

การวิเคราะห์เชิงเปรียบเทียบและการศึกษาทางบริบท
ต่อกฎแห่งการรับรู้ (Rule of Recognition) ในสังคมไทย
Unveiling the Rule of Recognition in Thai Society:
A Comparative Analysis and Contextual Examination

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(Received: March 29, 2024; Revised: April 1, 2024; Accepted: April 2, 2024)

บทคัดย่อ

การศึกษาครั้งนี้เป็นการสำรวจแนวคิดของ เอช แอล เอ ฮาร์ท (H.L.A. Hart) เกี่ยวกับกฎแห่งการรับรู้ (Rule of Recognition) และการปรับใช้ในระบบกฎหมายของชุมชนขนาดเล็กและสังคมร่วมสมัย ฮาร์ท ให้เหตุผลว่าการควบคุมทางสังคมอาศัยการยึดมั่นร่วมกันต่อกฎหลักของพันธกรณีภายในชุมชนที่ใกล้ชิดกัน อย่างไรก็ตาม เมื่อสังคมมีขนาดใหญ่ขึ้น ความไม่แน่นอนเกี่ยวกับบรรทัดฐานและการบังคับใช้กฎเกณฑ์ก็เกิดขึ้น ฮาร์ท เสนอ 'กฎแห่งการรับรู้' ซึ่งเป็นกฎลำดับรองที่จะเป็นตัวกำหนดกฎที่ถูกต้องและมีผลผูกพัน กฎแห่งการรับรู้ที่จะรับรองความเป็นกฎหมายที่สมบูรณ์นั้นอาจมีหลายรูปแบบและถูกกำหนดโดยผู้มีบทบาทสำคัญ เช่น ศาล เจ้าพนักงาน และบุคคลใด ๆ ซึ่งในกรอบกฎหมายสมัยใหม่เป็นการครอบคลุมแหล่งที่มาทางกฎหมายทั้งหมด การทำความเข้าใจกฎแห่งการรับรู้เป็นสิ่งสำคัญในการทำความเข้าใจว่าบรรทัดฐานทางกฎหมายได้มาซึ่งสถานะที่เชื่อถือได้อย่างไร โดยเฉพาะอย่างยิ่งในสภาพแวดล้อมทางกฎหมายของประเทศไทย

อย่างไรก็ตาม พบว่ายังมีช่องว่างและการวิพากษ์วิจารณ์ที่ต้องถูกพิจารณา ซึ่งการศึกษานี้มีการศึกษาการตีความของนักวิชาการอีกสามคนที่เกี่ยวข้องกับกฎแห่งการรับรอง ได้แก่ อัดัม เพอร์รี่ (Adam Perry) ซิลวี เดลาครัวซ์ (Sylvie Delacroix) และอาดัม ทักเกอร์ (Adam Tucker) โดยเพอร์รี่ให้เหตุผลว่า การอาศัยการยอมรับทางสังคมเพียงอย่างเดียวอาจจำกัดเสถียรภาพและความสอดคล้องกันของกฎแห่งการรับรู้ เดลาครัวซ์ เน้นย้ำถึงความจำเป็นในการคำนึงถึงแนวทางปฏิบัติและประเพณีที่ไม่เป็นทางการ นอกเหนือจากการออกกฎหมายที่เป็นทางการ ในบริบทของประเทศไทย กฎแห่งการรับรู้เผชิญกับความท้าทายในการปฏิบัติตามอำนาจนิติบัญญัติและการรองรับลักษณะเฉพาะทางวัฒนธรรม การวิพากษ์วิจารณ์เหล่านี้เน้นย้ำถึงความ

จำเป็นในการทำความเข้าใจกฎแห่งการรับรู้ที่ครอบคลุมและละเอียดอ่อนมากขึ้นด้วยการผสมผสานบรรทัดฐาน แนวทางปฏิบัติที่ไม่เป็นทางการ และการพัฒนาต่อการยอมรับทางสังคม

โดยสรุป กฎการแห่งการรับรู้ของฮาร์ทมอบกรอบแนวคิดที่มีคุณค่า แต่การนำไปปฏิบัติจริงเผยให้เห็นช่องว่างและข้อจำกัด ซึ่งข้อมูลเชิงลึกจากนักวิชาการ เช่น เพอร์รี่ เตลาครัวร์ และ ทักเกอร์ เน้นย้ำถึงความสำคัญของการพิจารณาพฤติกรรมทางสังคม แนวทางปฏิบัติที่ไม่เป็นทางการ ลักษณะเฉพาะทางวัฒนธรรม และการมีส่วนร่วมกับอำนาจนิติบัญญัติของรัฐสภา การแก้ไขช่องว่างเหล่านี้จะช่วยให้เกิดความเข้าใจที่ครอบคลุมมากขึ้นเกี่ยวกับกฎแห่งการรับรู้เพื่อเพิ่มพูนความสัมพันธ์ต่อระบบกฎหมายร่วมสมัยและในบริบทของประเทศไทย

คำสำคัญ : กฎแห่งการรับรู้, การยอมรับทางสังคม, ระบบกฎหมาย, อำนาจนิติบัญญัติ, การสมรสของบุคคลเพศเดียวกัน

Abstract

This study explores H.L.A. Hart's concept of the rule of recognition and its application in the legal systems of compact communities and contemporary societies. Hart argues that societal control relies on collective adherence to primary rules of obligation within close-knit communities. However, as societies grow larger, uncertainties regarding the nature and application of rules emerge. Hart proposes the secondary 'rule of recognition', which determines valid and binding rules. The rule of recognition can take various forms and is identified by actors such as courts, officials, and individuals. In modern legal frameworks, it encompasses the entire spectrum of legal sources. Understanding the rule of recognition is crucial to comprehending how legal norms acquire authoritative status, particularly in Thailand's legal environment.

