly followed through to ensure consistency in decisions. The court must also follow the distinguishing and conforming principle when it applies precedents.

### **Recommendations for Human Trafficking Cases**

- a. Immediate actions must be undertaken upon receipt of a complaint of intimidation or undue influence to the survivors and comprehensive rehabilitation package should be provided to survivors to prevent hostile victims.
- b. The burden of proof standard in Human Trafficking and Transportation (Control) Act must be amended.
- c. The court must also clearly distinguish the liability of different parties to the crime, the separation of principle offenders from secondary offenders and recognition of inchoate crimes.
- d. Supreme Court should make consistency in interpreting burden of proof and victim statement verification provision and the consequence of victims being hostile.
- e. The **proper distinction between transportation and attempt to trafficking** must be made in the statute itself or by the Supreme Court's interpretation.
- f. The social stigma associated with trafficked women discourages them to come before the court and make a proper complaint. This situation must be addressed with more awareness programs.
- g. Nepal police should deploy female investigation officers to investigate trafficking cases.
- h. When investigating, the police must attempt to verify the statements mentioned in the FIR first.
- i. The laws on organ trafficking must be made clear and the discrepancies between the Human Body Organ Transplantation (Regulation and Prohibition) Act 1998 and the Human Trafficking and Transportation (Control) Act must be addressed.
- j. While we can notice that the time taken for final judgment is reducing with time, it takes 7 years on average to reach the final judgment. In these situations, the survivors continue to suffer. Efforts must be made from all levels for speedy justice mechanisms. The survivors



of trafficking in persons all share their disappointment with the delay in the delivery of justice.

- k. It is necessary to improve the judgment execution procedure and minimize the time taken in judgment execution in human trafficking cases.
- l. FIR is an important document in the investigation process, which needs to be detailed and explanatory. Thus, police need to discourage the FIRs written in format. It would be better to testify to the information provided.

### **Recommendations for Foreign Employment Cases**

- a. It is necessary that the government initiate a comprehensive awareness program against malpractice in the recruitment process occurring in Nepal.
- b. Initiating legal awareness programs from all levels of government, especially the local level to targeted communities/districts on the proceeding of foreign implement cases is necessary.
- c. Interim Compensation should be provided to victims through government-managed welfare fund and **reimburse** such amount from the defendant when the case ends.
- d. Government should review on current judgment execution process of foreign employment.
- e. The burden of adducing evidence must not be imposed on victims and must be with state officials or the police's active involvement in collecting evidence or inventory of property of the accused.
- f. The Department of Foreign Employment should initiate strict investigation and prosecution of fraud (section 44 of the Act) conducted by the manpower agency.
- g. FET should take action for the effective implementation of summary court procedures.
- h. **Material evidence** like call details, bank accounts, and hotel bills must be traced and appropriately used to make the charge sheet stronger.
- i. The process of taking testimony through online methods or with the help of Embassies in destination countries must also be effectively implemented.
- j. The laws must be amended in favor of the victims so that they could file complaint wherever they find easier either in police station or Department of Foreign Employment, or local government's judicial committee or in the labor office.

- k. To decentralize the investigation procedure of foreign employment crime and enhance access of victims, it is necessary to amend Section 43 and Section 44 of the Act by including the jurisdiction of police to investigate.
- l. Localizing the foreign employment justice delivery is necessary. This can be done by forming more than one foreign employment tribunal or having a foreign employment bench in the high courts.