

## The Opportunity for a Civil Code in Myanmar

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### ABSTRACT

If the modern concept of codification is seen as a Code, Myanmar experienced for long time official and various codifications in a broad interpretation of the term. Indeed, Dhammathat has been used in the Ancient Burma. Moreover, a Burma Code related to the codification of Indian Common Law has been established in the country through the British colonisation. Since the independence of the country, the government continues to compile statutes law and case law on a year-by-year basis. Nowadays, codification can be used to solve legal uncertainty and conflict of laws in civil law such as family law, contract law and property law. Hence, Myanmar needs to modernise its civil law and could do it through a Civil Code. Therefore, this modernisation can be a great opportunity to achieve the legal, social and political unity in the country.

**Keywords:** Codification, Civil Law, Civil Code, Dhammathats, Burma Code

**Received:** 22 Oct 2020, **Accepted:** 31 Mar 2021, **Published:** 28 Jul 2021

### 1. Introduction

For decades, Myanmar was marginalised from globalisation. Foreign investors were not prone to invest due to the political and economic situation in the country. Since 2011, plenty of laws were enacted along the path of modernisation, free market and rule of law. The modernisation of the law can be implemented through the tool of codification. However, in a many countries, reflection on codification was in varying degrees and was aggressive. This modernisation took place for both Civil Law countries and Common Law countries.<sup>1</sup> However, the concept of code does not have the same scope in these two legal systems and

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<sup>1</sup> Gunther A Weiss, 'The Enchantment of Codification in the Common-Law World' (2000) 25 Yale Journal of International Law 435.

has different national connotations.<sup>2</sup> In Asia, it can be noted that Civil Law legal system has been extremely well exported.<sup>3</sup>

Many scholars have difficulties to explain the legal system and the legal history of Myanmar.<sup>4</sup> However, the importance of these topics is crucial in the idea of drafting a Civil Code for the country. Although most of the legal researchers are considering that Myanmar possesses a mixed legal system with the combination of customary laws on family matters, codified English common law principles and recent Myanmar legislation,<sup>5</sup> the legal system in Myanmar is actually closer to the one existing in Civil Law country for two main reasons: the considerable place of statute law in the sources of law and the decline of the judicial power.<sup>6</sup> In addition, according to Maung Ba Han,

In most languages a distinction is struck between what is just or right and what is a bundle of rights. The Latin has two words for law —jus and lex. Jus means that which is just or right, and lex means a bundle of such rights. The same distinction is preserved in French. The corresponding words are droit and lois. Similarly we have in German recht and gesetz. In Burmese also we have taya and upade. But in English, the term 'law' means both what is right and what is a bundle of rights.<sup>7</sup>

The concept of code is a polysemous term and no single definition of code exists. In Myanmar, the word 'code' is translated in Burmese as *code upade*.<sup>8</sup> This word has emerged and came from the British colonisation. Historians can confirm that the first complete law code in the world arises from the Code of Ur-Nammu and dates back to the middle of the

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<sup>2</sup> Vlad Constantinesco, 'La "codification" communautaire du droit privé, future constitution civile de l'Europe?' in *de code en code, Mélanges en l'honneur de Georges Wiederkehr*, (Daloz, Etudes, mélanges, travaux, 2009) 117.

<sup>3</sup> Jiayou Shi, *La codification du droit civil chinois au regard de l'expérience française*, préf. Mireille Delmas-Marty, (t. 473, LGDJ, coll. Thèses 2006); Ngoc Dien Nguyen, 'Vietnam', in *Contribution des groupes autres que le groupe français de l'association Henri Capitant des amis de la culture juridique française, Les droits de tradition civiliste en question, à propos des rapports Doing business de la Banque Mondiale (Société de législation comparée, 2006)* 149; René Guyon, *L'Oeuvre de Codification au Siam* (Paris: Imprimerie Nationale 1919); Marie Goré, 'Existe-t-il un droit asiatique?' in Marie Goré and others (eds), *Liber amicorum: Mélanges en l'honneur de Camille Jauffret-Spinosi* (Daloz Paris 2013) 524.

<sup>4</sup> On this topic, see Hla Aung, 'The Burmese Concept of Law' (1969) 53 *Journal of the Burma Research Society* 33; Andrew Huxley, 'The Last Fifty Years of Burmese Law: E Maung and Maung Maung' (1998) *Lawasia: Journal of the Law Association of East Asia and the West Pacific* 9; Andrew Huxley, 'Is Burmese Law Burmese? John Jardine, Em Forchhammer and Legal Orientalism' (2008) 10 *Australian Journal of Asian Law* 184; Hla Aung, *Law and Justice in Myanmar* (Tun Foundation Bank Literary Committee 2008).

<sup>5</sup> About the mixed legal systems, see Vernon Valentine Palmer, 'Mixed Legal Systems' in Mauro Bussani and Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 369; on this point, see also Hla Aung, 'Code versus Custom in the Development of Burmese Law' (1966) 49 *Journal of the Burma Research Society* 163.

<sup>6</sup> In general, if you are asking which source of law is the primary source in Myanmar, scholars, lawyers and judges are answering the legislation.

<sup>7</sup> Maung Ba Han, *A Legal History of India and Burma* (AMAK Press 1952) 6.

<sup>8</sup> Maung Ba Han, *The University English-Burmese Dictionary*, vols 1 and 2 (The Hanthawaddy Press 1951) 123.

21st century BC.<sup>9</sup> In addition, Babylonian king Hammurabi, who reigned from 1792 to 1750 BC proclaimed the Code of Hammurabi, which was one of the earliest and the most complete written legal codes.<sup>10</sup> At a later stage, the concept of code or *codex* (or *caudex*)<sup>11</sup> appeared in the legal vocabulary through the *codex Gregorianus* and *Hermogenianus* in the last years of 3rd century. *Codex* comes from Roman Empire and means the tree trunk and a new format used for documents kept (not in the usual papyrus rolls).<sup>12</sup>

In addition, the concept of code is different between scholars trained in the Civil Law and Common Law tradition. In Civil Law system, a code is a regulatory framework<sup>13</sup> or a set of general rules, which has an authority, which is complete and methodical with the legal principles and divided between different parts. This legal tool is organised in a logical manner.<sup>14</sup> In civil law countries, code is seen as the primary source of law and is considered as such in any area of law.<sup>15</sup> In common law countries, a code gathers existing statute laws and includes important case law.<sup>16</sup> This legal tool is generally drafted in order to consolidate the law in a particular area of law due to the current confusion of this area of law.<sup>17</sup> Furthermore, it is extremely rare in the implementation of a code in Common Law to draft new rules and regulations or new legal concepts.<sup>18</sup> Therefore, the definition chosen in this paper is as follows: a code is ‘a reunification more or less consistent, systematic and complete of legal norms.’<sup>19</sup>

The concept of Civil Code is less challenging to define. Legal scholars have their own definition as follows:

It can be a scholarly work, an intellectual construction, the expression of a level of science and thought of law, legal philosophy, an intellectual, moral, ideological, cultural understanding of the relationships between human

<sup>9</sup> Ba Han (n 7) 3; Rémy Cabrillac, *Les codifications* (Collection Droit, Éthique, Société, Paris, PUF 2002) 11.

<sup>10</sup> John Dyneley Prince, ‘The Code of Hammurabi’ (1904) *The American Journal of Theology* 601.

<sup>11</sup> Frédéric Zénati, ‘Les notions de code et de codification: Contribution à la définition du droit écrit’, in *Mélanges Christian Mouly* (T.1, Paris, Litec 1998) 226; Jean-Philippe Dunand, ‘Entre tradition et innovation. Analyse historique du concept de code’, in Jean-Philippe Dunand and Bénédicte Winiger (eds), *Le Code civil français dans le droit européen* (Bruylant, Bruxelles 2005) 5.

<sup>12</sup> Jean-Pierre Coriat, ‘Introduction Code et compilation: l’avenir d’un héritage’ in David Deroussin and Florent Garnier (eds), *Passé et présent du droit; compilations et codifications juridiques*, vol 6 (Le manuscrit 2008) 15.

<sup>13</sup> Jean Gaudemet, ‘La codification, ses formes et ses fins’ (1986) *Revue juridique et politique d’indépendance et coopération* 240.

<sup>14</sup> Philippe Malaurie, ‘Les enjeux de la codification’ (1997) *L’Actualité juridique. Droit administratif* 642.

<sup>15</sup> Michel Grimaldi, ‘Codes et codifications: pour souligner le dixième anniversaire de l’entrée en vigueur du Code civil du Québec et le bicentenaire du Code Napoléon’ (2005) 46 *Les Cahiers de droit* 53.

<sup>16</sup> Dafydd Bened Walters, ‘L’image du Code dans le contexte de la Common Law en Grande-Bretagne et dans le Commonwealth britannique’ in Régine Beauthier and Isabella Rorive (eds), *Le Code Napoléon, un ancêtre vénéré?, Mélanges offerts à Jean Vanderlinden* (Bruylant 2005) 145.

<sup>17</sup> Weiss (n 1).

<sup>18</sup> Peter De Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge Cavendish 2007) 48.

<sup>19</sup> Dunand (n 11).

beings. In other words, it can be the code of law professors, a temple, a monument.<sup>20</sup>

Under Jean-Étienne-Marie Portalis, one of the drafters of the French Civil Code, a Civil Code is 'a body of laws intended to lead and to fix the relationships of sociability, family and interest between human beings who belong to the same city'.<sup>21</sup> Hence, it is admitted that a Civil Code is a systematic collection of laws designed to deal with the core areas of private law such as law of contracts, torts, family law, law of inheritance and sometimes, corporate law. Nowadays, modernisation in these areas of law is decisive. Under the current State Counsellor, Daw Aung San Suu Kyi,

The true measure of the justice of a system is the amount of protection it guarantees to the weakest. Where there is no justice there can be no secure peace.<sup>22</sup>

In the relationships between individuals, it could be possible to protect the weakest party and to guarantee justice and social peace through the use of a Civil Code.<sup>23</sup>

Based on an empirical methodology, the opportunity for a Civil Code is merging into Myanmar regarding the political, philosophical, social and technical conditions defined by legal experts.<sup>24</sup> As a matter of fact, this legal tool may have a real technical interest in Myanmar and it is obvious that the current context is quite appropriate to adopt a Civil Code throughout the country.

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<sup>20</sup> In this sense, see the observations of President G Canivet on the occasion of the bicentenary of the Civil Code organised by the Chancellery: 'Live and Keep Alive the Civil Code' (2004) *Les Petites Affiches* 40.

<sup>21</sup> Jean-Etienne-Marie Portalis, *Discours, rapports et travaux inédits sur le Code civil* (Librairie de la Cour de cassation Paris 1844) 92.

<sup>22</sup> Aung San Suu Kyi, *Freedom from Fear: And Other Writings* (Penguin Books 1995) 17.

<sup>23</sup> The idea of a Civil Code is not new in Myanmar; See Henry M Lütter, *A Manual of Buddhist Law: Being Sparks' Code of Burmese Law, with Notes of All the Rulings on Points of Buddhist Law* (Hanthawaddy Press, 1887); Aye Kyaw, 'Religion and Family Law in Burma' (1992) 80 *Journal of The Siam Society* 59–65: 'there had been some suggestions that Burmese customary law should be codified, and attempts were made in this direction. A Codification Committee, with Sir Guy Rutledge as its chairman, worked for a few years beginning in 1924, and a Committee on the Buddhist Will was also appointed in 1938. The work of these committees could not go very far because of division of opinion regarding approaches to the solution of the existing situation. One approach conceded that Burmese customary law should be codified in order to meet the needs of Burmese society, particularly concerning the position of Burmese women. This approach was almost impossible to put in action, primarily because the muscles and bones were too old to cure the running sore of both social and legal problems. The other approach argued that Burmese customary law had attained its maturity naturally, and a complete tidy code would fail to encompass much of the living fabric of Burmese customary law, and would be incompatible with the changing customs and norms of Burmese society.'