However, there are gaps and criticisms to consider. This study examines three other scholars' interpretations of the rule of recognition: Adam Perry, Sylvie Delacroix, and Adam Tucker. Perry argues that relying solely on social acceptance may limit the stability and consistency of the rule of recognition. Delacroix emphasises the need to account for informal practices and customs in addition to formal legislation. In the Thai context, the rule of recognition faces challenges in aligning with legislative power and accommodating cultural specificities. These criticisms underscore the need for a more comprehensive and contextually sensitive understanding of the rule of recognition, incorporating norms, informal practices, and evolving social acceptance.

In conclusion, Hart's rule of recognition provides a valuable framework, but its practical application reveals gaps and limitations. Insights from scholars such as Perry, Delacroix, and Tucker highlight the importance of considering social habits, informal practices, cultural specificities, and the interplay with parliamentary legislative power. Addressing these gaps will

contribute to a more comprehensive understanding of the rule of recognition, enhancing its relevance in contemporary legal systems, and in the context of Thailand.

Keywords : Rule of recognition, Social acceptance, Legal system, Legislative power, Same-sex marriage

Introduction

As a key component of human cultures, social acceptability has experienced tremendous change throughout history. Throughout history, public views toward diverse behaviours, ideals, and marginalised populations have evolved, reflecting the changing dynamics of nations and civilizations. The purpose of this study is to investigate the complex link between social acceptance and the rule of recognition suggested by legal philosopher H.L.A. Hart. We can acquire a better understanding of how societal attitudes impact legal systems and influence the formation of legal norms by investigating the interaction between social acceptance and the rule of recognition.

Historically, social acceptance was frequently firmly ingrained in traditional norms, customs, and cultural practices that served as the foundation of community harmony and order. Certain act of deviance, aberrant or opposed to existing social norms acts or practices were treated with condemnation and ostracization.¹ These standards were frequently founded on deeply established prejudices, discrimination, and injustice, perpetuating the marginalisation of people or groups based on characteristics such as race, gender, sexual orientation, or socioeconomic status.

However, there has been a noticeable movement in cultural understanding and consciousness in recent decades. Movements for equality, justice, and the rights of underrepresented groups have gained momentum, resulting in heightened scrutiny of prejudiced behaviour and the promotion of inclusiveness. This awakening, commonly referred to as being "woke", has prompted a reevaluation of long-standing beliefs and behaviours that perpetuate injustice.²

Within the legal realm, Hart's idea of the rule of recognition provides a useful framework for comprehending the relationship between societal acceptance and the evolution of legal systems. The rule of recognition is used to identify and create legitimate and binding legal norms within a specific jurisdiction. It includes a variety of legal sources, such

¹ Marshall B. Clinard and Robert F. Meier, *Sociology of Deviant Behavior* (14th edn, Wadsworth Cengage Learning 2011) 4.

² Aja Romano, 'A history of wokeness' (*Vox*, 9 October 2020) <<https://www.vox.com/culture/21437879/stay-woke-wokeness-history-origin-evolution-controversy>> accessed 24 May 2023.

as legislation, court precedents, and customary practices, all of which are recognised and enforced by legal actors.

The rule of recognition, at its foundation, emphasises the critical role of social acceptance in imparting authority and legitimacy to legal standards. When social acceptability coincides with legal principles, people in society are more likely to see laws as valid and binding. However, when society's views shift, new challenges and concerns develop that call the present legal system into question. By embracing new norms and values, the rule of recognition allows legal institutions to adapt to changing social dynamics.

The changing social acceptability landscape has pushed excluded groups and their rights to the forefront of public debate. Previously marginalised populations, such as members of the LGBTQ+ community, racial minorities, and women, have sought legal recognition, equality, and protection. This shift in social acceptance has driven lawmakers to rectify historical injustices and pass legislation protecting these communities' rights and dignity.

However, the path to inclusion and social acceptance does not come without challenges. In Thailand, the rule of recognition confronts special obstacles in harmonising with legislative power while also accepting cultural differences. The Thai legal system has a complicated task in balancing the demands of social acceptance with the necessity to respect established legal principles and the rights of all citizens.

Traditional values and cultural standards frequently intersect with legal systems in Thai culture. Social acceptability can be tough to alter since it is strongly based on social norms and historical traditions. While Thailand has made tremendous progress in recognising the rights of excluded groups, barriers persist as some elements of society continue to fight progressive change. This contradiction between societal acceptance and the rule of recognition provides a difficult balancing act for Thai legislators, who must balance the needs of a developing community with the preservation of its cultural traditions.

