

Comparative Account of the Legal Protection against Elder Abuse in Selected Asian Countries

*Renu Ghimire**

1. Introduction

According to the 2014 Global status report on Violence Prevention, Elder abuse has not been studied to the same extent as other types of abuse.¹ National surveys conducted in high income countries show reported rates of abuse among older adults living in private households range from 0.8% in Spain, and 2.6% in the United Kingdom to upwards of 18% in Israel, 23.8% in Austria and 32% in Belgium.² In studies of vulnerable elders (for example, those suffering dementia or living in a residential institution for older adults), nearly 25% reported significant levels of psychological abuse.³

Elder Abuse is an issue related to the present day society closely connected with the socio economic structure of the country, human rights, criminal law, public health , domestic violence, gender justice as well as population or demographics. This issue has been touched upon with the need to take urgent actions by organisations, individuals as well as State agencies. But, despite the need to take urgent actions there has been a lack of a comprehensive legislation dealing with the issue. In this context this paper comparatively studies the legislations against Elder Abuse in various countries and recommends the way forward for our country.

* Advocate. LLM in International Law and Commercial Law, Tribhuvan University

¹ WHO, Global status report on Violence Prevention (2014), *Available at:* <https://www.compassion.com/multimedia/violence-prevention.pdf> (Accessed on July 9, 2018).

² Ibid.

³ Id.

2. Historical Origin of the Concept of Elder Abuse

The abuse of older people by family members dates back to ancient times. Until the advent of initiatives to address child abuse and domestic violence in the last quarter of the 20th century, it remained a private matter, hidden from public view. Initially seen as a social welfare issue and subsequently a problem of ageing, abuse of the elderly, like other forms of family violence, has developed into a public health and criminal justice concern.⁴ Mistreatment of older people – referred to as “elder abuse” – was first described in British scientific journals in 1975 under the term “granny battering”. The United States Congress for the first time seized the problem followed by researchers and practitioners.⁵ In the 1980s governments in Australia, Canada, China (Hongkong SAR), Norway, Sweden and United States and in the following decade Argentina, Chile, Brazil, India, Israel, Japan and South Africa, United Kingdom and the other European Countries took action against Elder Abuse.⁶

In Nepal, the traditional Hindu culture that influenced the majority of the population in the country worked as a “protective shield” against Elder Abuse to a large extent. But along with the phenomenon of globalization, modernization as well as westernization, the Older Population gradually began to face abuse owing to the decline in the age old values of regarding parents as an epitome of God. As a result, more and more cases of Elder Abuse came to the forefront. Due to this, the government action in form of an enactment of the Legislation to ensure a dignified life of the Elderly population came into being in 2006 A.D. However, the present Constitution of Nepal 2072 is the first constitution of the Country to guarantee the right of the Elderly Population as a fundamental right under Article 41 of the Constitution. Ironically, the present Constitution does not explicitly prohibit Elder Abuse in the said Article.

3. Bases for the Classification of Elder Abuse:

The most often cited definition of elder abuse defines it as, “a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person. This type of violence constitutes a violation of human rights and includes physical, sexual, psychological, and emotional abuse; financial

⁴ WHO, Global Report on Violence and Health, (2002). Available at: http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap5.pdf?ua=1 (Accessed on July 9, 2018).

⁵ Ibid.

⁶ Id.

and material abuse; abandonment; neglect; and serious loss of dignity and respect.”⁷ Elder abuse can be classified into different forms or types based on the different bases of classification which can be summarized in the table below:⁸

Table 1: Classification of Elder Abuse

S.No.	Basis of Classification	Types	Remarks
1.	The Forms of Abuse ⁹	a. Physical b. Emotional c. Sexual d. Self-Neglect and Caregiver Neglect e. Financial	
2.	The Place of Abuse	a. Residential b. Institutional c. Open/Unknown Places	
3.	Abuser/Abused Relation	a. Family Member b. Relative c. Caregiver d. Health Service Provider e. Stranger	
4.	Cause of Abuse	a. Social b. Economic c. Cultural d. Health Related	

4. Theories that Explain Elder Abuse:¹⁰

There are various theories that help explain the cause of elder abuse. They are as follows:

⁷ WHO, *Fact Sheet on Elder Abuse (2017)*. Available at: <http://www.who.int/mediacentre/factsheets/fs357/en/> (Accessed on September 14, 2017).

⁸ This table is created by the researcher after the analysis of the reports published by WHO, American Psychological Association and various other NGO and INGO like the Help Age International and Geriatric Center Nepal.

⁹ Renu Ghimire, *Legal Protection Against Elder Abuse in Nepal: International Human Rights Law Perspective*, NEPAL BAR COUNCIL JOURNAL Silver Jubilee Edition (2017)

¹⁰ STAGE (2015). *Elder Abuse Context and Theory: Finland, Romania and Italy*. Available at: http://www.combatingelderabuse.eu/wp-content/uploads/2016/04/Booklet_stage.pdf (Accessed on July 10, 2018). These theories that explain Elder Abuse are enlisted here being based on the Booklet prepared by STAGE.