<sup>24</sup> Roscoe Pound, *Interpretations of Legal History* (Cambridge University Press 1923) 81; Bruno Oppetit, 'De la codification', in Bernard Beignier (ed), *La codification* (Recueil Dalloz, Thèmes et Commentaires 1996) 33.

## 2. The Technical Interest of A Civil Code in Myanmar

In the classical conception, legal certainty, justice and social progress constitute the trilogy of legal purposes. In a modern concept, legal certainty has the task of securing of the legal order.<sup>25</sup> The requirement of legal certainty can mean numerous notions such as non-retroactivity, acquired rights, clarity, precision, knowledge, publicity, legitimate confidence, stability, etc. Therefore, legal certainty has no real and precise definition. Consequently, the definition of Thomas Piazzon, a French legal scholar, might be the most relevant one as follows:

Legal certainty is the ideal of reliability of an accessible and understandable law, which allow legal subjects to foresee reasonably the legal consequences of their acts or behaviours, and which respects the legitimate expectations already built by legal subjects promoting the achievement.<sup>26</sup>

In Common Law system, legal certainty depends on the predictability of jurisprudential answers given by the judge on any specific dispute. If the predictability is uncertain, the legal outcome of a dispute is more likely to be arbitrary and each party will have the tendency to continue the dispute until the end in order to get their points across. In Myanmar, the confidence in the court system is low due to the lack of transparency and independence of the judicial power.<sup>27</sup> Hence, the need of legal certainty through the concept of civil law countries can be practicable in the country. However, the implementation of this legal concept can take time and this task can be difficult for various reasons.

### 2.1 The Need for Legal Certainty

Throughout the feudal period,<sup>28</sup> there was no formal legal business framework.<sup>29</sup> The Ancient Burmese Law was a mosaic of different legal instruments such as *Dhammathats*,<sup>30</sup>

<sup>25</sup> Bernard Pacteau, 'La sécurité juridique, un principe qui nous manque?' (1995) *L'Actualité juridique: Droit administratif* 155.

<sup>26</sup> Thomas Piazzon, *La sécurité juridique* (Defrénois, coll. Doctorat & Notariat 2009) 62.

<sup>27</sup> Myint Zan, 'Judicial Independence in Burma: No March Backwards Towards the Past' (2000) *1 Asian-Pacific Law & Policy Journal* 5, 38.

<sup>28</sup> Guy Lubeigt, *La Birmanie: l'âge d'or de Pagan (Guides Belles lettres des civilisations)* (Les Belles Lettres 2005) 125.

<sup>29</sup> In the *Dhammathat*, no provisions concern companies. Most of the provisions cover Private Law such as Criminal Law, Family law, Property Law and Contract Law. See David Richardson, *The Damathat or the Law of Menoo* (University of Michigan Library Press 1874); U Gaung, *A Digest of the Burmese Buddhist Law Concerning Inheritance and Marriage; Being a Collection of Texts from Thirty-six Dhammathats*, vol 1–2 (Office of the Superintendent Government Printing 1905); Emmanuel Forchhammer, *King Wagaru's Manu Dhammasattham: Text, Translation, and Notes* (Rangoon: Superintendent, Government Printing, Burma 1892); U Gaung, *The Attasankhepa Vannana Dhammathat: Chapters on Inheritance, Partition, Marriage, and Divorce* (Office of the Superintendent Government Printing 1963); John Jardine, *Notes on Buddhist Law*, vols 1–8 (Office of the Superintendent Government Printing 1953); Lütter (n 23).

<sup>30</sup> Maung Kyin Swi, 'The Origin and Development of the Dhammathats' (1966) *49 Journal of the Burma Research Society* 173.

Yazathats<sup>31</sup> or Pyathons<sup>32</sup>. The *Dhammathat* was the most important legal source and has served as a guide for the King and the judges.<sup>33</sup> The real contribution of the *Dhammathat* has been debated and scholars disagreed about the use of the *Dhammathat* as a Civil Code.<sup>34</sup> Even though *Manugye Dhammathat* is still known as the most famous *Dhammathat*,<sup>35</sup> the Court, at the time, for some reasons did not accept its authority.<sup>36</sup>

Before the British colonisation, Burma's economy was a village economy and did not have a developed foreign trade, as it was self-sufficient as a country.<sup>37</sup> In the 19th century, the British invaded Burma after three successive wars<sup>38</sup> and Burma was part of the 'British

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<sup>31</sup> Ryuji Okudaira, *Kingship and Law in the Early Konbaung Period of Myanmar (1752-1819). A Study of the Manugye Dhammathat: an eighteenth century major law book* (Mekong Publishing Co., Ltd. 2018) 51: 'In modern usage Yazathat is often translated as criminal or penal code, but in the pre-modern period of Myanmar, it meant both the science of Kings and the judicial decisions of the Kings. In other words, the former was the art of governing or more particularly of adjudicating cases, while the latter bore the Dhammathat.'; See also Than Tun, *The Royal Orders of Burma, AD 1598-1885* (The Center for Southeast Asian studies, Kyoto University 1983); Than Tun, 'Observations on the Translation and Annotation of the Royal Orders of Burma' (1988) 4 *Crossroads: An Interdisciplinary Journal of Southeast Asian Studies* 91.

<sup>32</sup> See Htun Yee, *Collection of Hpyat-sa (Legal Cases and Court Decisions of Myanmar in the Kon-Baung Period)* (Myanmar Affairs Bureau: Literature Bank 2006); Okudaira (n 31); Maung Maung, *Law and Custom in Burma and the Burmese Family* (The Hague Martinus Nijhoff 1963); Maung Maung, *Burma in the Family of Nations* (Djambatan Ltd International Educational Publishing House 1956); Tun (n 31); Ryuji Okudaira, 'Cases on Theft in 18th Century Myanmar (Burma) with Special Reference to the Atula Hsayadaw Hpyathton' (2014) *Journal of Asian and African Studies* 44–64; Aung (n 4).

<sup>33</sup> Ryuji Okudaira, 'The Burmese Dhammathat', in Michael Barry Hooker (eds), *Introduction: the South-East Asian Law Textes—Materials and Definitions* (Butterworth & Co 1986) 66; E Maung, *The Expansion of Burmese Law* (Series of Lectures 1951) 6; Swi (n 30).

<sup>34</sup> Yee (n 32) 211; Tin Aung Aye, *Interpretation of Statute Law and Treaty* (2nd edn, 2011) 42; Andrew Huxley, 'Burma: It Works, but Is It Law?' (1988–89) 27 *Journal of Family Law* 23–34; Aung Than Tun, *Kinwun Mingyi and Dhammathats* (The Tun Foundation Bank Literary Committee 2006) 32; Dietrich Christian Lammerts, *Buddhism And Written Law: Dhammasattha Manuscripts And Texts In Premodern Burma* (Cornell Theses and Dissertations 2010).

<sup>35</sup> For more information, see Richardson (n 29); Okudaira (n 31); See also Ryuji Okudaira and Andrew Huxley, 'A Burmese Tract on Kingship: Political Theory in the 1782 Manuscript of Manugye' (2001) 64 *Bulletin of the School of Oriental and African Studies* 248.

<sup>36</sup> *Dr Tha Mya v Daw Khin Pu* (1951) *Burma Law Reports* (SC) 108: 'That Buddhist Law within the meaning of s. 13 of the Burma Laws Act means the Dhammathats and collection of precedents (...). The Manugye Dhammathat is not the paramount authority in the body of Dhammathats as enunciated by the Privy Council in *Ma Hnin Bwin v U Shwe Gon* (1914) 8 LBR 1, followed by the High Court of Judicature at Rangoon in *Ma Nyun v Maung San Thein* (1927) 5 Ran. 537.'

<sup>37</sup> U Tun Wai, *Economic Development of Burma from 1800 to 1940* (Department of Economics, University of Rangoon 1961) 95; John Sydenham Furnivall, *An Introduction to the Political Economy of Burma* (3rd edn, Peoples' Literature Committee & House 1957).

<sup>38</sup> John Frank Cady, *A History of Modern Burma* (Cornell University Press 1958); Leach Frank Burton, *The Future of Burma*, Rangoon: (3rd edn, British Burma 1937); John Sydenham Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (New York University Press 1956); John Nisbet, *Burma Under British Rule – and before, vol 1-2* (Westminster Archibald Constable & Co 1901): 'there have been three Burmese Wars: First Anglo-Burmese War (1824-1826), Second Anglo-Burmese War (1852 to 1853) and the Third Anglo-

India' until 1935.<sup>39</sup> Afterwards, Myanmar developed its own law in the same model as Common Law countries since its independence in 1948.<sup>40</sup> Thereafter, the legal certainty declined since 1962.<sup>41</sup>

Nowadays, a Civil Code can provide a legal certainty without freezing the evolution of the law. Moreover, it could be a starting point for any legal reforms. When all the rules and regulations in a specific area are gathered in one document, it is much easier to undertake modifications, which will be more consistent legally and technically. Furthermore, a Civil Code offers to the doctrine the possibility to debate or discuss about the Myanmar Law. Non-compliance of legal certainty may lead to a breach of equality before the court and injustice between citizens. In Myanmar, a quote is famous among Myanmar lawyers as follows: 'there are two kinds of law: "the law of today and the law of tomorrow"'. It actually means that the justice provided by the Court is unpredictable. Therefore, the legal certainty is very significant especially for the foreseeability of Myanmar Law (1). This legal concept involves that the existing law shall be known and understood. For this reason, the knowledge of law should be emphasized regarding the equality before the law and the legal education (2).

### 2.1.1 The Different Components of Legal Certainty

Legal certainty is among one of the major issues to fix in Myanmar. Hence, a Civil Code can provide consistency and simplicity to Myanmar Law for various reasons.

First and foremost, a Civil Code stabilises and clarifies the law. This legal tool provides an intelligible and reachable law. Only a clear, transparent, effective and understandable law can provide justice, order, predictability, well-being and peace.<sup>42</sup> The word 'intelligibility' can be defined as the understandability, which is the propensity of thing to be understood.<sup>43</sup> Actually, this concept is more focused on the substance and less on the access of law. Furthermore, there are several levels of understanding of the law. Firstly, there is a subjective understandability of the law, which is coming from its author of the law.

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Burmese War (1885); Alleyne Ireland, *The province of Burma; a report prepared on behalf of the University of Chicago* (Boston and New York, Houghton, Mifflin and Company 1907).

<sup>39</sup> Government of Burma Act 1935, s 3: 'The Governor of Burma is appointed by His Majesty by a Commission under the Royal Sign Manual and has all such powers and duties as are conferred or imposed on him by or under this Act, and such other powers of His Majesty as His Majesty may be pleased to assign to him.'

<sup>40</sup> See Emanuel Forchhammer, *The Jardine Prize: An essay on the sources and development of Burmese Law from the era of the first introduction of the Indian Law to the time of the British Occupation of Pegu* (Nabu Press 2014); Maurice Collis, *Trials in Burma* (AVA Publishing House 1996); Joseph Dautremer, *Burma under British Rule* (T Fisher Unwin 1913); Michael Barry Hooker, *Legal Pluralism. An Introduction to Colonial and Neo Colonial Laws* (Clarendon Press 1975).

<sup>41</sup> For more information about the legal situation during the socialist period, see Hla Aung, 'State and Law in Contemporary Socialist Legal Thought' (1967) 50 Journal of the Burma Research Society 261.

<sup>42</sup> Philippe Malaurie, 'L'intelligibilité des lois' (2005) 114 Pouvoirs 131.