This study will examine the interrelationship between the rule of recognition and social acceptance as an essential component of Hart's theory. Legal systems must adapt to reflect the changing values and norms of society as societal attitudes change. By comprehending the interplay between social acceptance and the rule of recognition, we are looking further to critically analyse the effect of societal attitudes on the evolution of legal systems and the protection of marginalised groups in Thailand, in particular. This examination opens up opportunities for additional studies into how legal systems can effectively respond to the changing social landscape while upholding the principles of justice, equality, and the rule of law. As well as how the rule of recognition of Hart is dynamically affected and challenged by a rapidly evolving society.

Hart's Concept on the Rule of Recognition

Hart posits that societal control can conceivably be achieved through the collective disposition of the group towards its established normative patterns of conduct, encapsulated within what he terms as primary rules of obligation.³ However, this assertion holds true solely within the confines of a compact community characterised by close-knit social bonds grounded in kinship, shared sentiments, and common beliefs. As the size of a society expands, the probability of encountering inquiries regarding the nature of its rules or the precise extent of their application becomes increasingly likely. In such instances, if the community relies exclusively on primary rules, no mechanism exists to resolve these uncertainties, be it through reference to an authoritative textual source or the pronouncements of an authoritative figure. Consequently, an exclusively primary rule-based society inexorably encounters the predicament of uncertainty pertaining to the ambit of primary rules.⁴

The secondary rule of recognition serves as a remedial mechanism aimed at addressing the aforementioned problem of uncertainty by facilitating the determination of binding and valid rules.⁵ Hart, in his scholarly discourse, provides an illustrative example from the legal system of the United Kingdom, wherein he expounds upon the validity of a particular law through an analysis of its hierarchical structure. He traces the validation of this law to a specific rule, namely, the enactment of legislation by the Queen in Parliament. However, a pertinent question arises: what underpins the legitimacy of this particular rule? Hart elucidates that the "law enacted by the Queen in Parliament" holds the status of a rule of recognition within the UK legal framework. He further clarifies that the Rule of Recognition is fundamentally a social rule, emanating directly from the collective acknowledgment of the populace, wherein they recognise its existence and validate its normative authority.

Upon deeper analysis, it becomes evident that the rule of recognition need not necessarily assume a written form, as its presence manifests in the manner by which specific rules are discerned and identified.⁶ This identification process is carried out by a variety of actors, including courts, officials, private individuals, and their advisors⁷, who collectively engage in the task of recognising and applying legal norms. In the context of a rudimentary legal system, the criteria employed for identifying the rule of recognition may exhibit considerable diversity. These criteria could encompass authoritative textual sources, legislative

³ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 91.

⁴ Ibid 92.

⁵ Ibid 94.

⁶ Ibid 94.

⁷ Ibid 101.

enactments, customary practices, general pronouncements made by designated individuals, or judicial decisions rendered in specific cases.⁸

However, as legal systems evolve and grow more intricate, the criteria employed for establishing the rule of recognition become increasingly multifaceted. In modern legal frameworks, such criteria encompass the entire spectrum of legal sources. This encompasses not only written constitutions, enactments by legislative bodies, and judicial precedents, but also the broader array of legal authorities that shape the legal landscape. Thus, the criteria for identifying the rule of recognition expand to incorporate the multifarious origins from which legal norms emerge, reflecting the complex and interconnected nature of contemporary legal systems.⁹

In essence, Hart postulates two imperative conditions that serve as prerequisites for the establishment of the Rule of Recognition. Firstly, the rule in question must enjoy widespread adherence and observance within the given legal system. Its normative authority and enforceability should be substantiated by a broad acceptance and conformity among the members of the community. Secondly, the rule must be embraced and acknowledged from an internal perspective, effectively assuming the status of a shared, communal standard of conduct. It necessitates that the individuals comprising the society genuinely internalise and embrace the rule as an inherent aspect of their collective normative framework. Only when these two conditions are satisfied can the rule be deemed officially recognised and valid within the legal system, consequently mitigating the predicament of uncertainty that plagues the determination of the legitimacy and applicability of the rules.

By imposing such conditions, the rule of recognition effectively resolves the conundrum of uncertainty that arises within a legal system. It achieves this by providing a robust mechanism for distinguishing between rules that hold legal validity and those that do not. The recognition of a rule as a binding norm effectively dispels ambiguity and imbues it with legal efficacy. As a consequence, the legal actors within the system gain the capacity to differentiate between valid and invalid rules, facilitating consistent and predictable legal outcomes. This establishment of legal certainty engenders stability and coherence within the legal order, fostering a more effective and functional framework for governance and social regulation. Also, the rule of recognition, if approached from a simplified standpoint, can be discerned through legal hermeneutics and jurisprudential analyses, as it represents a phenomenon rooted in societal acceptance and adherence. It epitomises a state of validity, contingent upon the degree to which individuals acquiesce to and conform with it. Nevertheless, upon careful consideration, the inquiry arises as to which particular rules can be deemed to embody the rule of recognition, thereby attaining the esteemed status of validity.

⁸ Ibid 100.

⁹ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 116.

This inquiry necessitates a comprehensive assessment of whether such rules satisfy the criteria of being generally obeyed and accepted as an internal perspective.

Examining Context on the Rule of Recognition in Thailand

Hart's key idea of the rule of recognition, within the rich tapestry of legal theory, provides an informative framework for examining the complexity and nuances of legal systems, including Thailand's particular environment. Hart's suggested rule of recognition serves as a basic pillar, establishing the conditions for recognising and certifying legal norms within a specific jurisdiction.¹⁰ Understanding the rule of recognition is critical in understanding the methods by which legal validity is imparted and legal norms acquire authoritative status in the Thai legal environment.