- **Theories related to interpersonal relationships**

a. Social Learning Theory : This explanation to Elder Abuse is proposed by Albert Bandura. It combines cognitive learning theory and behavioral learning theories. The cognitive learning theory propounds that learning is influenced by psychological factors whereas the behavioural learning theory posits that learning is based on the environmental stimuli.¹¹ Social learning theory proposes that violent acts are a learned behaviour. A person has learned, through the process of modelling, to use violence in an earlier context to either resolve conflicts or obtain a desired outcome.¹² For example: a child in a joint family learns to respect elders, especially grandfathers, and grandmothers, by watching their parents' behavior towards them. So, if the parents' have abused their own parents, according to this theory, there is high chance that the cycle of elder abuse will be repeated and vice versa.

b. Social Exchange Theory: This theory is propounded by John Thibaut and Harold Kelly (1959).¹³ It comes from the field of sociology, psychology and economics. It is based on the theory that human interaction in the society is guided by the conscious cost-benefit analysis. Social behavior is guided by human expectations, a consideration for every act of kindness. For example: Parents take care of their children, according to this theory, not only because of genuine love but also for the security of the future. Nurturing and educating the children is bound to the spill-over effects of the secure future of the children- the secure future of parents in their old age. Where this balance is upset or perceived to be upset, one party may feel they are not getting a fair return and may resort to abuse .For example, an adult child providing care to a parent may feel entitled to keep some of their pension.¹⁴ When this expectation of the adult child is not met, it leads to elder abuse, according to this theory. Later, sociologists Peter Blau and Richard Emerson further developed the theory.¹⁵

¹¹ "Social Learning Theory" *Psychology Today*. Available at : <https://www.psychologytoday.com/us/basics/social-learning-theory> (Accessed on 10 July 2018).

¹² STAGE at 19, (2015)

¹³ Mark V. Redmond, *Social Exchange Theory, English Technical Reports and White Papers*. Available at : https://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=1003&context=engl_reports (Accessed on April 18, 2019).

¹⁴ STAGE at 19, (2015)

¹⁵ "Understanding Social Exchange Theory" *Thought Co*. Available at : <https://www.thoughtco.com/social-exchange-theory-3026634> (Accessed on July 10, 2018).

c. Caregiver Stress Theory: The Caregiver Stress Theory explains that the cause of Elder Abuse is the caregiver stress as a result of inability of the caregiver to properly address the needs of the Senior Citizens in the family. This may be because of two main reasons economic and health reasons, among many others. For example: In Nepal, where more than 28 % people are multi dimensionally poor and 21.6% of them live in absolute poverty, the most poor and vulnerable are unable to take proper care of the Senior Citizen. Likewise, the family members generally lack the specialized training to take care of the Elder member suffering from age related health problems such as dementia and Alzheimer's Disease. These two reasons explain both the subconscious Elder Abuse. Caregiver stress theory centers on the family members caring for an older adult with significant care needs. Without support, the care-giver may be unable to adequately manage their responsibilities and become overwhelmed and frustrated leading to abuse.¹⁶

- **Theories Related to Societal and Multi System Context¹⁷**

a. Social Ecology Theory: Social ecology theory looks at the interactions between the individual, relationships, community and society and how these influence well-being. This framework has been increasingly employed to understand the complexities of elder abuse, from multiple perspectives, on a range of levels and in a diversity of settings.¹⁸ The ecological systems theory, as outlined by Bronfenbrenner, identifies the influence of different environmental systems on the individual. The focus is on the interaction at four levels:¹⁹

- ❖ **micro-system**—the relationship between the older person and individuals within their immediate settings such as their home or nursing home, family and social networks;
- ❖ **meso-system**—the relationships between the micro-settings that include the older person, such as institutions that provide services;

¹⁶ Fulmer T, Guadagno L, Bitondo Dyer C, Connolly MT. Progress in elder abuse screening and assessment instruments. *J Am. Geriatr Soc* 2004; 52: 297–304 qtd. from Yadollah Abolfathi Montaz et. Al *Theories and Measures of Elder Abuse*. Available at: https://www.researchgate.net/publication/263481077_Theories_and_measures_of_elder_abuse?(Accessed on July 10, 2018).

¹⁷ STAGE at 20, (2015)

¹⁸ Ibid.

¹⁹ Id.