<sup>43</sup> Carolina Cerda-Guzman, *Codification et constitutionnalisation* (Fondation Varenne, collection de thèses 2011) 322.

Secondly, it exists a contextual understandability, which allows the judge to apply the law in a particular case. Eventually, it could be possible to think that there is a political understandability, which allow citizens to access the political intention of the legislation.<sup>44</sup>

In the legal practice in Myanmar, practitioners are facing many difficulties in their work due to the complexity of Myanmar Law. For instance, variety of personal laws in family law involves conflicts of law,<sup>45</sup> which extends the complexity for judges to deal with this issue.<sup>46</sup> A common core of family law would be less challenging for Myanmar citizens with different customs and religions in their willingness to marry each other.<sup>47</sup> Furthermore, ancient laws are still applicable while new laws are enacted. As result some of the laws have no consistency due to the gap between the theory and the legal need of the population. For instance, the Contract Act 1872 can be described as liberal but the Myanmar practice uses only one page for any contract. Hence, the Contract Act is not sufficient to protect parties and most of the issues related to their business. Therefore, quality of the law is important. In the judgement of Courts in England, *ratio decidendi* of judges are considered as case law. Opinions of judges are drafted into the judgement<sup>48</sup> and the rule of *stare decisis* can work.

In Myanmar, there are a multitude of laws in different area of law such as property law or labour law. Quantity should not take priority over quality. Montesquieu, in *l'Esprit des lois*, stated that 'unnecessary laws can weaken the necessary laws'. The adoption of numerous laws could actually decrease the efficiency of a legal system. A well-written statute law needs to possess specific characteristics: general, compulsory and permanent.<sup>49</sup> A general law commonly means that the law will be applicable to any people who create the social body. General rule of law is a guarantee against arbitrariness and individual discrimination. If a law is too precise and detailed, this law can be quickly obsolete. A law is permanent because the application is constant during its existence. This law is implemented in all situations until the competent authority will repeal it. A law is a commandment. If not, it will be only an advice at the discretion of each individual. The rule of law permits, prohibits, orders, punishes or rewards.<sup>50</sup> While a Civil Code can organise and rationalise the Law, it cannot be the solution to everything.

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<sup>44</sup> Valérie Lasserre-Kiesow, 'La compréhensibilité des lois à l'aube du XXIème siècle' (2002) Dalloz Chronique 1157.

<sup>45</sup> Chan-Toon, *The Principles of Buddhist Law: Also containing a translation of important portions of the Manu Thara Shwe Myin, with Notes* (Myles Standish & Co 1894).

<sup>46</sup> Chie Ikeya, 'Colonial Intimacies in Comparative Perspective: Intermarriage, Law and Cultural Difference in British Burma' (2013) 14 Journal of Colonialism and Colonial History.

<sup>47</sup> Peter Gutter, 'Law and religion in Burma' (2001) 8 Legal Issues on Burma Journal 1.

<sup>48</sup> Jean-Louis Bergel, *Théorie générale du droit* (5th edn, Dalloz, Méthodes du droit 2012) 67.

<sup>49</sup> Henri et Léon Mazeaud, Jean Mazeaud et François Chabas, *Introduction à l'étude du droit* (12th edn, Montchrestien Leçon de droit civil 2000); Jean Carbonnier, *Droit civil. Introduction. Les personnes. La famille, l'enfant, le couple* (PUF Quaridge Manuels 2004); Gérard Cornu, *Droit civil. Introduction au droit* (13th edn, Montchrestien Domat Droit privé 2007); Philippe Malaurie and Patrick Morvan, *Introduction au droit* (LGDJ Droit civil 2016).

<sup>50</sup> Aude Zaradny, *Codification et État de droit* (Thèse Université Paris II – Panthéon Assas 2011).



In Myanmar, Penal Code is often used in order to resolve civil law issues because the criminal justice is shorter than civil justice. The support of the police allows obtaining an efficient means of pressure. An individual relationship can easily involve the State in any judiciary process. It will be difficult for Myanmar citizens to predict the cost and the time of a lawsuit. The use of the Section 403 for criminal misappropriation of property,<sup>51</sup> Section 405 for breach of trust<sup>52</sup> and Section 415<sup>53</sup> for cheating are often used for civil cases especially in Contract Law.

For individuals, legal certainty would entail having a guarantee against any modification of the existing law. The principle of non-retroactivity is strictly applied in criminal law and it has been subject of a flexible interpretation in the other areas of law. Hence, the question of the modification of the law is delicate. Abrupt changes are not recommended. Under Section 43 of the Myanmar Constitution 2008, 'no Penal law shall be enacted to provide retrospective effect'. Therefore, the interests of the legal certainty for Myanmar people can partly restoring confidence in the Myanmar judiciary system.

### 2.1.2 The Interest of Knowledge of Law

Knowledge of law is a corollary of the legal certainty and is an important condition for its effectiveness. This is the reason why the legal adage *ignorance of the law is no excuse*<sup>54</sup> enables the effectiveness of the law independently of the real legal knowledge of people. This legal adage is a legal fiction but it is necessary in order to ensure the effective functioning of the legal order. It is obvious that no one can remember the entire applicable laws in the country. If this legal adage does not exist, everyone could claim its ignorance of the law in order to escape sanctions. Furthermore, if a law is not published, it has no force in law: *lex non promulgata non obligat*. In Myanmar, the question of knowledge of law is bound with the access of law. The accessibility can be defined as the possibility to find the effective law.

Is the legal adage *Ignorance of the law is no excuse* is similar in Common Law countries and Civil Law countries? For Anglo-Saxon doctrine, the legal knowledge is not a result of

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<sup>51</sup> Myanmar Penal Code 1860, s 403: 'Whoever dishonestly misappropriates or converts to his own use any moveable property shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.'

<sup>52</sup> *ibid*, s 405: 'Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust.'

<sup>53</sup> *ibid*, s 415: 'Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to causes damage or harm to that person in body, mind, reputation or property, is said to "cheat".'

<sup>54</sup> For information, the legal adage 'Ignorance of the law is no excuse' is proudly posted in the library of the Department of Law of Dagon University.

ordered law but a clear, readable and certain law. On the contrary, Latin-Roman doctrine supports the idea of a rational law in its foundations and clarity in its systematic expression facilitating its knowledge. This difference takes its origin in the conception of *equal treatment*. Equality, as defined by Continental Law, the equality can be only obtained in a legal order by the statute law because the principle of equality is designed as a principle of political and social organisation. Hence, the link between equality of citizens and accessibility of law is unequivocal. *Accessibility of law* has two sides: material accessibility and intellectual accessibility. In this respect, material accessibility means material access of set of laws and intellectual accessibility is the understanding of the law. In the Common Law legal system, the judge applies the same rule because facts are similar. The doctrine of precedent permits to guarantee this *equal treatment*. Therefore, the absence of systematisation does not necessarily involve an unintelligible law but can come from the absence of clarity in the enunciation of rule, unclear origin of the rule or the absence of clarity in Court decisions.

A Civil Code is a great tool for dissemination and understanding of law. This kind of code selects and restructures a set of dispersed rules in a same corpus.<sup>55</sup> Civil Code promotes access of law and can be organised in a digitised file or retrievable on the screen.<sup>56</sup> In this way, Myanmar citizens can have a simplified access to the law. All the sparse Family law, Contract law and Property Law will be gathered in a single document. Furthermore, a Civil Code could arguably strengthen the legal research and legal education in Myanmar.<sup>57</sup> Indeed, debate for the draft of a Civil Code would provide an intellectual stimulation between supporters of traditions and modernity. Legal research must be performed for the creation of Myanmar Civil Code and for modernising current civil law. This Civil Code will be the foundation of an equal teaching of civil law throughout universities departments of law of in the country. It can be also useful for lawmakers to be more familiar with this kind of immense legal project in the purpose of modernising Myanmar Law.

Though the Attorney General Office has already done a great effort in order to provide access of law, some remains to be made in Myanmar.<sup>58</sup> This governmental institution has created the Myanmar Law Information System with the support of Korea International Cooperation Agency (KOICA), the Republic of Korea's Ministry of Government Legislation

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<sup>55</sup> Jürgen Basedow, 'Conclusions: du Code Napoléon à la codification européenne – 200 ans de codification à la lumière de ses fonctions', in Jean-Philippe Dunand and Bénédicte Winiger (eds), *Le Code civil français dans le droit européen* (Bruxelles 2005) 318.

<sup>56</sup> Elisabeth Catta, 'Les techniques de codification: de la cire au silicium' (1997) *Actualité juridique de droit administratif* 647.

<sup>57</sup> In order to understand Legal Education since 1960s in Myanmar, see Maung Maung, 'Lawyer and Legal Education in Burma' (1962) 11 *International and Comparative Law Quarterly* 285; Myint Zan, 'Legal Education in Burma since the 1960s' (2008) 12 *Journal of Burma Studies* 63.

<sup>58</sup> For information, enacted laws are published in Burmese language in Myanmar *Alin* or *The Mirror* (Kyemon) but also in English language such as the *New Light of Myanmar*. The *State Gazette of Myanmar* (Myanmar *Maingngan Pyantan*) is published every week by the News and periodical enterprise under the authority of the Ministry of Information. However, this gazette is complicated to acquire. Statute laws are compiled and are published every year since 2000. Access to case law is still limited in the country.

and the National Law Information Centre of Republic of Korea (KLIS).<sup>59</sup> Under the current Union Attorney-General U Tun Tun Oo,

The website <https://www.mlis.gov.mm> is a hub for law information which is very useful for law researchers, law students, lawmakers, and business investors, while it will also contribute a lot in the e-Government process of the country.

Additionally, personal initiatives such as Myanmar Law Library<sup>60</sup> came to light in order to gather ancient Burmese law, constitutions, statutes law and case law.

Though, legal certainty is a real and deep request from citizens in Myanmar, its implementation faces several obstacles.

## 2.2 The Implementation of Legal Certainty

Along with Japan and the Middle East region, Myanmar has been the only country to develop legal professional without the European influence. Legal profession in Ancient Burma emerged with the development of Burmese Legal tradition from the 12th century to the beginning of 16th century. At the Colonial time, Burmese students were trained based on the British model and the profession was very powerful in 1920s. This *barristocracy* was, in the meantime, the mediators between colonisers and Burmese population. Nowadays, the current pleaders, higher grade pleaders and advocates do not have the same statute as before because of the decline of the judiciary system. Consequently, though at first they can resistant to accept a project of a Civil Code, they also are conscious that legal certainty is a necessity in the country.

Through the Myanmar Constitution 2008, the force of the statute law has continuously increased in order to enforce political decisions. The lack of legal certainty in the country lies in the fact that the law is not correctly applied and the consistency of Myanmar civil law should be improved. If the judiciary system in Myanmar is not really popular in the country (A), legal certainty can be implemented by the symbol of a Civil Code (B).

### 2.2.1 The Jurisprudential Guarantee

The influence of Common Law has been visible throughout the *Parliamentary Democracy* in Myanmar.<sup>61</sup> The country inherited the administrative system of British Common Law through the *prerogative writs*.<sup>62</sup> Thereafter, the Myanmar Constitution 1947 allows

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<sup>59</sup> Office of the Attorney General of the Union, 'Myanmar Law Information System' <<https://www.mlis.gov.mm/>>.

<sup>60</sup> 'MLR Legal and Tax' (*Myanmar Law Library*) <<http://www.myanmar-law-library.org/>>.

<sup>61</sup> Nang Yin Kham, 'An Introduction of the Law and Judicial System of Myanmar' (2010) Myanmar Law Working Papers Series 1.