For a thorough understanding of how Hart's rule of recognition is used in Thailand, it is necessary to investigate the unique factors that determine the recognition and validation of legal norms within the country's legal structure. Hart highlighted general obedience as an essential requirement¹¹ that needs an analysis of the extent to which legal rules are adhered to throughout Thai society. This entails a detailed study of people', institutions', and governing bodies' legal practices and behaviours, highlighting the extent to which legal standards are observed and respected.

In Thailand, the rule of recognition is critical in creating and legitimising legal norms. When correctly developed and followed, the norm of recognition acts as a compass for legal actors and institutions, directing their interpretation and implementation of the law. The rule of recognition guarantees the Thai legal system's stability, coherence, and predictability by adhering to the prerequisites of widespread obedience and acceptance as an internal point of view. It offers a method for resolving legal issues, establishing societal trust, and preserving the rule of law.

It is significant to highlight, however, that the rule of recognition is not static and changes in tandem with cultural transformations and legal advances.¹² The rule of recognition in Thailand must be sensitive to the dynamic nature of Thai society, its cultural diversity, and the changing demands and ambitions of its citizens. This necessitates an ongoing conversation between legal institutions, legislators, and the broader public to ensure that the rule of recognition meets increasing aspirations for justice, equality, and human rights.

The application of Hart's rule of recognition to the Thai legal setting reveals the complexities of legal systems and the critical role that the rule of recognition plays in

¹⁰ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 102-103.

¹¹ *Ibid* 115.

¹² *Ibid* 197.

bestowing legal legitimacy. By investigating the prerequisites of universal obedience and acceptance from inside Thailand, a thorough knowledge of the recognition and validation of legal norms emerges. This research offers insight on the intricate interplay of legal concepts, societal attitudes, and growing expectations for justice, adding to the continuing debate in Thailand about the rule of law.

The Rule of Recognition in Thailand: case study of LGBTIQ+ rights on same sex-marriage recognition

Globally, there has been notable advancement in the acknowledgement and safeguarding of LGBTIQ+ rights, which encompasses the legalization of same-sex marriage. This progress is indicative of a shifting societal attitude and an increasing dedication to achieving parity. Several countries have made significant progress in legalizing same-sex marriage and implementing legislation that protects the rights of individuals who identify as LGBTIQ+. This including the Netherlands, Belgium, Canada, Spain, South Africa and Taiwan, have been at the forefront of recognising same-sex marriage, establishing a model for other regions to emulate.¹³ These countries have adopted the tenets of social inclusivity by recognising the multiplicity of gender and validating the entitlements of persons to establish voluntary, affectionate partnerships, irrespective of their sexual preference or gender expression. Furthermore, the acknowledgement of same-sex marriage and the more extensive safeguarding of the rights of the LGBTIQ+ community exemplify a communal transition towards comprehensive legal structures that advance parity, confront prejudice, and cultivate societal unity.

Thailand has also witnessed notable progress in its quest for legal recognition of LGBTIQ+ rights, driven by a burgeoning societal acceptance and the relentless pursuit of equality. The estimated figures from LBGT Capital found that in 2019, there were approximately 3.6 million Thai LGBT+ individuals aged 15 and above. This accounts for about 5% of the total Thai population. If we also include foreign residents who identify as LGBT+ living in Thailand, it cannot be denied that they constitute a significant portion of society, forming one large group.¹⁴

Momentous strides, including the decriminalisation of homosexuality, and the implementation of anti-discrimination legislation. Nevertheless, the unresolved issue of same-sex marriage looms, demanding further legal reforms and continued dialogue within society to address this pressing concern comprehensively. The formulation of inclusive legal frameworks and the promotion of social acceptability for all individuals, regardless of sexual

¹³ David Masci, Elizabeth Podrebarac Sciapac, and Michael Lipka, 'Same-Sex Marriage Around the World' (*Pew Research Center*, 28 October 2019) <<https://policycommons.net/artifacts/616530/same-sex-marriage-around-the-world/1597190/>> accessed 23 May 2023.

¹⁴ Thuttai Keeratipongpaiboon, 'LGBT+ เปิดกว้างสู่สังคมที่เท่าเทียม ฟังพาแต่ไม่ฟังฟัง' (*Thaipublica*, 25 January 2022) <<https://thaipublica.org/2022/01/future-thailand-thuttai-keeratipongpaiboon/>> accessed 23 May 2023.

orientation or gender identity, requires a thorough comprehension of the historical context and ongoing developments surrounding LGBTIQ+ rights in Thailand. And as of 2022, there are four draft legislations that currently passed the parliamentary votes which were presented by political parties and by the cabinet.¹⁵

Examining into the consideration of Hart's recognition rule in legal theory gives a viewpoint through which to critically assess the complex and shifting environment of LGBTIQ+ rights and legal acknowledgment. It is obvious that the acknowledgement of these rights extends much beyond a simple assessment of societal approval or individual subjective preferences. Instead, a more sophisticated understanding is required when delving into the normative foundations of the legal system, where the rule of recognition is crucial.