- ❖ **exo-system**—the social structures and systems that do not directly contain the older person, but which impact upon the immediate microsystem in which the older person is situated and can include health policy, social welfare system, adult protection services;
- ❖ **macro-system** – centres on the overarching beliefs and dominant social values around ageing, such as ageist attitudes towards older people.

b. Positioning Theory : Positioning theory provides for the linking between micro-interaction (interpersonal explanations for abuse), institutional (organizational characteristics) and macro-element (e.g. ageism) .²⁰ The focus of the theory is on the connections between social interaction, individual understanding and actions, the interaction between the older person and the ‘trusted other’ set within the context of factors that include status, rights and duties. For example, a person’s dignity is either enhanced or diminished depending on how they are positioned. If the person is seen as incapable of making decisions, the person may be seen as less worthy of interaction.

c. Power and Control Theory (Feminist Approach): A feminist approach assumes that gender defines women’s role and status in society and shapes their social relationships. While there are plenty of feminist theories of domestic violence, conceptualizations highlight men’s power and control over women. According to the approach, men’s violence against women should not be seen as arbitrary and irrational acts or simply in the context of families and interpersonal relationships but within its social and cultural context. Among those practices that men use to keep women in their subordinate position, violence and abuse are the most effective forms of control.

- **Theories based on Both Interpersonal Relation and Social System Analysis**

a. Generational Intelligence Theory: Generational intelligence theory states that the generation gap and the difference of patterns of interaction between people of different generation is the root cause behind elder abuse. Briggs and Lowenstein (2011) posit the concept of generational intelligence as way of understanding elder abuse.²¹ Generational

²⁰ Ibid at. 20.

²¹ Ibid at 32.

intelligence is specifically the ability to reflect and act, which draws on an understanding of one's own and others' life-course, family and social history, placed within its social and cultural context.²² For example : The way in which Elders are supposed to be treated are different in different cultures. Howe In many western societies ageing is associated with negative connotations. In most Eastern countries along with Nepal and India people in their old age are traditionally respected. For example in Korean and Japanese cultures ageing is honored and respect for the older person is central. Hence attitudes and ideas about other generations and age groups are shaped by society and culture.

5. Comparative Study of Legislation in Selected Asian Countries:

5.1 Japan: The Japanese Legal System is a Civil Legal system. It has a plethora of laws with the Constitution at its apex. Article 98 of the Constitution of Japan (1946) declares that the Constitution is the supreme law of the Land.²³ Therefore, the Constitutional Rights enshrined in the Japanese Constitution are of utmost importance. Part III of the Constitution of Japan (1946) guarantees the Rights and Duties of the Japanese People. Article 10 to Article 40 of the Constitution has enshrined provisions related to the Rights and Duties of the People of Japan (*nihonjin*).²⁴ Article 11 of the Constitution declares that the Rights guaranteed in this Part of the Constitution of Japan are eternal and inviolable to be exercised equally by the present and the future generation.²⁵ Article 12 of the Constitution prohibits the abuse of the rights conferred by the Constitution.²⁶ Article 13 of the Constitution affirms that the people of Japan shall be respected as individuals. Their right to life, liberty and pursuit of happiness shall, be supreme, provided it does not interfere with the public welfare.²⁷ Similarly, Article 25 of the Constitution guarantees Right to adequate standard of Living and Right to Health of the People of Japan.²⁸ The Supreme Court is the highest court in the land. Although the Supreme Court is vested with the power of judicial review, it is

²² Ibid.

²³ CONSTITUTION OF JAPAN, Article 98, *Available at:* https://www.constituteproject.org/constitution/Japan_1946. (Accessed on 3 June 2019)

²⁴ *Available at:* https://en.wikipedia.org/wiki/Japanese_people (Accessed on 2 June 2019).

²⁵ Article 11, Constitution of Japan (1946). *Available at:* https://www.constituteproject.org/constitution/Japan_1946.pdf (Accessed on 3 June 2019).

²⁶ CONSTITUTION OF JAPAN, Article 12, (1946).

²⁷ Ibid, Art. 13

²⁸ Ibid, Art. 25.

not a constitutional court in the sense in which this term is used in German law.²⁹

Japan has enacted Law for Preventing Abuse of Older People and Providing Assistance to the Caregivers (2005).³⁰ It entered into force in April 2006.³¹ As the name of the Act suggests the Act focuses on the Preventive Aspect of Elder Abuse by addressing the causes of Elder Abuse through various policy intervention measures. Providing support to the Caregivers of the Elderly is one of the various strategies adopted for the prevention of the Elder Abuse.³² The major purpose of the Act is to prevent Elder Abuse and protect the dignity of the Elderly population in Japan.³³ Article 2 of the Act defines the persons of 65 years or above as the Elderly Persons.³⁴

Similarly, Article 10 of *Employment Measures Act 1966* requires the employers to give equal opportunity to people of all ages to employment irrespective of their age.³⁵

Long term care Insurance System introduced in 2000.³⁶ The aim of the Insurance System was to provide social support to the Senior Citizens of 65 years or above with Long –Term Insurance. It is regarded as a first step to revising the structure of the social security system in Japan. The bed ridden and elderly with dementia are the main target groups of this program.³⁷ The

²⁹ *Court System of Japan*. Available at: http://www.courts.go.jp/english/vcms_if/2018_Court_System_of_Japan.pdf. Accessed on 3 June 2019. Shegenori Matsui, *Why is the Japanese Supreme Court so Conservative?*. Available at: <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article> (Accessed on 3 June 2019).