<sup>62</sup> See Mi Khin Saw Aung, 'Writ Jurisdiction in Myanmar' (2020) 11 Dagon University Research Journal 98.

constitutional review before the Supreme Court.<sup>63</sup> The implementation of constitutional writs was only cancelled by exceptional circumstances such as threat to public order, invasions or the establishment of state of emergency.<sup>64</sup> Firstly, the writ of Habeas Corpus entitles petitioners to challenge the legality of their arrest or detention before a Court.<sup>65</sup> Secondly, the writ of Certiorari is issued by the Supreme Court for the re-examination of an action of a lower court. Thirdly, a writ of prohibition is a writ directing a subordinate to stop doing something the law prohibits. Fourthly, a writ of mandamus is a court order issued by a judge at a petitioner's request compelling someone to execute a duty that they are legally obligated to complete. Lastly, the writ of Quo Warranto requiring a person to show by what authority he exercises a public office, franchise, or liberty.

<sup>63</sup> Myanmar Constitution 1947, s 25 (2): 'Without prejudice to the powers that may be vested in this behalf in other Courts, the Supreme Court shall have power to issue directions in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari appropriate to the rights guaranteed in this Chapter'; See also *Kean Eng & Co v The Custodian of Moveable Properties, Burma & One* [1949] Burma Law Reports (SC) 71: 'that the High Court of Judicature at Rangoon used to issue writs of certiorari under its inherent jurisdiction as King's Court. That court ceased to exist with the Independence of Burma. The present High Court is a new Court established by the Union Judiciary Act and has only such jurisdiction as has been given to it by the Act. S 25 of the Constitution of Burma invests the Supreme Court of the Union with the power to issue directions in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for enforcement of fundamental rights granted by Chapter II of the Constitution, and by implication powers of the High Court to issue such directions are negated. S 228 of the Constitution refers to old courts existing at the time of Independence of Burma and not to new courts established by a new Act. Ss 30 and 31 of the Union Judiciary Act, 1948, cannot be invoked as they are to be read subject to the provisions of the Constitution. The present High Court has thus no power to issue writs of certiorari. Under Rule 4 of the Original Side Rules the whole case referred to must be disposed of by the Bench.'

<sup>64</sup> *ibid*, s 25 (1): 'The right to move the Supreme Court by appropriate proceedings for the enforcement of any of the rights conferred by this Chapter is hereby guaranteed.'

<sup>65</sup> *G.N. Banerji v The Superintendent, Insein Jail Annexe* [1948] Burma Law Reports (SC) 199: 'the writ of habeas corpus is an ancient Common Law writ used as the normal procedure for protecting the liberty of the subject against unlawful arrests and detentions. It enables the immediate determination of the right to the applicant's freedom. It is not a proceeding in a suit but a summary application of the person detained. The efforts of the Court are invariably directed to prevent evasion and delay. The exercise of this check, whole and unimpaired but shorn of antiquated technicalities has been entrusted to the Supreme Court by the Constitution of the Union'; See also *Daw Aye Nyunt v The Commissioner of Police, Rangoon and one* [1949] Burma Law Reports (SC) 5: 'a written order is necessary to justify detention under s 5A of Public Order (Preservation) Act, and an oral order is invalid. A written order with retrospective effect is illegal'; *Ma Lone v The Commissioner of Police, Rangoon and one* [1949] Burma Law Reports (SC) 8: 'under sub-s (1) of s 5 any Police officer of the type described can arrest without a warrant and commit him to custody for not more than 15 days under the first proviso to sub-s (2). In the meantime he must submit his report to the President or any officer empowered to act on his behalf can if empowered by any law other than the one in sub-s (4) pass a final order relating to the detention, etc.; the only law in this behalf is contained in s 5A. S 5, clause (4) may be described as an enabling section and s 5A as a penal section. If the Commissioner of Police intended to order the detention of the detainee for more than two months he can on receipt of the report from the arresting officer pass a final order straight away under s 5A, clause (b). In the present case, the Commissioner passed an order of detention for an indefinite period under s 5 (4). He could not do this and the detainee cannot be detained for more than two months. They must therefore be released'; *Pakiya Ammal v The Deputy Commissioner, Hanthawaddy and one* [1949] Burma Law Reports (SC) 35: 'that under s 5 (1) of the Act the Police Officer can arrest a person whom he suspects of having acted or is about to act in a manner calculated to disturb or assist the disturbance of public tranquillity. On such suspicion the Police Officer may keep the

Therefore, Myanmar Supreme Court has got the reputation to protect individual rights of citizens from the government interference.<sup>66</sup> Indeed, between 1948 and 1962, the Supreme Court issued 252 writs.<sup>67</sup> Hence, Myanmar was affiliated as a Common Law country. However, between 1962 and 2011, the judiciary system declined and the number of writs was marginal. The revival of writs took place during the current Constitution 2008.<sup>68</sup> Supreme Court can issue writs in order to control the judgements of lower courts and governmental institutions.<sup>69</sup> However, the quality and quantity of common standard of writs is still in progress for the Supreme Court.<sup>70</sup>

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person arrested under detention up to 15 days. This period of 15 days is permitted to enable the Police Officer who acts on reasonable suspicion to investigate into the matter further and satisfy himself whether his suspicion is well founded. The period of detention under this section can be extended to a period of altogether two months if there is a further order from the President or the officer authorized by the President under s 7'; *Daw Khin Tee v U Chan Tha and One* [1949] Burma Law Reports (SC) 193: 'the right of appeal is not inherent in the nature of things, it is a right which has to be given by express enactment. The Supreme Court in issuing directions in the nature of habeas corpus does not exercise an appellate jurisdiction. If in arresting or directing the detention of a citizen the authority concerned was acting within its lawful powers, the Supreme Court cannot interfere and the Supreme Court cannot go into the question of fact when the Legislature has made that authority the judge of facts. The Supreme Court in proceedings for directions in the nature of habeas corpus will accept its findings of facts unless there are vitiated in law'; *Ma Than Sint v The Commissioner of Police, Rangoon* [1949] Burma Law Reports 1: 'that under the Press (Registration) Act, one U Than Tun's name is printed on every issue as Editor and not that of the detainee. If detainee was not the Editor the detention was not proper. That assuming the report to be false and misleading it does not follow that the effect would be to prejudice public safety and the maintenance of public order. If the effect was to excite dissatisfaction towards the Government steps should be taken under s 124 A of the Penal Code Public Order (Preservation) Act, 1947 was enacted in the interest of preventive justice and not for providing additional punishment for an act which would be penal under the law in force. The jurisdiction to order detention arises only where the authority empowered is satisfied that action is necessary with a view to prevent a person from acting in any manner prejudicial to public safety and for the maintenance of public order. In the absence of both these elements the detention was unlawful.'

<sup>66</sup> *U Htwe (alias) AE Madari v U Tun Ohn and One* [1948] Burma Law Reports (SC) 541: 'that the writ of prohibition is a judicial process issued out of a Court of superior jurisdiction and directed to an inferior Court from usurping a jurisdiction with which it is not legally invested or to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction. The writ of certiorari is a writ issued by superior Court in the exercise of the superintending power over inferior jurisdiction and it requires judges or officers of such jurisdiction to certify or send proceedings before them to the superior court for the purpose of examination as to their legality or giving more satisfactory effect to them.' See also Melissa Crouch, 'The Common Law and Constitutional Writs: prospects for accountability in Myanmar', in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart Publishing 2014) 142.

<sup>67</sup> Lwin Moe and Dominic Nardi, 'Understanding the Myanmar Supreme Court's Docket: an Analysis of Case Topics from 2007 to 2011', in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart Publishing 2014) 96.

<sup>68</sup> Myanmar Constitution 2008, s 296: 'The Supreme Court of the Union: (a) has the power to issue the following writs: (i) Writ of Habeas Corpus; (ii) Writ of Mandamus; (iii) Writ of Prohibition; (iv) Writ of Quo Warranto; (v) Writ of Certiorari. (b) The applications to issue writs shall be suspended in the areas where the state of emergency is declared.'

<sup>69</sup> Union Judiciary Law 2010, s 16: 'The Supreme Court of the Union: (a) has the power to issue the following writs; (i) Writ of Habeas Corpus; (ii) Writ of Mandamus; (iii) Writ of Prohibition; (iv) Writ of Quo Warranto;

## 2.2.2 The Legal Guarantee

The law made by Parliament has taken a significant prominence in the judgement *Tinsa Maw Naing (Applicant) v. The Commissioner of Police Rangoon and another (Respondents)*<sup>71</sup> in 1950. When the Constitution of 1947 is stating the word 'law', it is bound with the law made by lawmakers. It could be interpreted that under Montesquieu, the judges are 'only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigour'.<sup>72</sup> In its strict vision of the separation of powers, the judicial power has only a limited role. Moreover, Alexis de Tocqueville stated that

The first characteristic of judicial power in all nations is the duty of arbitration. But rights must be contested in order to warrant the interference of a tribunal; and an action must be brought to obtain the decision of a judge. As long, therefore, as the law is uncontested, the judicial authority is not called upon to discuss it, and it may exist without being perceived. When a judge in a given case attacks a law relating to that case, he extends the circle of his customary duties, without however stepping beyond it; since he is in some measure obliged to decide upon the law in order to decide the case. But if he pronounces upon a law without resting upon a case, he clearly steps beyond his sphere, and invades that of the legislative authority.<sup>73</sup>

Regarding the current situation in Myanmar, Parliament could limit the discretion of judges. Supreme Court shall comply with the Constitution (2008).<sup>74</sup> Under the Section 96 of

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(v) Writ of Certiorari. (b) shall suspend the applications for the issue of writ in the areas where the state of emergency is declared. (c) At the time of the occurrence of the following situation, the right to claim the rights contained in section 377 of the Constitution shall not be suspended unless it is required for public security; (i) in time of war; (ii) in time of foreign aggression; (iii) in time of insurrection.'

<sup>70</sup> Myint Zan, 'The "New" Supreme Court and Constitutional Tribunal Marginal improvement or more of the Same?', in Nick Cheesman, Monique Skidmore, Trevor Wilson (eds) *Myanmar's Transition openings, obstacles and Opportunities* (Institute of Southeast Asian Studies Singapore 2012) 262.

<sup>71</sup> *Tinsa Maw Naing v Commissioner of Police, Rangoon & Another* [1950] Burma Law Reports (SC) 37: In this regard, 'in construing the provision in s. 16 of the Constitution "that no citizen shall be deprived of his personal liberty save in accordance with law" it is pertinent to examine the sense in which this term has been understood in this country for many years before the constitution was framed. The term "LAW" in s 13 (1) of the Burma Laws Act, 1898 again repeats the provisions of the Act VII of 1872. It is by people who had lived or who had been trained under this system that the Constitution of the Union of Burma was drawn up and enacted and it is therefore reasonable to conclude that "LAW" refers to the will of the legislature enacted in due form, provided that it is within the competence of the legislature. To accept natural law as a higher law which invalidates any inconsistent positive law would lead to chaos and each Judge would be a law unto himself. "LAW" therefore under s 16 of the Constitution is an enactment by Parliament or by other competent legislative body. Their powers are defined and circumscribed and within such limits the "LAW" are binding on all in the Union of Burma.'

<sup>72</sup> Montesquieu, *De l'Esprit des lois* (1758, book 11, chapter 6).

<sup>73</sup> Alexis de Tocqueville, *De la démocratie en Amérique* (1835, chapter 6).

<sup>74</sup> Myanmar Constitution 2008, s 295: '(a) Only the Supreme Court of the Union has the following original jurisdiction: (i) in matters arising out of bilateral treaties concluded by the Union; (ii) in other disputes, except the Constitutional problems, between the Union Government and the Region or State Governments; (iii) in

the Constitution (2008), the *Pyidaungsu Hluttaw* (Myanmar Parliament) shall have the right to enact laws for the entire or any part of the Union related to matters prescribed in Schedule One of the Union Legislative List. Section 11 (d) in Schedule one states that civil laws and procedures including contract, arbitration, actionable wrong, insolvency, trust and trustees, administrator and receiver, family laws, guardians and wards, transfer of property and inheritance are in the legislative list. Hence, family Law is not only covered by the Section 13 of the Burma Laws Act 1898.<sup>75</sup> Nowadays, *Pyidaungsu Hluttaw* has jurisdiction to enact laws in family law, contract law and property law.