According to Hart, the rule of recognition is the basic mechanism for establishing and determining the validity of legal norms in a given jurisdiction. It is the cornerstone of the legal system, providing the framework for regulations to gain authoritative stature and binding force. In relation to LGBTIQ+ rights, the recognition rules are crucial in shaping the legal landscape and giving legal force to these rights. From his viewpoint, Hart is highly pertinent in the context of homosexuality because of his discussion with Lord Devlin on the merging of law and morality. The Wolfenden Committee Report, released in England in 1957, articulated its opinion on homosexuality decriminalisation in simple and harsh terms: "*must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.*" In rejecting this thesis, Devlin called it "*crude and brief*"¹⁶ and claimed that legislation plays an important role in defending society's morals. According to him, homosexuality is immoral, and no distinction should be made between private and public morality in this respect.

In considering Lord Devlin's report, it is essential to recognise the shift in societal attitudes towards homosexuality and the subsequent development of laws that protect LGBTIQ+ rights. The concept of conferring power on individuals without assigning them specific responsibilities reflects the evolution of legal frameworks designed to ensure equality and nondiscrimination. It recognises that the law should not impose restrictive obligations based solely on the sexual orientation or gender identity of an individual. Instead, the emphasis is placed on empowering members of the LGBTIQ+ community to freely exercise their rights, participate fully in society, and enjoy the same opportunities as their heterosexual counterparts.

Overall, the application of Hart's rules of recognition in the legal context of LGBTIQ+ people reveals the complicated and multidimensional processes of legal recognition.

¹⁵ BBC Thai, 'ร่าง พ.ร.บ. สมรสเท่าเทียม-คู่ชีวิต : ต้องผ่านขั้นตอนอะไรบ้าง ก่อนบังคับใช้เป็นกฎหมาย' (BBC Thai, 15 June 2022) <<https://www.bbc.com/thai/thailand-61808097>> accessed 24 May 2023.

¹⁶ Home Office, *The Report of the Departmental Committee on Homosexual Offences and Prostitution* (Cmd 247, 1957) para 61.

Analysing the prerequisites of universal conformance and acceptance as an internal perspective leads to a full understanding of the recognition and validation of LGBTIQ+ rights. This research illustrates the intricate interplay between legal frameworks, public views, and growing demands for equality, eventually contributing to continuing legal theory and practice debates around LGBTIQ+ rights.

Comparative Analysis of Rule of Recognition from Hart's context and Thailand Context

Similarities of Hart's Rule of Recognition in Thailand Context

The rule of recognition, a central concept in H.L.A. Hart's legal theory plays a crucial role in understanding the establishment and authoritative status of legal norms. This concept finds resonance in the legal landscape of Thailand, where it operates as a fundamental principle for determining the validity and binding force of legal rules. By examining the similarities between Hart's rule of recognition and its application in the Thai context, we can gain valuable insights into the interplay between legal systems, societal values, and the evolving nature of social acceptance.

In both Hart's context and the Thai context, the rule of recognition serves as a criterion by which legal norms acquire legitimacy and become authoritative. It functions as a fundamental norm that is acknowledged and accepted by key actors within the legal system, including courts, officials, and individuals. The recognition of this norm is essential for conferring validity and enforceability to legal rules, thereby providing a sense of certainty and stability in legal relations.

Moreover, the rule of recognition, in both contexts, encompasses a wide range of legal sources. It extends beyond formal legal mechanisms, such as legislation and judicial decisions, to include informal practices, cultural norms, and societal attitudes. This recognition of diverse sources acknowledges the complex interplay between legal frameworks and societal dynamics, highlighting the significance of social acceptance in shaping the legal landscape.

Despite the differences in cultural, historical, and institutional contexts, the Thai legal system shares a fundamental similarity with Hart's concept of the rule of recognition: the reliance on collective recognition and acceptance of legal norms. Just as Hart argues that social control depends on the adherence to primary rules of obligation within close-knit communities, the Thai legal system recognises the importance of collective adherence to legal norms in maintaining social order and harmony.

Furthermore, the application of the rule of recognition in Thailand, as in Hart's context, faces challenges arising from the evolving nature of social acceptance. With the increasing awareness and emphasis on inclusivity and equality in Thai society, there is a growing demand

for the recognition and protection of the rights of marginalised groups, including the LGBTIQ+ community. This necessitates an evolving understanding of legal norms and their recognition to align with the changing values and expectations of the society.

The Thai legal system, like any legal system influenced by societal change, must navigate the complexities of reconciling legal principles with evolving social values and demands for justice. This requires a continuous process of reevaluation and adaptation, ensuring that the rule of recognition remains responsive to societal shifts while upholding the legitimacy and authority of legal norms.

By recognising the similarities between Hart's rule of recognition and its application in the Thai context, we gain a deeper appreciation for the universal nature of this concept and its relevance in diverse legal systems. This understanding allows for critical analysis of how the rule of recognition can effectively address the challenges posed by societal changes, while upholding the legitimacy and authority of legal norms.

The similarity between Hart's rule of recognition and its application in the Thai legal system lies in the recognition of legal norms through collective acceptance, the incorporation of diverse legal sources, and the challenges posed by evolving social acceptance. This recognition provides a foundation for exploring the nuanced interplay between legal frameworks and societal dynamics, facilitating a comprehensive understanding of the rule of recognition in the context of Thailand and its continued relevance in ensuring the fair and equitable functioning of the legal system. By embracing and addressing these challenges, the Thai legal system can effectively adapt and evolve to meet the changing needs and expectations of society.