³⁰ M. Osako & N. Tsukada, *Addressing Elder Abuse in Japan, The Oldest Country in Asia*, *Innovation in Aging*, Vol. 1, Issue. Sup. 1, July 2017. Available at: <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article> <https://watermark.silverchair.com/igx004.1052.pdf?token> (Accessed on April 18, 2019).

³¹ Responses from the Government of Japan to the Questionnaire on Rights of Older Persons (A/RES/65/182). Available at: <https://www.ohchr.org/Documents/Issues/OlderPersons/Submissions/Japan.pdf> (Accessed on April 19, 2019).

³² *Act on the Prevention of Elder Abuse, Support for Caregivers of Elderly Persons and Other Related Matters*. Available at: http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=02&id=2045. (Accessed on April 18, 2018.)

³³ See generally, Article 1, *Act on the Prevention of Elder Abuse, Support for Caregivers of Elderly Persons and Other Related Matters*. (2005)

³⁴ *Act on the Prevention of Elder Abuse, Support for Caregivers of Elderly Persons and Other Related Matters*. Sec. 2 (2005)

³⁵ *Ibid.*

³⁶ *Long-term Care Insurance in Japan*. Available at: <https://www.mhlw.go.jp/english/topics/elderly/care/index.html> (Accessed on April 19, 2019); Responses from the Government of Japan to the Questionnaire on Rights of Older Persons (A/RES/65/182). Available at: <https://www.ohchr.org/Documents/Issues/OlderPersons/Submissions/Japan.pdf> (Accessed on April 19, 2019).

³⁷ *Long-term Care Insurance in Japan*. Available at: <https://www.mhlw.go.jp/english/topics/elderly/care/index.html> (Accessed on April 19, 2019)

Japan Legal Support Center has to help the Japanese nationals on legal matters.³⁸ In addition to this the Criminal Code as well as the Civil Code of Japan afford different types of general protection against Abuse. For example the Criminal Code provides protection against the harm done against the dignity of the elderly persons in par with the people of other age groups of people of Japan.

Similarly, Section II of the Civil Code of Japan has incorporated various provisions for the protection of the rights of the Incapacitated Persons including person of Old Age suffering from mental or other types of disabilities.³⁹

Apart from this the Japanese Courts, time and again have interpreted the Constitution and the Laws in the favour of the people of an ageing Japan. For instance, in the case Regarding the Liability of the Kin of the Elderly with Dementia, the Court has set out six grounds for differentiating the legal guardian and the custodian of the Elderly with dementia. The court has held that while the Custodian of the Elderly may be liable, the immediate kin of the Elderly with dementia may not always be responsible to pay for the damages of the Railway Company.⁴⁰ “The main issue in the trial was whether the dementia patient’s family members who were involved in the care of the deceased should be held legally responsible and made to pay compensation for the train service delays caused by the accident, “⁴¹ reports Japan Times.

5.2 India: The Constitution of India, in **Article 21**, has guaranteed Right to Life as a fundamental right.⁴² It states, “*No person shall be deprived of his life or personal liberty except according to procedure established by law.*”⁴³ **Article 41, states,** “*The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to*

³⁸ Responses from the Government of Japan to the Questionnaire on Rights of Older Persons (A/RES/65/182). Available at: <https://www.ohchr.org/Documents/Issues/OlderPersons/Submissions/Japan.pdf> (Accessed on April 19, 2019).

³⁹ Civil Code, Section II, (Act No. 89 of 27 April 1897) .

⁴⁰ *Global Legal Monitor, Japan: Supreme Court Ruling on Liability of Kin of Elderly with Dementia.* Available at: : <https://www.loc.gov/law/foreign-news/article/japan-supreme-court-ruling-on-liability-of-kin-of-elderly-with-dementia/>. (Accessed on 3 June 2019).

⁴¹ Shusuke Murai, Japan’s Supreme Court Dismisses Liability of Family in Death of Man with Dementia cited from the *Global Legal Monitor, Japan: Supreme Court Ruling on Liability of Kin of Elderly with Dementia.* Available at: <https://www.loc.gov/law/foreign-news/article/japan-supreme-court-ruling-on-liability-of-kin-of-elderly-with-dementia/> .(Accessed on 3 June 2019).