Furthermore, from the colonial era, the interpretation of Courts was regulated by the Burma General Clause Act 1898. At a later stage, the Interpretation of Expression Law (Law No. 22/73) was enacted by the Revolutionary Council of the Union of Myanmar in 1973. It was considered as a modern revision of the Burma General Clauses Act. Section 27 of the Expression Law states that ‘the Revolutionary Council of the Union of Myanmar shall interpret the laws for the purpose of uniformity.’<sup>76</sup>

Therefore, the rule of law<sup>77</sup> was already accepted over several decades. However, in different way, constitutionalism in Myanmar was implemented in 2008 and granted a prominent role of the law. For all these reasons, a Civil Code can be an opportunity for the country to centralise Myanmar Civil Law.

### 3. A Favourable Context for a Civil Code in Myanmar

Myanmar has a written legal tradition.<sup>78</sup> In the Ancient Burma, the main source of law was the *Dhammathat*, which is defined as a treaty of laws guiding Burmese Kings.<sup>79</sup> It was a

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other disputes, except the Constitutional problems, among the Regions, among the States, between the Region and the State and between the Union Territory and the Region or the State; (iv) other matters as prescribed by any law. (b) As the Supreme Court of the Union is the highest court of the Union, it is the court of final appeal. (c) The judgments of the Supreme Court of the Union are final and conclusive and have no right of appeal. (d) The Supreme Court of the Union, subject to any provision of the Constitution or any provision of other law, has the appellate jurisdiction to decide judgments passed by the High Courts of the Regions or the States. Moreover, the Supreme Court of the Union also has the appellate jurisdiction to decide judgments passed by the other courts in accord with the law. (e) The Supreme Court of the Union has the revisional jurisdiction in accord with the law.’

<sup>75</sup> Burma Laws Act 1898, s 13: ‘(1) Where in any suit or other proceeding in the Union of Burma it is necessary for the Court to decide any question regarding succession, inheritance marriage or caste, or any religious usage or institution: (a) the Buddhist law in cases where the parties are Buddhists, (b) the Muhammadan law in cases where the parties are Muhammadan and (c) the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law. (2) [...] (3) In cases not provided for by sub-section (1), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.’

<sup>76</sup> Interpretation of Expression Law 1973.

<sup>77</sup> In the sense of the supremacy of the law.

<sup>78</sup> Gaung (n 29); Gaung (n 29).

<sup>79</sup> Maung (n 32) 7: ‘The Dhammathats, or treatises of ‘rules which are in accordance with custom and usage and which are referred to in the settlement of disputes relating to person and property’, are a principal source of

compilation-codification of many sources of laws such as customary law, *Pyathon*<sup>80</sup> and *Yazathat*.<sup>81</sup> During the British colonisation, the codification of Indian Common Law was transplanted to Burma (compiled inside a Burma Code).<sup>82</sup> This codification included many areas of law and was a ‘modern codification’ drafted by supporters of Jeremy Bentham who is considered as the father of the concept of codification. However, Burma Code was not applicable in the whole country and the process of *stare decisis*<sup>83</sup> was not very functional continuously. At this time, the established legal system could not entirely fall under the Common Law family system.

Following the installation of the semi-civilian government in 2011, Myanmar has undertaken significant political, economic and administrative reforms. In 2015, Aung San Suu Kyi’s National League for Democracy has won a landslide victory in Myanmar, ending fifty years of military rule. Her father, the General Aung San, is considered as the father of Myanmar independence and was seen as the Myanmar equivalent of George Washington in United States of America.<sup>84</sup>

Consequently, various indicators demonstrate the opportunity of a Civil Code, which can be a real benefit for the country: the acceleration of the economic and social reform and the acceleration of the state reform.

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Burmese customary law. They are not codes of law in the strict sense, and there is wide variance among them in content and quality. They reflect the social customs of the day, and expound rules of wisdom as guides for Kings, ministers, and judges to rule by and for the people to live by. They record decisions, real or imaginary, to establish rules of persuasive force.’

<sup>80</sup> Okudaira (n 31) 51: ‘Hpyathon, which is a collection of judicial decisions, also seems to have played an important role in the history of Myanmar legal literature.’

<sup>81</sup> *ibid* 51: ‘In modern usage Yazathat is often translated as criminal or penal code, but in the pre-modern period of Myanmar, it meant both the science of Kings and the judicial decisions of the Kings. In other words, the former was the art of governing or more particularly of adjudicating cases, while the latter bore the Dhammathat.’; See also Than Tun, *The Royal Orders of Burma, A.D 1598-1885* (The Center for Southeast Asian Studies Kyoto University 1983); Than Tun, ‘Observations on the Translation and Annotation of the Royal Orders in Burma’ (1988) 4 *Crossroads: an Interdisciplinary Journal of Southeast Asian Studies* 91.

<sup>82</sup> Alan Watson, *Legal transplants: an approach to comparative law* (2nd edn, The University of Georgia Press 1993); Pierre Legrand, ‘The Impossibility of “Legal Transplants”’ (1997) 4 *Maastricht Journal of European and Comparative Law* 111; Daniel Berkovitz, Katharina Pistor, Jean-François Richard, ‘The Transplant Effect’ (2003) 51 *American Journal of Comparative Law* 163, 171; François Barrière, ‘Le Code civil français aujourd’hui: influences’ in Jean-Philippe Dunand and Bénédicte Winiger (eds), *Le Code civil français dans le droit européen* (Bruylant 2005) 95.

<sup>83</sup> *Stare decisis* is Latin for ‘to stand by things decide’. In short, it is the doctrine of precedent. Courts cite to *stare decisis* when an issue has been previously brought to the court and a ruling already issued.

<sup>84</sup> Gustaaf Houtman, ‘Mental Culture in Burmese Crisis Politics: Aung San Suu Kyi and the National League for Democracy’ Monograph Series No. 33 (Institute for the Study of Languages and Cultures of Asia and Africa Tokyo University of Foreign Studies 1999) 16.



### 3.1 The Acceleration of the Economic and Social Reform

The acceleration of the economic reform was made more visible than the social reform in order to attract more foreign investments in the country.<sup>85</sup> In this regards, the adoption of a Civil Code would be a tremendous support. As an example, when it was ask to a prominent legal scholar named René David why Ethiopia adopted a Civil Code, he admitted that it was to reassure foreign investors for attracting international capital.<sup>86</sup>

Regarding the social reform, it is now obvious that the use of the law is absolute. Customary law are less used in labour law and family law. In addition, the implementation of new laws can be an issue in the coherence and significance with the former laws. In that result, a Civil Code can organise and rationalise all these laws in allowing better understanding from the people. If the economic reform is considered more important in the country (1), the social reform can also affect the entire population (2).

#### 3.1.1 The Economic Reform in Myanmar

First and foremost, the former president Thein Sein signed the Foreign Investment Law No. 21/2012 in November 2012. This law allows the country to be more attractive to foreign investors while fully protecting the strategic sectors. Incentives for investors are numerous especially in tax purpose.<sup>87</sup> The law was giving guarantees to investors regarding the nationalisation<sup>88</sup> and the duration of the land lease.<sup>89</sup>

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<sup>85</sup> About the economic reform in Myanmar, see Sean Turnell, 'Legislative Foundations of Myanmar's Economic Reforms' in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart Publishing 2014) 194.

<sup>86</sup> Cabrillac (n 9) 138.

<sup>87</sup> Myanmar Foreign Investment Law 2012, s 27.

<sup>88</sup> *ibid*, s 28: 'The Union Government guarantees that a business formed under the permit shall not be nationalized within the term of the contract or the extended term if such term is extended; Section 29 of Foreign Investment Law (2012): The Union Government guarantees not to suspend any investment business carried out under the permit of the Commission before the expiry of the permitted term without any sufficient cause; Section 30 of Foreign Investment Law (2012): On the expiry of the term of the contract, the Union Government guarantees the investor invested in foreign capital to disburse his rights in the category of foreign currency in which such investment was made.'

<sup>89</sup> *ibid*, s 29: 'The Commission may allow the investor actually required period of the right to lease or use land up to initial 50 years depending upon the category of the business, industry and the volume of investment'; Section 32 of Foreign Investment Law (2012): 'The Commission may extend the period of consecutive 10 years and for further 10 years after the expiry of such period to the investor desirous of continuation of the business after the expiry of the term permitted under section 31, depending upon the volume of investment and category of business'; Section 33 of Foreign Investment Law (2012): 'The Commission may, for the purpose of economic development of the Union, allow to make investment on such land by obtaining the initial agreement from the person who is entitled to lease or use land with the prior approval of the Union Government'; Section 34 of Foreign Investment Law (2012): 'The Commission may, from time to time, stipulate in respect of rates of rent for the land owned by the Government departments and organization with the prior approval of the Union Government'; Section 35 of Foreign Investment Law (2012): 'The investor has the right to carry out, in performing the contract system of agricultural and breeding business in farms, only by joint venture system with citizen investors which are allowed to carry out by the citizens'; Section 36 of

Subsequently, the Myanmar Investment Law was adopted in 2016 and applicable in 2017. This law combines aspects of the previous Foreign Investment Law of 2012 and Myanmar Citizens Investment Law of 2013.<sup>90</sup> The Myanmar Investment Law vastly simplified the process for investment applications and offers a number of tax breaks,<sup>91</sup> incentives, guarantees, rights and protections for business ventures.<sup>92</sup> The Myanmar Investment Law and associated Investment Policy of 2016 both stress the government's interest in responsible business conduct, and responsible and mutually beneficial foreign investment.<sup>93</sup>

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Foreign Investment Law (2012): 'The Commission may, for the purpose of the development of the entire Nation, stipulate longer than the period for the right to lease or use land contained in this Law, for enjoyment of the investors who has invested in the region where the economy is less developed and difficult to access with the approval of the Union Government.'

<sup>90</sup> Myanmar Investment Law 2016, s 2 (p): 'Investor means a Myanmar Citizen investor or foreign investor who invests within the Union in accordance with the Law'; Section 47 of Myanmar Investment Law (2016): 'In dealing with the investors: (a) the Government shall accord to foreign investors and their direct investments, treatment no less favourable than it accords to Myanmar citizen investors in respect of the expansion, management, operation, and the sale or other disposition of direct investments according to this Law except any way stipulated in Laws, rules and notifications; (b) the Government shall accord, in like circumstances, to foreign investors and their direct investments from one country, treatment no less favourable than that it accords to investors of any other country and their direct investments in respect of establishment, acquisition, expansion, management, operation, and the sale or other disposition of direct investments; (c) The provision of subsection (b) shall not be construed so as to oblige foreign investors with any treatment, preferences or privileges resulting from the following matters: i. Custom Union, Free Trade Area, Economic Union resulting from Custom Union, Free Trade Area and Economic Union and international agreements; ii. more favourable treatments to be accorded to investors and their investments included in international agreements, bilateral or regional or international treaties, agreements or arrangements between regional countries, treaties, agreements or arrangements with other countries, or arrangements relating wholly or partially to taxation'; Section 48 of Myanmar Investment Law (2016): 'The Government guarantees to the investors fair and equitable treatment in respect of the followings: (a) the right to obtain the relevant information on any measures or decision which has a significant impact for an investor and their direct investment; (b) the right to due process of law and the right to appeal on similar measure, including any change to the terms and conditions under any license or permit and endorsement granted by the Government to the investor and their direct investment.'