Differences of Hart's Rule of Recognition in Thailand Context

Despite the fact that Hart's rule of recognition and its application in the Thai legal system share many similarities, it is essential to recognise the distinctions that result from different cultural, historical, and institutional contexts. These distinctions influence the implementation and interpretation of the rule of recognition, resulting in unique characteristics and difficulties within the Thai legal framework.

The sources of legal recognition constitute a significant difference. In establishing the rule of recognition, Hart's theory emphasises the importance of formal legal mechanisms, such as legislation and judicial decisions.¹⁷ In contrast, the Thai legal system draws from a wider variety of sources, including customary practices, cultural norms, and religious traditions. These informal sources of recognition supplement formal legal mechanisms and significantly shape the Thai legal environment.

¹⁷ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 155.

In addition, the Thai legal system confronts exceptional difficulties in reconciling the rule of recognition with the principle of legislative power by the parliament. The legislative power, which is profoundly rooted in Thai constitutional law, provides the legislature with the ultimate authority to create and amend laws. Therefore, the rule of recognition must navigate the tension between collective recognition and legislative preeminence. This difficulty illustrates the need to strike a delicate balance between recognising societal values and preserving the democratic legitimacy of the legislative process.

The cultural particularities endemic to the Thai context constitute a second distinction. Collectivism, hierarchical relationships, and respect for authority are highly valued in Thai culture.¹⁸ As they define the attitudes and expectations of individuals and institutions within the legal system, these cultural values influence the acceptance and recognition of legal norms. To preserve social cohesion and stability, the rule of recognition in Thailand must account for and accommodate these cultural nuances.

Moreover, the evolving character of social approval presents a unique challenge to the application of the rule of recognition by the Thai legal system. Awareness and advocacy for the rights of marginalised groups, including the LGBTIQ+ community, have increased in Thailand. This societal transformation necessitates a more inclusive comprehension and acceptance of legal norms. The Thai legal system must adapt to these shifting values while balancing the need for legal certainty and uniformity, highlighting the dynamic nature of the rule of recognition in the face of changing societal expectations.

Despite the fact that Hart's rule of recognition functions as a foundational concept in both Hart's context and the Thai legal system, there are significant cultural, historical, and institutional differences. These distinctions manifest themselves in the sources of legal recognition, the interplay between the rule of recognition and legislative power, cultural particularities, and the difficulties posed by the evolution of social acceptability. Recognizing and addressing these differences is necessary for a comprehensive comprehension of the rule of recognition in the Thai context and for the effective operation of the legal system in light of Thailand's distinctive sociocultural landscape.

Gaps and Criticisms in Hart's Rule of Recognition in the real world context

The interpretation of H.L.A. Hart's first essential condition for establishing a legal system revolves around the notion of social acceptance. According to Hart's theory, it is both a necessary and sufficient condition that a social group's majority habitually obeys the rules. This implies that in a society, citizens adhere to the primary rules, even in the absence of specific numerical thresholds. Hart's example draws upon a primitive society where rules could

¹⁸ Zhaoyan Duan, 'The Concrete Embodiment of Hierarchy in Thailand's Society and Its Analysis' (2019) 378 *Advances in Social Science, Education and Humanities Research* 887, 887-888.

manifest as authoritative lists or texts found in written documents or publicly displayed inscriptions. While Hart does not provide examples of rules beyond regulations or laws, it is reasonable to assume that in a primitive society, rules presented for public acknowledgment hold a similar weight to laws in modern societies. Consequently, Hart's Concept of Law allows for interpretive flexibility, as it does not impose limitations on the forms rules may take.¹⁹

Furthermore, Hart elucidates that the rule of recognition can take on diverse and varied forms, whether simple or complex. However, in contemporary society, with its legislative presuppositions, an intriguing question arises regarding whether acceptance can stem from de facto behaviours. In this context, societal acceptance of the LGBTIQ+ phenomenon can be understood as treating it as "true" based on Robert Stalnaker's definition, which asserts that accepting a proposition involves treating it as true for a reason.²⁰ Thus, treating the phenomenon as true becomes fundamental to acceptance.

Examining the Thai context, substantial evidence supports the notion that citizens treat the phenomenon as true. This suggests that rules need not necessarily be laws, written or legislated, to qualify as "generally obeyed" by the people. The social acceptance of a phenomenon, as reflected in how it is treated as true, can function as the contemporary equivalent of primary rules. However, social acceptance alone cannot suffice for it to attain legal standing. Recognition, or the acceptance of the rules by officials, represents the additional necessary condition. These officials must not only acknowledge the rule of recognition embraced by the people but also adopt those rules as standards for their own behaviour, ensuring their appropriate conduct.²¹

According to this interpretation within the Thai context, Hart's theory implies that Members of Parliament (MPs) and legislators, as officials, should recognise the society's acceptance. Given that MPs derive their legislative powers from the sovereign power granted by the consent of the Thai people²² failing to align with the societal rule signifies a dereliction of their duty as representatives. Thus, a harmonious relationship between legislators and the society's recognition is paramount for upholding the rule of recognition.