⁴² CONSTITUTION OF INDIA, Article 21 (Right to Life and Personal Liberty)(Fundamental Right), (As of July 31, 2018). Available at: <http://www.legislative.gov.in/sites/d> (Accessed on April 17, 2019)

⁴³ *Id.*

*education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.*⁴⁴

Supreme Court in the *Re Kerala Education Bill* (1957), had propounded the Doctrine of Harmonious Construction to avoid a situation of conflict while enforcing Directive Principles and State Policies (DPSP) and the Fundamental Rights (FRs). As per this doctrine, the court held that there is no inherent conflict between FRs and DPSPs and the courts while interpreting a law should attempt to give effect to both as far as possible i. e. should try to harmonize the two as far as possible.⁴⁵ Seen from this perspective, Article 21 and 41 of the Indian Constitution by way of harmonious construction can be interpreted as having afforded the protection against Elder Abuse, to the Senior Citizens in the Indian context.⁴⁶

In India, there is *Draft National Policy on Senior Citizens 2011* and *The Maintenance of Parents and Senior Citizens Act 2007*, to protect the Senior Citizens against Abuse.⁴⁷ However, the universal definition of Elder Abuse is missing in the legislation.⁴⁸ But, even before the promulgation of specific legislation, the rights of the Elder members of the family is seen to have been protected through the interpretation of Personal Laws. For example: In *Narayanarao Ramachandra Pant v. Ramabai*, *ILR (1879) 3 Bom 415*⁴⁹, is a case filed by Ramabai against her son Narayan Rao, claiming that under the Hindu Law, the son has the obligation to maintain her, even before the enactment of Hindu Marriage Act 1956. In this case, the Privy Council acknowledged the right to maintenance of the Mother, who was the widow of Ramchandra Pant, and identified and established her right to maintenance as well as the property of her dead husband.

⁴⁴ Ibid, Art. 41 (Directive Principles), Available at: <http://www.legislative.gov.in/sites/default/files/COI-updated-as-31072018.pdf>. (Accessed on April 17, 2019)

⁴⁵ *Fundamental Rights v. Directive Principle: What if there is a Conflict?*. Available at: <https://www.clearias.com/fundamental-rights-vs-directive-principles-> (Accessed on April 17, 2019).

⁴⁶ Maneka Gandhi V. Union of India AIR SC 597, cited from Gyanendra Kumar Sahu, *An Overview of Article 21 of Indian Constitution*, *International Journal of Law*, Vol.3, Iss.3 (May 2017). Available at: www.lawjournal.org. The article refers to Article 21 of Indian Constitution as the celebrity provision that occupies a unique place as a fundamental right that has extended protection of life and liberty to citizens and non-citizens alike.

⁴⁷ Help Age India, *Impacting Elder Policies and Laws*. Available at: <https://www.helpageindia.org/our-work/rights-entitlements-programs> (Accessed on April 17, 2019)

⁴⁸ Maintenance of Parents and Senior Citizens Act 2007. Available at: [http://socialjustice.nic.in/writereaddata/UploadFile/Accessed on 4 June , 2019](http://socialjustice.nic.in/writereaddata/UploadFile/Accessed%20on%204%20June%202019.pdf); Maintenance and Welfare of Parents and Senior Citizen Amendment Draft Bill 2018. Available at: [http://socialjustice.nic.in/writereaddata/](http://socialjustice.nic.in/writereaddata/Accessed%20on%204%20June%202019.pdf) (Accessed on 4 June, 2019).

⁴⁹ *Narayanarao Ramachandra Pant v. Ramabai*, *ILR (1879) 3 Bom 415*. Available at: <https://www.casemine.com/judgement/in>. (Accessed on 4 June, 2019)

Subsequent to this case, after the enactment of Hindu Adoption and Maintenance Act 1956, Section 20(1) of the Act, stated, every Hindu son or daughter is under obligation to maintain aged and infirm parent. Parents are entitled to maintenance if they are unable to maintain themselves. The amount is determined by the court taking into consideration the position and status of the parties. In *Sunny Paul & Anr. v State Nct of Delhi et.al.*⁵⁰, the Delhi High Court has ruled that Children who abuse their parents while staying with them in their house can be evicted from the property, “As long as the parents have the legal possession of the property, they can evict their abusive adult children,” the court said, adding that even the “courts have repeatedly acknowledged the right of senior citizens or parents to live peacefully and with dignity”.

The court, consequently, directed the Delhi government to amend its rules and formulate an plan to protect the life and property of senior citizens because Delhi government’s rules allowed a senior citizen to complain to district authorities to evict abusive children only from a self-acquired property, despite the fact that the Act makes no such distinction and gives protection to parents even in a rented accommodation. In the case of *Shadab Khairi & ANR v. State et.al*, the Court had settled the issue whether the Maintenance Tribunal formed under the Maintenance and Welfare of Parents and Senior Citizens has the power to issue an Eviction Order after the alleged parental abuse. The Supreme Court of India has declared that it is in accordance to the principles of justice, equity and good conscience to interpret a beneficial legislation with widest possible liberal attitude and thus has sustained the rights of the Maintenance Tribunal to issue eviction order.⁵¹

Section 125 of the Criminal Procedure Code (1973) of India has provisions conferring the duty of maintenance of wives, children and parents. Sub Section (1) of Section 125 of the Code mentions that if the person having sufficient means neglects or refuses to maintain *inter-alia* his father or mother, then the Magistrate of First Class, upon the obtainment of evidence of such neglect, refusal, order such person to provide monthly allowance to the indigent parent at a rate the Magistrate deems appropriate. The indigent person is also entitled to receive interim maintenance according to the provision.⁵² In the case of *Dr. Jagadish Jugtawat v. Smt. ManjuLata et.al*, the purpose of Section 125 of the Indian Criminal Procedure Code is thus

⁵⁰ *Sunny Paul & Anr. v. State Nct of Delhi & Ors.* Available at : <https://www.casemine.com/judgement/in/> (Accessed on 4 June 2019).