<sup>91</sup> *ibid*, ss 74–81.

<sup>92</sup> *ibid*, s 52: 'The Government guarantees not to nationalize any investment carrying out in accordance with the law. Except under the following conditions, the Government guarantees not to take any measures which expropriate or indirectly expropriate or is likely to effect a result in the termination of an investment: (a) actually necessary for the interest of the Union or its citizen; (b) non-discriminatory manner; (c) measures in accordance with the applicable Laws; (d) prompt, fair and adequate payment of compensation'; Section 53 of Myanmar Investment Law (2016): 'A fair and adequate compensation shall be designated as an equivalent to the market value prevailing at the time of expropriation of the investment. However, that designation shall be based on a fair consideration of public interest as well as the interests of the private investor, and shall take into account the present and past conditions of investment, the reason for expropriation of the business or property, the fair market value of the investment, the purpose of expropriating the business or property, the profits acquired by the investor during the term of investment, and also the duration of the investment'; Section 54 of Myanmar Investment Law (2016): 'Non-discriminatory manner, including in Chapter XXI and Chapter XXII of this Law, which the Government performs in their authority for the purposes of regulating economic or supporting social interest shall not apply to the provisions in this Chapter'; Section 55 of

In the meantime, the Companies Act 1914, which derived from the British Companies Act 1907 and the Indian Companies Act 1913, has been repealed by the Myanmar Companies Law in order to facilitate the registration of companies and for a modern business practice.<sup>94</sup> The Government wanted to provide ethical practice in corporate governance and to tackle corruption. Therefore, the most significant reform regarding the new Companies Law 2017 concerns foreigners who are able to own 35% of a local company.<sup>95</sup> Moreover, a private company can be incorporated with a minimum of one shareholder and one director.<sup>96</sup> Eventually, at least one director of every company must be

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Myanmar Investment Law (2016): 'If an investor asserts that a measure or series of measures undertaken under section 52 are inconsistent with the provision of such section and amount to an indirect expropriation, the Government shall conduct a case-by-case and fact-based inquiry that takes into consideration the following factors: (a) whether the measure creates an intentional adverse effect on the economic value of an investment or not; (b) whether the measure breaches the prior binding written commitment of the Government, contract, license, or other legal documents issued in favour of the investor or not; (c) whether the measures of Government, including the objective contained in section 52 (a), are consistent with the public interest or not.'

<sup>93</sup> *ibid*, s 65: 'The Investor: (a) shall respect and comply with the customs, traditions and traditional culture of the ethnic groups in the Union; (b) shall establish and register a company or sole proprietorship or legal entities or branches of such entities under the Laws in order to invest; (c) shall abide by the terms and conditions, stipulations of special licenses, permits, and business operation certificates issued to them, including the rules, notifications, orders, and directives and procedures issued by this Law and the applicable laws, terms and conditions of contract and tax obligations; (d) shall carry out in accordance with the stipulations of the relevant department if it is, by the nature of business or by other need, required to obtain any license or permit from the relevant Union Ministries, government departments and government organizations, or to carry out registration; (e) shall immediately inform to the Commission if it is found that natural mineral resources or antique objects and treasure trove are not related to the investment permitted above and under the land on which the investor is entitled to lease or use and not included in the original contracts. If the Commission allows, the investor shall continue to carry out the investment in such land, and if not allowed, the investor shall transfer and carry out, by obtaining the permission, at the substituted place which is selected and submitted by him; (f) shall not make any significant alteration of topography or elevation of the land on which he is entitled to lease or to use, without the approval of the Commission; (g) shall abide by applicable laws, rules, procedures and best standards practised internationally for this investment so as not to cause damage, pollution, and loss to the natural and social environment and not to cause damage to cultural heritage; (h) shall list and keep proper records of books of account and annual financial statement, and necessary financial matters relating to the investments performed by permit or endorsement in accordance with internationally and locally recognized accounting standards; (i) shall close and discontinue the investment only after payment of compensation to employees in accordance with applicable laws for any breach of employment contracts, closure of investment, sale and transfer of investment, discontinuation of investment, or reduction of workforce; (j) shall pay wages and salaries to employees in accordance with applicable laws, rules, procedures, directives and so forth during the period of suspension of investment for a credible reason; (k) shall pay compensation and indemnification in accordance with applicable laws to the relevant employee or his successor for injury, disability, disease and death due to the work; (l) shall supervise foreign experts, supervisors and their families, who employ in their investment, to abide by the applicable laws, rules, orders and directives, and the culture and traditions of Myanmar; (m) shall respect and comply with the labour laws; (n) shall have the right to sue and to be sued in accordance with the laws; (o) shall pay effective compensation for loss incurred to the victim, if there are damage to the natural environment and socioeconomic losses caused by logging or extraction of natural resources which are not related to the scope of the permissible investment, except from carrying out the activities required to conduct investment in a permit or an endorsement. (p) shall allow the Commission to inspect in any places, when the Commission informs the prior

ordinarily resident in Myanmar<sup>97</sup> and directors must comply with stipulated directors' duties.<sup>98</sup>

These new economic legal tools have consequences on the property law regarding the interest of foreign and local investors. Since the British colonial era, plenty of laws have been enacted in this area of law,<sup>99</sup> which is very debilitating for foreign and local investors and totally unclear in practice<sup>100</sup> in regards to the juridical status of land ownership especially in the industrial zone.<sup>101</sup> Therefore, practising property law needs more experience than knowledge of the theory and a Civil Code has proven its usefulness in understanding property rights.

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notice to inspect the investment; (q) shall take in advance permit or endorsement of the Commission for the investments which need to obtain prior approval under the Environmental Conservation Law and the procedures of environmental impact assessment, before undertaking the assessment, and shall submit the situation of environmental and social impact assessment to the Commission along the period of activities of the investments which obtained permit or endorsement of the Commission.'

<sup>94</sup> Melinda Tun, 'A Principled Approach to Company Law Reform in Myanmar' in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart Publishing 2014) 230.

<sup>95</sup> Myanmar Companies Law (2017), s 1 (c) (xiv): "'foreign company" means a company incorporated in the Union in which an overseas corporation or other foreign person (or combination of them) owns or controls, directly or indirectly, an ownership interest of more than thirty-five per cent.'

<sup>96</sup> *ibid*, s 4: '(a) A company registered under this Law must have: (i) a name; (ii) a constitution; (iii) at least one share in issue (provided that a company limited by guarantee need not have a share capital); (iv) at least one member; (v) subject to sub-section (vi), at least one director who must be ordinarily resident in the Union; (vi) if the company is a public company, at least three directors, at least one of whom must be a Myanmar citizen who is ordinarily resident in the Union; and (vii) a registered office address in the Union. (b) A company may appoint a company secretary and have a common seal.'

<sup>97</sup> *ibid*, s 1 (c) (xix): 'ordinarily resident' means a person who is a permanent resident of the Union under an applicable law or is resident in the Union for at least 183 days in each 12 month period commencing from: (A) in the case of an existing company or a body corporate registered under a repealed law, the date of commencement of this Law; and (B) in the case of any company or body corporate registered under this Law, the date of registration of the company or body corporate.'

<sup>98</sup> *ibid*, s 164: 'Sections 165 to 172 (inclusive) below contain the main duties imposed on directors and officers but do not limit duties imposed elsewhere under this Law or any other applicable law.'

<sup>99</sup> See The Caste Disabilities Removal Act 1850, The Hindu Widow's Remarriage Act 1856, The Married Women's Property Act 1874, Specific Relief Act 1877, The Land and Revenue Act 1879, The Kazis Act 1880, The Transfer of Property Act 1882, The Land Acquisition Mines Act 1885, The Upper Burma Land and Revenue Regulation 1889, The Partition Act 1893, The Lower Burma Town and Village Lands Act 1899, The Towns Act (1907 amended in 1947), The Village Act (1908 amended in 1955 and 1961), the Embankment Act 1909, the Code of Civil Procedure 1909, The Registration Act 1909, The Hindu Disposition of Property Act 1916, The Rangoon Development Trust Act 1921, The City of Rangoon Municipal Act (1922 amended in 1955, 1958, 1960, 1961, 1991), The Cantonments House Accommodation Act 1923, The Water Power Act 1927, The Hindu Inheritance Removal of Disabilities Act 1928, The Hindu Law of Inheritance Amendment Act 1929, The Hindu Gains of Learning Act 1930, The Custodian of Movable Property Act 1945, Public Property Protection Act 1947, The Requisitioning Emergency Provisions Act 1947, The Land Nationalisation Act 1953, The Urban Rent Control Act (1960 amended in 1960, 1961), The Tenancy Law (1963 amended in 1965), The Law Safeguarding Peasant Rights 1963, Electricity Law (1984 amended in 1990), The Transfer of Immoveable Property Restriction Act (1987 amended in 2005), The City of Yangon Development Law (1990 amended in 1995 and in 1996), Duties and Rights of the Central Committee for the Management of Cultural Land, Fallow Land and Waste Land 1991, The Law for the Repeal of Laws 1992, The Forest Law 1992, The Narcotic Drugs and Psychotropic

Nonetheless, the adoption of these economic legal tools is not sufficient. Myanmar is still not in a good position in the Doing Business Report of World Bank. In the 2020 ranking, the country appears at the 165th place out of 190 countries. Particularly regarding enforcement of contracts, Myanmar is at the bottom of the ranking (188th).<sup>102</sup> Furthermore, the World Bank has a narrow vision of Civil Law and it can be considered that this international institution could be reluctant for any adoption of a Civil Code.<sup>103</sup>

However, the World Bank has already recognised that in some countries a Civil Code can be an economic tool to ensure the enforcement of contracts. For instance in Djibouti,

[t]o meet the needs of citizens and legal practitioners, as well as to improve the business and investment climate, Marie-Paule and Alain Martinet of the Djibouti Bar Association, and Yves Strickler, vice-dean of research at the Faculty of Law and Political Science of the University of Nice, were selected to first make an inventory of existing texts, and then propose a Djiboutian civil code and a code of civil procedure. After two years of work, the Civil Code and the Code of Civil Procedure were promulgated on April 12, 2018. In a general way, these texts meet the requirements of the World Bank's 'Doing Business' project, which aims to support states in acquiring modern and effective tools to guarantee a certain juridical stability and a rapidity of justice in the resolution of conflicts to improve the investment environment.<sup>104</sup>

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Substances Law 1993, Development Committees Law 1993, The Child Law 1993, The Development of Border Areas and National Races Law 1993, The Protection of Wildlife and Conservation and Protection of Natural Areas Law 1994, Myanmar Mines Law 1994, The Protection and Preservation of Cultural Heritage Regions Law 1998, Judiciary Law 2000, Highways Law 2000, The Attorney General Law 2001, The City of Mandalay Development Law 2002, Order No. 3 Conferring Powers relating to Land Administration 2007, Cantonment Development Law 2010, The Ward and Village Tract Administration Law 2012, Notification 1/2012: Vacant, Fallow and Virgin Lands Management Rules, Farmland Law 2012, Law of Protection of the Farmer Rights and Enhancement of their Benefits 2013, Special Economic Zones Law 2014, Law amending the Lower Myanmar Town and Village Land Act 2015, Myanmar Investment Law 2016, Condominium Law 2016, Myanmar Territory Sea Water and Exclusive Economic Zone Law 2017, Companies Law 2017.

<sup>100</sup> See Cheah Swee Gin, 'An introduction to Myanmar's real estate laws' (*Mingalar*, 21 August 2018) <<https://www.mingalarrealestateconversation.com/news/2018/08/21/introduction-myanmars-real-estate-laws/1534807786>>.

<sup>101</sup> See the Industrial Zone Law 2020.