Exploring Hart's rule of recognition within the context of Thailand highlights the significance of social acceptance and recognition by officials. While societal acceptance based on the treatment of a phenomenon as true can serve as a contemporary manifestation of primary rules, the recognition of these rules by officials, particularly legislators, is essential. By aligning legislative actions with societal expectations, officials can fulfil their responsibilities as

¹⁹ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 94.

²⁰ Robert Stalnaker, 'Common Ground' (2002) 25(5/6) *Linguistics and Philosophy* 701, 702-720.

²¹ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 116.

²² Constitution of the Kingdom of Thailand B.E. 2560 (THA)

representatives, ensuring the rule of recognition's efficacy and integrity within the Thai legal system.

To look deeper into the rule of recognition within a real-world context and considering the perspectives of Adam Perry, Sylvie Delacroix, and Adam Tucker, certain gaps and criticisms emerge. While Hart's concept of the rule of recognition provides a valuable framework, it encounters challenges when applied in practical settings. Perry's analysis highlights the potential limitations of relying solely on social acceptance as the basis for recognition, as societal attitudes may fluctuate and differ across diverse populations. This raises concerns about the stability and consistency of the rule of recognition in capturing the complexity of societal norms.²³

Delacroix's examination underscores the need to consider the impact of social habits on the rule of recognition. She posits that the rule of recognition should not solely rely on formal legislation or written laws but should also account for the influence of informal practices and customs.²⁴ This highlights a potential limitation of Hart's framework, which predominantly focuses on the formal sources of law and may overlook the significance of informal norms that shape legal understandings in a given society.

In the Thai context, additional gaps and criticisms arise. While Hart's theory emphasises the role of social acceptance and recognition by officials, the practical implementation of the rule of recognition within the Thai legal system faces challenges. The interplay between the rule of recognition and the doctrine of exercising power of legislative power, as explored by Tucker, reveals potential conflicts. The exercise of legislative power may not always align with the social acceptance and recognition of certain phenomena, leading to a dissonance between the rule of recognition and the legislative actions of officials.²⁵

Furthermore, the Thai context highlights the need to consider cultural specificities and societal complexities. The diverse nature of Thai society, with its unique customs, traditions, and values, necessitates a nuanced understanding of recognition and acceptance within the rule of law. The rule of recognition should be adaptive and flexible, encompassing the dynamic social landscape of Thailand and accounting for the diverse perspectives and interests within the legal system. This unique context on the social acceptance and recognition is shown by one of the exceptional court verdicts on same-sex marriage in the Constitutional Court of Thailand decision number 20/2564. According to a study conducted by Pudit Ovattananakhun in 2022, the Court ruling on Article 1448 of the Thai Civil Code regarding marriage, which is only permitted between men and women, is not unconstitutional or

²³ Adam Perry, 'Aspect of Social Rules' (2015) 35 *Oxford Journal of Legal Studies* 283, 284-293.

²⁴ Sylvie Delacroix, 'Law and Habits' (2017) 37 *Oxford Journal of Legal Studies* 660, 662-685.

²⁵ Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31 *Oxford Journal of Legal Studies* 61, 71-72.

contains elements of gender discrimination that violate human rights. The Court used natural law lenses to conceptualise the morality and norms of love and marriage in the traditional sense. Ovattananukhun further noted that the Court only referenced a few extracts from Cicero and Finnis ideas, both of which included the natural law applicability to marriage.²⁶

Cicero's definition of true law includes the idea that laws must be consistent with natural and moral principles in order to be regarded as legitimate. This viewpoint raises concerns about the compatibility of same-sex partnerships with Cicero's notion of true law in the case of same-sex marriage. Given that Cicero's definition of natural order was based on conventional cultural norms and reproduction, same-sex marriage may be considered a departure from his understanding of natural order. The same-sex marriage controversy shows the dichotomy between sticking to historical concepts of true law and modifying legal systems to suit modern understandings of human rights and social development.

Also, cited by the Court in the ruling pointed out by Ovattananakhun, Finnis argues that the institution of marriage possesses an innate objective of procreation and nurturing, and as a result, it ought to be restricted to heterosexual unions. He viewed the same-sex relationships as incongruous with the innate objective of marriage due to their inability to fulfil the procreative function. In addition, acknowledgement of same-sex marriage would diminish the distinct societal importance attributed to heterosexual partnerships and, consequently, result in a weakened institution overall. The individual posits that the conventional concept of marriage holds significant value for society and that legalizing same-sex marriage could potentially have adverse effects on the welfare of children and the stability of society. Finnis posits that the intrinsic link between marriage, procreation, and societal order, grounded in natural law principles, underlies his opposition to same-sex marriage.

But these two scholars' perspectives also have certain weaknesses and contradictions in their views regarding social acceptance and the rule of recognition. One weakness lies in their limited consideration of the evolving nature of social norms and cultural diversity. They tend to emphasise universal moral principles as the basis for determining the validity and recognition of laws, which may overlook the complexities of societal values and the need for inclusive perspectives. This can create a tension between their natural law framework and the realities of diverse social contexts, where social acceptance and the rule of recognition may require a more nuanced understanding of cultural dynamics and evolving societal norms.