⁵¹ *Shadab Khairi & ANR v. State and Ors.* Available at : [https://www.casemine.com/judgement/in.](https://www.casemine.com/judgement/in/) (Accessed on 4 June 2019).

⁵² Criminal Procedure Code, Sec. 125, (1973), India

stated, “The object of Provisions of Section 125 Cr.P.C is to provide for a social justice falling within the swim of Article 15 (3) and 39 of the Constitution of India, which have been enacted to protect the weaker of the society like women, children. It is in the form of secular safeguard irrespective of the personal laws of the parties. The object is to compel a man to perform a moral obligation towards the society in respect of maintaining his wife, children and old parents so that they do not have to face destitution and become the liability of the society or may be forced to adopt a life of vagrancy, immorality and crime for their subsistence and go astray.”⁵³

5.3 Comparative Table on Legal Protection against Elder Abuse

Table 2: Summary of Comparison of Legal Protection against Elder Abuse in Various Countries.

S.No.	Country	Major Acts for the Protection Against Elder Abuse	Major Provisions for the Protection of the Elderly	Case Interpretation	Remarks
1.	Japan	<ol style="list-style-type: none"> 1. <i>Act on Elderly Abuse Prevention and Support for Caregivers of Elderly etc. (2006).</i> 2. <i>Civil Code of Japan</i> 	The Civil Code of Japan holds the custodians of the persons suffering from mental disability to pay for the damage caused to the third party.	In a case, the Supreme Court of Japan held that the wife and the son of a man suffering from dementia were not liable to pay for the damages caused to the railway company.	In this case, the Japanese Supreme Court has differentiated between a custodian and the guardian. While the custodians can be held liable to pay for the damages caused by such incapacitated person, the guardian cannot be held. Six major basis for the differentiation between a legal guardian and custodian are identified: <ol style="list-style-type: none"> a) Circumstances of guardian's own life; b) Whether they have kinship ties with the dementia sufferer and how close is the tie; c) Whether they live with the patient or how often they meet daily ; d) Whether they are involved in the patient's finances; e) Whether the patients have any behavioral problem and the nature of the problem; f) The condition of nursing care;
2.	India	<ol style="list-style-type: none"> 1. <i>The Maintenance of Parents and Senior Citizens Act 2007,</i> 			

⁵³ *Dr. Jagadish Jugtawat v. Smt. ManjuLata and Ors.* Available at : <https://www.casemine.com/judgement/in/> (Accessed on 4 June, 2019).

6. Legal Protection against Elder Abuse in Nepal

Nepal has guaranteed Right of Senior Citizens as a fundamental right in Article 41 of the Constitution of Nepal.⁵⁴ But, needless to say, Elder Abuse is not explicitly prohibited in the Constitution. Apart from that, the Act Related to the Senior Citizens and its Rules have incorporated certain provisions for the protection of Senior Citizens. But, the Act alone does not afford adequate protection against Elder Abuse in Nepal. Various legislations have made cursory provisions for the protection of Elderly against the abuse. The Article on *Legal Protection Against Elder Abuse in Nepal: International Human Rights Law Perspective* of the author of this article published in the Nepal Bar Council Journal discusses the Legal Protection against Elder Abuse from Human Rights Perspective focusing on the Senior Citizens Act and other sectoral laws and Policies in detail. The provision against Elder Abuse incorporated in the Muluki Civil and Criminal Codes, which is not discussed in the former Article is discussed in this Article.⁵⁵

6.1 Protection Provisions under the Civil and the Criminal Code of Nepal:

a. Protection Against Elder Abuse in the Civil Code

Table 3: Summary Table regarding the Provisions in the Civil Code Related to the Protection of the Senior Citizens

Chapter	Section of Civil Code	Title of the Provision	Particulars of the Provision	Remarks
Chapter 4	Section 122		Children are required to respect their parents	
			Children shall be responsible to provide parents with medical treatment, nurture and take care of their parents in accordance with their socio-economic capacity of the Adult child.	
	Section 123	Limitation for Filing Complaint	Except, in conditions where a separate provision of Limitation is made, the Limitation for filing the complaint is 6 months from the date of occurrence of the incident.	

⁵⁴ THE CONSTITUTION OF NEPAL, Art. 41, (2015).