<sup>102</sup> World Bank Group, *Doing Business 2020: Comparing Business Regulation in 190 Economies – Economy Profile Myanmar* (Economy Profile Myanmar, 2020) 50.

<sup>103</sup> World bank, *Doing Business 2004: Understanding regulation* (World Bank, 2004); see also Arnaldo Wald, 'Brésil' in Contribution des Groupes autres que le Groupe français de l'Association Henri Capitant des Amis de la Culture Juridique Française, *Les droits de tradition civiliste en question: À propos des rapports Doing Business de la banque mondiale* (Société de législation comparée 2006) 10; l'Association Henri Capitant, *Les droits de tradition civiliste en question: A propos des rapports Doing Business de la banque mondiale* (Société de législation comparée 2006) 79.

<sup>104</sup> Oxford Business Group, 'Updates to the codes regulating Djibouti's business environment' (Oxford Business Group) <<https://oxfordbusinessgroup.com/overview/legislating-change-update-codes-regulating-business-environment>>.

As a direct consequence, Djibouti's rank in the Doing Business Report of World Bank has considerably improved.

Which area of law could be possible to include in a Civil Code? It is obvious that family law, contract law and property law are the three main pillars of this legal tool. Notwithstanding, a Civil Code can also integrate the commercial provisions such as in Netherlands,<sup>105</sup> Russia<sup>106</sup> or Senegal.<sup>107</sup> In that respect, the new Myanmar Companies Law is a real success that could lead to a large modernisation of civil law. Moreover, the social reform in Myanmar could also facilitate this project.

### 3.1.2 The Social Reform in Myanmar

Labour law already existed during the British colonial administration and some laws are still applicable.<sup>108</sup> After the independence, labour law was developed and expanded.<sup>109</sup> From 2011, the government has repealed and amended old laws in order to modernise labour laws.<sup>110</sup> As a consequence, labour laws have a direct impact on Contract Law.<sup>111</sup> In practice, the law of contract<sup>112</sup> can be considered as separated from reality. For instance, most of the local people are used to draft a one-page agreement. The Contract Act 1872 is considered to have a liberal approach, which is not in the interest of local parties who need protection and more detailed provisions.<sup>113</sup>

In addition,, legal personality is a primary concern in Myanmar because it is profoundly related to the ability to hold a scrutiny card:

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<sup>105</sup> The Burgerlijk Wetboek 1992.

<sup>106</sup> Civil Code of the Russian Federation 1994–1996.

<sup>107</sup> Civil and Commercial Obligations Code 1968.

<sup>108</sup> For instance, Workers' Compensation Act 1923 amended in 2005; Trade Union Act 1926 and Trade Disputes Act 1929 reformed in 2012; Payment of Wages Act 1936.

<sup>109</sup> For instance, Minimum Wage Act 1949; Employment and Training Act 1950; Factories Act 1951; Leaves and Holiday Act 1951; Shops and Establishments Act 1951; Social Security Act 1954.

<sup>110</sup> For instance, Labour Organisation Law 2011; Settlement of Labour Dispute Law 2012 amended in 2014; Social Security Law 2012; Employment and Skills Development Law 2013; Minimum Wage Law 2013; Payment of Wages Law 2016; Shops and Establishment Law 2016; National Minimum Wage Committee Notification No. 2/2015 – Minimum Wage; Ministry of Labour Notification No. 84/2015 – Severance Payments.

<sup>111</sup> Ministry of Labour Notification No. 1/2015 – Labour Contracts; Ministry of Labour Notification No. 140/2017 – Template Employment Contract.

<sup>112</sup> On this topic, see Adrian Briggs and Andrew Burrows, *The Law of Contract in Myanmar* (Ashford Colour Press 2017).

<sup>113</sup> Some provisions of Contract Act 1872 such as Section 17 (Fraud) and Section 18 (Misrepresentation) are directly inspired by the draft of the New York Civil Code; See also The commissioners of the code, and submitted to the judges and others for examination, prior to revision by the commissioners, *Draft of a Civil Code for the State of New York* (Weed, Parsons and Company 1862); Frederick Olds Bissell, 'Codification in the State of New York' (1893) Historical Theses and Dissertations Collection Paper 337; Andrew P Morriss, Sco J Burnham and James C Nelson, 'Debating the Field Civil Code' (2000) 61, Montana State University Law School Association 371.

Scrutiny cards are documents that help to show a person's citizenship. Scrutiny cards are very important, as they may enable people to do basic things like travel, attend high school and university, open a bank account, register their marriage, vote, and buy and sell land. The card records their personal information, including name, sex, religion, father's name and identification number.<sup>114</sup>

This scrutiny card is different from the national registration card or three-folded card, which is a document that was issued to all Myanmar residents (except foreigners) after independence in 1948. Some minority groups did not have scrutiny card but only national registration card. A household list or family list (Form 66/6) and birth certificate are also important for any Myanmar people living in the country to obtain the scrutiny card. A household list is a document that lists all members of a household or family living in the same house.<sup>115</sup> A birth certificate (Form 103) is a certificate issued by the Ministry of Health when a child is born and signed by the Township Medical Officer. Before the Citizenship Law 1982, citizenship was a single and unified category.<sup>116</sup> However, under Section 347 of Constitution 2008, the 'Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection'. Under Section 348 of Constitution 2008, the 'Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth'. Therefore, the modernisation of civil law through a Civil Code could clarify the question of the legal personality in Myanmar and may permit to comply practically with the current Constitution in Myanmar.

Moreover, the modernisation of civil law can also apply to the death penalty, which is dedicated by the law<sup>117</sup> and covered by the Constitution 2008.<sup>118</sup> Hence, if a Civil Code can provide the right to live, it will be based on the moral principle observed in the population and complied with the idea that no one should be unjustly killed by another human being. This project may also have an interest for animals, which have an important value in Myanmar society.

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<sup>114</sup>Justice Base, *A legal guide to citizenship and identity documents in Myanmar* (December 2018) 6: 'full citizens should receive a pink card, or citizenship scrutiny card (CSC), associate citizens can apply for a blue card, or associate citizenship scrutiny card (ACSC), naturalised citizens can apply for a green card, or naturalised citizenship scrutiny card (NCSC). People can apply for a CSC one they turn 10 years old. They should renew it at ages 18, 30 and 45. These three types of scrutiny card were all created pursuant to the 1983 Procedures, which correspond to the three types of citizenship under the 1982 Citizenship Law. Full citizenship is defined in Sections 3, 5, 6 and 7 of the 1982 Law. Associate citizenship is defined in Section 23 of the 1982 Law. Naturalised citizenship is defined in Sections 42, 43, 44 and 45 of the 1982 Law.'

<sup>115</sup>See Residents of Registration Act 1949.

<sup>116</sup>Base (n 114) 10.

<sup>117</sup>Myanmar Penal Code 1860, ss 84, 121, 132, 194, 307, 382, 396; Narcotic Drugs and Psychotropic Substances 1993, ss 20, 22, 26; Criminal Procedure Code 1898, s 84.

<sup>118</sup>Myanmar Constitution 2008, s 204, 373 and 382.

Family law in Myanmar is coming from several sources of law (customary law,<sup>119</sup> case law, doctrine and statute law). Nevertheless, in 2015, the Race and Religion Protection Laws were adopted by the Parliament, which included religious conversion law, interfaith marriage law, monogamy law and population control law.<sup>120</sup> Because the Parliament is now competent to enact laws concerning family law, these laws in 2015 have shown that statute law is the main source of family law in Myanmar. For this reason, the modernisation of family law can be carried out through a project of a Civil Code but it was also admitted in conducting a project of a codification in this specific area of law.

Lastly, a Civil Code would help to ensure the understanding of lifestyle in cities and in the countryside and relationships between individuals. Beyond differences (gender differences, between rich and poor, people from the North, South, West and East, religions, ethnic groups), all the Myanmar people would be covered under the same Law and same values. A Civil Code could represent the implementation of social harmony in Myanmar.

### 3.2 The Acceleration of the State Reform

According to David Steinberg,

There is no country in Southeast Asia that is essentially homogeneous in ethnicity or language. The creation of such nations, the search for unity and cohesion and a sense of power justly shared, has been the task, never easily fulfilled, of the newly independent countries of the region. Nowhere is this better illustrated than in Burma: each government of the Union of Burma has attempted to create this sense of nationhood—a sharing of national values and will amongst all of its diverse people. Yet, each effort has to a major been unsuccessful. Although a Union of Burma as a state was titularly created, a union of people as a nation was not.<sup>121</sup>

The history of Myanmar has always focused on national unity. It can only be understood if we trace back historically the settlement of a country based on a mosaic of population.<sup>122</sup> Moreover, it is important to highlight the specific traits and reasons why these populations did not accept the assimilation of the majority group.<sup>123</sup>

If the political unity of the country is the current main purpose, legal unity is a major issue in Myanmar.

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<sup>119</sup> Burma Laws Act 1898, s 13.

<sup>120</sup> Melissa Crouch, 'Constructing Religion by Law in Myanmar' (2015) 13 *The Review of Faith & International Affairs* 1.

<sup>121</sup> David Steinberg, *Burma The State of Myanmar* (Georgetown University Press 2001) 182.

<sup>122</sup> Furnivall (n 38) 304.

<sup>123</sup> Pierre Fistié, 'La Birmanie ou la quête de l'unité' (1985) 139 *Ecole Française d'Extrême-Orient Paris*, preface.



### 3.2.1 The Political Unity of the Country

Myanmar is an ethnically diverse country. The variety of different tribal groups and the contrast in the locality, the dress, cultures, customs, religion and traditions of these ethnic groups vary considerably.<sup>124</sup>

For example, no trace exists now of the group called 'Yabein' that inhabited the Bago Yomas and was included in the 1931 census. The same is also true of the 'Fon'. They were found within the khatcho region near Myitkyina.<sup>125</sup>

Since the British colonisation, no reliable census data available on Myanmar ethnic minorities has been carried out. However, the government claims that there are 135 national races. Despite Myanmar's rich cultural heritage, political tensions between ethnic groups have been continuous. How can we define a national minority? General Aung San, leader of the Burma Independence Army, has suggested a population test.<sup>126</sup>

At the AFPFL<sup>127</sup> Conference on 23 January 1946, General Aung San has performed a notorious speech as follows:

Unity must have a common interest, a common sense of working together and a common objective, for the independence of the whole country and the interests of the whole populace. Unity must work for the people so that they can enjoy shared well-being and shared cause in working together. It is not enough just to say that we want to be united. Labour must be shared, and interests must be shared. Our objective must be the same. Only this kind of effort is worth calling 'Unity'.

In 1947, General Aung San negotiate a plan for independence with the British colonial authorities and gathered minority groups to join the Union of Burma. General Aung San signed the Panglong Agreement with Kachin, Chin and Shan representatives, establishing guidelines for political autonomy. On 19 June 1947, he was assassinated. Under Section 201 of the Constitution 1947, 'Save as otherwise expressly provided in this Constitution or in any Act of Parliament made under section 199, every State shall have the right to secede from the Union in accordance with the conditions hereinafter prescribed'.

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<sup>124</sup> Kyaw (n 23).

<sup>125</sup> U Min Naing, *National Ethnic Groups of Myanmar* (Daw Moe Kay Khaing 2000).

<sup>126</sup> Maung Maung, *Burma's Constitution* (The Hague Martinus Nijhoff 1959) 169: 'The League of Nations before the war, he said, set the figure at one-fifth of the whole nation's population. It would not do to admit a plurality of national minorities. In the Shan States alone, for instance, there are twenty or thirty separate racial or tribal communities. That is why a national minority has to be determined on the basis of population ratio. But in Burma we can consider one-fifth as too rigid a proportion. We can stretch this point and consider that even if a certain indigenous race has population of only one-tenth of the whole, it constitutes a national minority.'