Furthermore, a contradiction arises in their views concerning the role of lawmaking in protecting individual rights. While both Cicero and Finnis acknowledge the importance of law in upholding human rights, their natural law perspectives can present challenges when it comes to translating moral principles into legal norms. Cicero's emphasis on reason and

²⁶ Pudt Ovattananakhun, 'Application of Natural Law Doctrine in Constitutional Court Decision No. 20/2564: A Jurisprudential Analysis' (2022) 2 Thai Legal Studies 227, 244-247.

natural justice may face difficulties in accommodating different cultural and ethical perspectives, potentially limiting the inclusivity and effectiveness of legal protections. Similarly, Finnis' reliance on a comprehensive moral framework may encounter criticism for imposing a particular moral vision on diverse societies, potentially undermining social acceptance and the legitimacy of the rule of recognition. These contradictions highlight the tension between the universal principles advocated by natural law theory and the need to navigate the complexities of social acceptance and the rule of recognition within a diverse and pluralistic society.

In light of these gaps and criticisms, it is crucial to further develop and refine Hart's concept of the rule of recognition to address the complexities and realities of legal systems in both global and local contexts. This requires incorporating a broader range of factors, such as cultural norms, informal practices, and the evolving nature of social acceptance, to ensure the rule of recognition remains relevant and effective in capturing the multifaceted nature of law in practice.

In conclusion, while Hart's rule of recognition provides a foundational framework, its application in real-world contexts, including the Thai legal system, reveals gaps and limitations. The insights from Perry, Delacroix, and Tucker shed light on the need to consider social habits, informal practices, cultural specificities, and the interplay with legislative power. Addressing these gaps and criticisms will contribute to a more comprehensive and contextually sensitive understanding of the rule of recognition, enhancing its practicality and relevance in contemporary legal systems.

Conclusion

The concept of the rule of recognition, as developed by H.L.A. Hart plays a significant role in understanding the establishment and authoritative status of legal norms. Analysing its application in the context of Thailand reveals valuable insights into the interplay between legal systems, societal values, and the evolving nature of social acceptance. While the Thai legal system shares fundamental similarities with Hart's rule of recognition, there are notable cultural, historical, and institutional differences that shape its implementation.

In both Hart's theory and the Thai legal system, the rule of recognition serves as a criterion by which legal norms gain legitimacy and authority. It is a fundamental norm acknowledged and accepted by key actors within the legal system. Additionally, the rule of recognition encompasses diverse legal sources, extending beyond formal mechanisms to include informal practices, cultural norms, and societal attitudes. This recognition of multiple sources recognises the complex interplay between legal frameworks and societal dynamics.

However, specific distinctions arise when applying the rule of recognition in the Thai context. The sources of legal recognition differ, with the Thai legal system drawing from a wider variety, including customary practices, cultural norms, and religious traditions. The interplay between the rule of recognition and legislative power poses challenges as well, as legislative actions may not always align with social acceptance, requiring a delicate balance to maintain the legitimacy of legal norms. Moreover, cultural particularities in Thai society, such as collectivism and respect for authority and seniority, influence the acceptance and recognition of legal norms, necessitating a nuanced understanding within the rule of law.

The evolving nature of social acceptance presents another challenge for the Thai legal system's application of the rule of recognition. Increased awareness and advocacy for the rights of marginalised groups, such as the LGBTIQ+ community, highlight the need for a more inclusive understanding and acceptance of legal norms. The Thai legal system must adapt to shifting values while ensuring legal certainty and uniformity. To emphasise static norms without taking into account the dynamic nature of social acceptability is incompatible with a society in which the movement toward the equal protection of the law for all is becoming increasingly esteemed.

While Hart's rule of recognition provides a valuable framework, gaps and criticisms arise when considering its practical application. These gaps include the stability and consistency of social acceptance, the influence of informal practices and customs on legal norms, and the challenges posed by legislative power and cultural diversity. Scholars like Adam Perry, Sylvie Delacroix, Adam Tucker raise these concerns, emphasising the need for a more nuanced and comprehensive understanding of the rule of recognition.

Addressing these gaps and criticisms requires the incorporation of factors such as cultural norms, informal practices, and the evolving nature of social acceptance into the concept of the rule of recognition. By doing so, a more contextually sensitive understanding can be achieved, enhancing the practicality and relevance of the rule of recognition in contemporary legal systems.

In conclusion, Thai authorities are still in favour of citing natural law as the legal justification towards social acceptance and lawmaking, which contradicts Hart's rule of recognition. But looking at the Constitutional Court of Thailand cited in the decision number 20/2564 in 2022, *“However, in the current global and Thai social context, there is an increasing acceptance and recognition of granting individuals broader rights regarding their gender identity. The state should have appropriate measures and support to enable individuals with diverse gender identities to live together. This can be achieved through specific legislation aimed at granting rights and addressing obstacles to the livelihood of*

*individuals with diverse gender identities (translated)*²⁷, it still opens for the possibility of using positive law as the legal justification to fulfil the gap for equal legal protection for everyone through laws.

With social acceptance as the key element as the secondary rule of recognition, it serves as the force to drive the process of legislative institutions by using the legislative power to proceed with this acceptability and become a fully recognised law. It ensures the rights of all people without prejudice and is adaptable to rapid societal change.

²⁷ Decision No 20/2564 (Decision on ‘Does Article 1448 of the Commercial and Civil Code contradict or conflict with Articles 25, 26, and 27 (1) (2) and (3) of the Constitution?’) (17 November 2021) 11 <https://www.constitutionalcourt.or.th/occ_web/download/article/article_20211221153745.pdf> accessed 24 May 2023.