⁵⁵ Renu Ghimire, *Legal Protection Against Elder Abuse in Nepal: International Human Rights Law Perspective*, NEPAL BAR COUNCIL JOURNAL 2017 (Silver Jubilee Edition). The Article discusses the Legal Protection against Elder Abuse from Human Rights Perspective focusing on the Senior Citizens Act and other sectoral laws and Policies in detail. The provision against Elder Abuse incorporated in the Muluki Civil and Criminal Codes, which is not discussed in the former Art.

Chapter	Section of Civil Code	Title of the Provision	Particulars of the Provision	Remarks
	Section 142	Taking Care of Incapacitated or Quasi- Capacitated Person	Legal guardian is under an obligation to take care, nurture and make necessary arrangements for the education, entertainment, nourishment from the property of minor or incapacitated or quasi-capacitated person; and if such property is not available shall make provisions for the nurture of such persons from one's own property.	

Source: Civil Code 2074

b. Protection Provisions under the Criminal Code of Nepal

Table No.4

Chapter	Section of Criminal Code	Title of the Provision	Particulars of the Provision	Remarks
	Section 160			No discriminatory behavior in any pretext is allowed. Age though not explicitly mentioned in the various grounds, other similar grounds includes age. If discrimination in the application of law is done by the public official, then they shall be punished pursuant to Section 160 for up to 3 years imprisonment and Rs. 30,000 fine.
Chapter 12	Offences related to Human Body			
	Section 168	Socially Degrading Practices that tarnishes the Dignity of a Person Prohibited	Practices of witchcraft, implicating a person as a witch, exiling the person from place of habitual residence, social ostracization and any other type of cruel, inhumane and degrading treatment against a person prohibited.	Imprisonment upto 5 years and fine up to Rs.50,000
	Section 169			<ul style="list-style-type: none"> Reasonable Compensation shall be provided to the victim. No limitation for filing complaint penalized under this Section,
	Section 184		No one shall abandon or throw or neglect away an infant (neonate), children, disable, sick or elderly against whom the person has a direct obligation to take care, or nurture thereby exposing the person's life and limb of the person to danger.	

6.2 Provisions of Senior Citizen Act and the Legal Protection Afforded Thereof:

The Senior Citizen Legislation 2006, has made various provisions for the protection of the Senior Citizens in the country. Within the span of the legislation with 32 Sections, various types of special protection measures are introduced within the Act. For example: Section 3 of the Act, requires everyone to respect Senior Citizens.⁵⁶ Section 4 of the Act has provisions regarding the duty to care and nurture Senior Citizens.⁵⁷ Section 6 of the Act, safeguards the liberty of the Senior Citizen's to utilize the property not to be partitioned among the co-parcners, as well as its proceeds, at one's volition.⁵⁸ Section 8 of the Act, prohibits the act of causing Senior Citizens to beg or to cause him/her to renounce worldly pleasures against his/her will.⁵⁹ Section 9 of the Act, has provisions of providing at least 50 percent concession on the transportation fare as well as requires public transport to reserve at least 2 seats for the Senior Citizens along with various other types of aid, assistance and privileges in public places.⁶⁰ Section 10 of the Act, mandates the right to preferential hearing as well as Right to Legal Aid where the parties to a Case is a Senior Citizen, a Helpless Senior Citizen.⁶¹ Similarly, the task involving a Senior Citizen shall be performed with priority, as per Section 11 of the Act.⁶²Section 12 of the Act, has provision for the remission in the imprisonment based on the crime committed, the gravity of the Offence as well as the age of the Offender.⁶³

6.3 Recent Case Laws⁶⁴

In the case of **Naradhoj Gurung v.High Court Pokhara et. al**⁶⁵ , the Supreme Court held that Senior Citizen's Act 2063 is a special protective legislation enacted for safeguarding the interest, privileges and welfare of the Senior Citizens. If any Rules framed by the Legislative is against the provisions of the Act, such provisions shall not prevail. Hence, the provisions of the Act shall be pursued. The Senior Citizens shall enjoy the privileges conferred by the Act, despite being imprisoned in the Crimes mentioned in

⁵⁶ Senior Citizen Act, Sec. 3, 2063 (2006).

⁵⁷ Ibid, Sec. 4.

⁵⁸ Ibid, Sec. 6.

⁵⁹ Ibid, Sec. 8.

⁶⁰ Ibid, Sec. 9

⁶¹ Ibid, Sec. 10.

⁶² Ibid, Sec. 11.

⁶³ Ibid, Sec. 12.

⁶⁴ The most recently published case laws related to Senior Citizens have been included here.

⁶⁵ *Naradhoj Gurung v. High Court, Pokhara et. al*, NKP 2075, No. 4, Decision Number: 9998.

the Negative List Rule 29 (1a) of the Prison Regulation 2020 B.S. It is not reasonable to deprive the Senior Citizens of the privileges conferred by the Act by the narrow interpretation of the Act. It shall be the legal obligation of the Public Official to take the logical decision at the right time regarding the privileges to be conferred to the Senior Citizens.