<sup>127</sup> The Anti-Fascist People's Freedom League or *hpa hsa pa* was a political alliance comprising several very different political parties held together by the common leadership of first Aung San and then U Nu.

Under Section 202 of the Constitution 1947, 'The right of secession shall not be exercised within ten years from the date on which this Constitution comes into operation'.

The Union of Burma was in a precarious existence. The *coup d'état* in 1962 led by General Ne Win did not end the conflict and negotiation and the 21st Century Panglong Peace Conference is still in progress. Consequently, it seems that the implementation of a federal state could be the most widespread response.

What is a federal state? A definition of federalism is difficult to define because 'the definition of the notion has to take into account perceptions of federalism specific to one national political practice or tradition'.<sup>128</sup> Nevertheless, it is commonly accepted that federalism consists of a specific combination of self-rule (autonomy), limited rule (superposition) and shared rule (participation), implying the coexistence of two independent levels of government acting simultaneously on the citizens.<sup>129</sup>

If a federal state has to draft a Civil Code, an issue may arise when the national federal government and state government have the concurrent power to enact law. This is the reason why civil law shall be applicable to all States. Precisely, if Myanmar is becoming a federal state, symbols are necessary in order to unite the people.<sup>130</sup> A Civil Code can be a symbol of personalised power such as the Hammurabi Code or Napoleon Code. It can also symbolise philosophical or political ideas. Laws can express the values of the society and a Code amplifies its effect.<sup>131</sup> A Civil Code can be a symbol of political unity and a powerful symbol of social harmony in Myanmar.

Lastly, rule of law is supported by many organisations and is subject as a mantra to the Myanmar government. There is no common definition for the concept of rule of law. For the United Nations system,

[T]he rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.<sup>132</sup>

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<sup>128</sup> Alain-G Gagnon and Soeren Kell, *Understanding Federalism and Federation* (Routledge 2016) 36.

<sup>129</sup> Georges Scelle, *Cours de droit international public* (1946) 256.

<sup>130</sup> Olivier Beaud, *Théorie de la fédération* (2nd edn, PUF Paris 2009) 161. On this topic, see also Hugues Portelli, *Droit constitutionnel* (9th edn, Dalloz 2011).

<sup>131</sup> Rémy Cabrillac, 'Le symbolisme des codes' in *L'avenir du droit, Mélanges en l'honneur de François Terré* (PUF 1999) 213.

<sup>132</sup> United Nations and the Rule of Law, 'What is the rule of law?' <<https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>>.

A country that adopts the rule of law ensures that all persons and organisations including the government are accountable in the eyes of the law. The law shall be clear, known, and enforced. In addition, the Court system is independent and resolves disputes in a fair and public manner. All persons are presumed innocent until proven otherwise by a Court. Furthermore, no one shall be arbitrarily arrested, imprisoned, or deprived of their property. Punishment must be determined by a Court and be proportionate to the offence.<sup>133</sup> Although substantial progress has been made for almost ten years now, the benefits of a Civil Code support the concept of rule of law and legal unity in Myanmar.

### 3.2.2 The Legal Unity of the Country

Legal unity is an organic and functional hierarchy of rules. Hence, any legal system targets unity because it shall be hierarchic.<sup>134</sup> When a legal system is discussed, it presupposes its unity.<sup>135</sup> For Dean Georges Vedel, the expression ‘unity of law’ would be a tautology.<sup>136</sup> Indeed, what is the difference between unity and uniformity? In France, uniformity is seen as the corollary of unity<sup>137</sup> while it is in fact only one of its specific definition. On the contrary, unity is not uniformity and it must lead to a soft law in order to let existing the plurality of different *Länder*.<sup>138</sup> In a narrow sense, unity would lead the legal unicuity to a uniform legal branch. Hence, a unique law will rule without taking into consideration specificities, traditions and pre-existing legal obligations. So unity is a common core or a benchmark for the entire legal branches.<sup>139</sup> The unification is making with the systematisation and centralisation of law provided by the codification. The centralisation involves that the codification permits to replace the codified law in the state apparatus.

In this way, Myanmar can use the German vision of unity, which will be more suitable with the idea of a federal state or can also copy the French vision of unity with the making of a Civil Code, which replaces plenty of customs, written rules, royal ordinances and canon

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<sup>133</sup> ‘What Is the Rule of Law?’ (Rule of Law Education Centre) <<https://www.ruleoflaw.org.au/what-is-the-rule-of-law/>>.

<sup>134</sup> François Ost and Michel Van de Kerchove, *Le système juridique entre ordre et désordre* (1st edn, PUF 1988) 25.

<sup>135</sup> Niklas Luhmann, ‘L’unité du système juridique’ in *Archives de philosophie du droit, Le système juridique* (1986) 163.

<sup>136</sup> Georges Vedel, ‘Aspects généraux et théoriques’ in *Economica, L’unité du droit: Mélanges en hommage à Roland Drago* (Economica 1996) 2.

<sup>137</sup> Guillaume Leyte, ‘Le Code civil et les autres codifications napoléoniennes’ in Laurent Leveneur and Yves Lequette (eds), *1804-2004, Le Code civil. Un passé, un présent, un avenir* (Daloz Paris 2004) 125.

<sup>138</sup> Olivier Beaud, ‘Savigny et le droit public. Plaidoyer pour une lecture politique de l’oeuvre de Savigny’ in Jean-François Kervégan and Heinz Mohnhaupt (eds), *Recht zwischen Natur und Geschichte* (Klostermann, Frankfurt am Main 1997) 177, quoted in Carolina Cerda-Guzman, *Codification et constitutionnalisation* (Fondation Varenne, collection de thèses 2011); See also Rainer Maria Kiesow, *L’unité du droit* (Éditions de l’École des Hautes Études en Sciences Sociales, collection Cas de figure 2014) 11.

<sup>139</sup> Cerda-Guzman (n 43) 372.

law.<sup>140</sup> The French Civil Code permitted the confluence of all sources of law in the country, which are bound in a unique body of law.<sup>141</sup>

What is the link between political unity and legal unity? The legal unity through codification is actually bound to the political unity. Indeed, it can be explained with the strong existing match between political order and legal order.<sup>142</sup> For the French doctrine, legal unity with codification is a condition for political unity.<sup>143</sup> Legal unity should be not the real target but should be based on the unity of the State.<sup>144</sup> For the French Professor Rémy Cabrillac, 'the codification often accompanies or follows a reunification of population into a same State'.<sup>145</sup> At the beginning of the 19th century, the French Civil Code answered the deep request for unity in the country.<sup>146</sup> In such cases, the legal unity shall serve the state unity.<sup>147</sup> Indeed, when codes are mainly adopted in a political framework in order to create a nation-state, a codification is often carried on by a national ideology, which is the extension of the unification of the population. In the United Kingdom, the failure of a codification can be explained because national unity has been already achieved by central courts in the form of Common Law. No English lawyers and the society felt the need for unification by a national codification.<sup>148</sup> Therefore, the willingness to adopt a code during the state-building has to come from two factors: the sovereignty and the centralisation of power. A codification is an act of sovereignty and permits the sovereign to establish its authority.

#### 4. Conclusion

Alongside the legal and political unity, social, language or cultural unity is difficult to achieve.<sup>149</sup> In that respect, a Civil Code is a political act because it contributes in uniting socially, geographically, ethnically separated population.<sup>150</sup> Furthermore, a Civil Code organises social relationships, creating links, which reinforce the cohesion of society.<sup>151</sup> It

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<sup>140</sup> Yves Lequette, 'Recodification civile et prolifération des sources internationales' in Laurent Leveneur and Yves Lequette (eds), *Le Code civil. 1804-2004. Livre du bicentenaire* (Daloz 2004) 183.

<sup>141</sup> Gérard Cornu, 'Réflexions en attendant le tricentenaire' in Laurent Leveneur and Yves Lequette (eds), *Le Code civil. 1804-2004. Livre du bicentenaire* (Daloz 2004) 709.

<sup>142</sup> Jean-Yves Frégné, 'Les grandes étapes de la codification en Italie du XVIIIème à nos jours' (2006) *Revue historique de droit français et étranger*, octobre-décembre 540.

<sup>143</sup> Cabrillac (n 9) 154.

<sup>144</sup> Cerda-Guzman (n 43) 385.

<sup>145</sup> Rémy Cabrillac, 'Le Code civil est-il la véritable constitution de la France' (2005) 39 *Revue juridique Thémis* 245, 252.

<sup>146</sup> François Terré, 'Les problèmes de la codification à la lumière des expériences et des situations actuelles' in Edn. Cujas, *Études de droit contemporain* (T. 23, Paris 1962) 176.

<sup>147</sup> Jean-Louis Gazzaniga, 'Le Code avant le Code' in Bernard Beignier (eds), *La codification* (Recueil Dalloz, Thèmes et Commentaires 1996) 30.

<sup>148</sup> Basedow (n 55) 311.

<sup>149</sup> Naing (n 125) 1.

<sup>150</sup> Rémy Cabrillac, 'La codification: histoire, définitions, attentes' (2003) *Revue juridique de l'Océan indien* 14.

<sup>151</sup> Jean-Etienne-Marie Portalis, *Essai sur l'utilité de la codification* (1838) III.

seals the social armistice by consolidating for the future with values, which will be the base of a new society.<sup>152</sup> A Civil Code can also provide geographical and social cohesion. For these reasons, this kind of code can offer various solutions in Myanmar.<sup>153</sup>

Nevertheless, many critics may arise against the idea of a Civil Code. A Civil Code can affect the legal pluralism in Myanmar, which can be considered as an important diversity in the legal system. Moreover, a Civil Code can freeze the law and will be outdated immediately after its adoption. Other people will insist on the improvement of the judiciary system. Appropriate laws organised in a systematic are actually more in order for the population to rediscover a clear and coherent Law. Knowledge and access to law are more important for people to believe in righteousness. It could be a historic opportunity to jump-start the development and social progress in the country. Reforming the law is complex and people will gain from the unification of civil law in Myanmar.

Finally, one of the great neighbours of the country has adopted a Civil Code. China is one of the top business partners with Myanmar and shares a long land border (2129 km) with the country. As a matter of fact, China's top legislature through the 13th National People's Congress has passed on 28 May 2020 the long-expected Civil Code. Comprised of seven parts plus supplementary provisions, 84 chapters and 1260 articles, the Civil Code is the most extensive legislation in the history of the People's Republic of China, and this is the only legislation officially named a "code"<sup>154</sup>. The Chinese Civil Code will take effect on 1 January 2021.<sup>155</sup>

## Acknowledgement

None.

## Funding Information

The author received no funding from any party for the research and publication of this article.

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<sup>152</sup> Rémy Cabrillac, 'Le Code civil est-il la véritable constitution de la France?' (2005) 39 *Revue juridique Thémis* 250.

<sup>153</sup> Remi Nguyen, *Réflexion sur la codification du droit civil en Birmanie*, Thèse (Université de Bourgogne-Franche Comté 2018); Remi Nguyen, 'The Opportunity of a Civil Code in Myanmar' Remi Nguyen, *Asian Journal of Law and Policy* (Coming Soon); Remi Nguyen, 'Enacting a civil code could open many doors for Myanmar' Myanmar Times (31 January 2020) <<https://www.mmtimes.com/news/enacting-civil-code-could-open-many-doors-myanmar.html>>.

<sup>154</sup> On the codification of civil law in China, see Shi (n 3) préf. Mireille Delmas-Marty; Xiao-Ying Li-Kotovtchikhine, 'La réforme du droit chinois par la codification' (2000) 52 *Revue Internationale de Droit Comparé* 529.

<sup>155</sup> 'Civil Code of the People's Republic of China' (*NPC Observer*) <<https://npcobserver.com/legislation/civil-code/>>.