In the case of **Narad Kandel v. Office of Prime Minister et. al**⁶⁶, the Supreme Court held that it is inappropriate to refer to the Local Self Governance Act, in matters that have been addressed especially by the Senior Citizens Act. The Court has further clarified that it is inappropriate to refer to Local Self Governance Act, defeating the object and purpose of the Senior Citizen Act enacted by the Legislative Parliament and thereby issue the Standard Operating Procedure for the Operation of Social Security Program 2069 (2012).

In the case of **Purushottam Manandhar v. Uma Manandhar et. al**.⁶⁷, the Honorable Supreme Court held that while examining the deed of Transfer of Property concluded between a sick Senior Citizens suffering from serious terminal illness and the other capable person, the holistic scenario including the background for the conclusion of the deed, the state of the total property, the alignment and concern of the co-pacners in such property, the duty of care and the duty to perform the last rites fulfilled by the copacners and heirs towards such feeble person in need of care as well as the accessibility, inaccessibility of possession of the property linking it with the age and the health condition of the transferor of the property.

7. Is there a need for a Separate Legislation to Curb Elder Abuse or Does the Existing Legal Mechanism Suffice?

A special Legislation that prohibits the Abuse of the Senior Citizens would undoubtedly be best option. Given the complex nature of the problem of Elder Abuse, the present legislation is inept to address the hidden causes for the prevalence of Elder Abuse in the Country. Given the present hidden nature of the problem, neither pure legal and formal means for curbing it such as the criminalization of Elder Abuse in the view of the Researcher would be sufficient to address it. Nor, would its decriminalization would solely solve the problem. A mix of formal and informal mechanisms should be adopted. For example: One possible way of addressing the issue could be

⁶⁶ *Narad Kandel v. Office of the Prime Minister*, NKP 2074, No.2, Decision No. 9762.

⁶⁷ *Purushottam Manandhar v. Uma Manandhar et. al*, NKP 2075, No.12, Decision No. 10161.

the promotion of cultures that nurture the age integrated family system and festivals.

But, in addition to that, the State should also start thinking of various innovative methods in which it can support the Adult Children of terminally ill Senior Citizens. State, in this scenario also means non- state actors, private sectors, community organizations apart from the Public Institutions and the Government in the traditional sense of the term. As a welfare state, these institutions are collectively the duty bearers of building up a conducive environment for the enjoyment of a dignified life of every people including the Senior Citizens.

8. Conclusion

We are a step ahead of the other countries mentioned in the list above, in guarantying the Fundamental Rights of Senior Citizens. Unfortunately, it is the least documented of the abuses. Nevertheless, it does not mean that it is not happening. The present legal regime of the protection against Elder Abuse in Nepal is not sufficiently adequate and therefore is in need of reform. Learning from the experiences of other countries we shall introduce a reform or enact a new law to best suit our own context.

9. Suggestions

- We have two options ahead. The first one is to enact a separate, elaborate legislation against Elder Abuse and the second one is to amend the existing Senior Citizens Act and aid it with various other legislations. But, both the options need a fresh outlook because it is the effective implementation of laws and the feeling of justice being done that matters to the people rather more than the mere existence of law.
- If we opt for the amendment of the existing legislation in order to prohibit Elder Abuse, then a large portion of the prevailing Senior Citizen Act including amendment in the Objectives, Definition and Penalties for the Elder Abuse shall be amended.
- If we are to introduce a separate legislation then the good starting point may be the carrying out of Baseline Survey on the Prevalence of Elder Abuse. This type of Survey shall focus on the causes behind Elder Abuse, the documentation of International Best Practices and the Contextualization of Magnitude of the problem of Elder Abuse in the Context of Nepal.

- We can learn from other leading countries while framing the legislation. For example: We can learn from Japan to design our context specific programs to provide incentives to the Adult Children who have been under the socio-economic burden of caring for Old Age parents. As, the Care- Giver Stress Theory points out lessening the economic burden of the Adult Child is bound to reduce the instances of Elder Abuse. Besides, providing support to the Adult Child to take care of terminally ill parents through the mobilization of trained health workers can be one possible way out. As the life expectancy of Nepalese is increasing day by day, it is the obligation of Welfare State to provide such support.
- Providing financial support to the Adult children may address the issue of Elder Abuse partially. It must be remembered that addressing the Financial Aspect does not address the problem of family dis-integration caused due to the separation of young bread-winners of the family with their old parents. It also leaves the issue of psychological trauma faced by the Old Parents due to the separation with their adult children and their grand-children in the age when they need the care, love, respect of their children the most. The government should therefore take every possible step to build a conducive environment for employment generation in the Country itself and promote holistic programs, policies that help build age- integrated sustainable societies.

□□