



ขอบเขตและความหมายของการเลือกปฏิบัติ อาจพิจารณาได้หลายมิติและในหลายบริบทกฎหมาย จึงเสนอให้มีการต่อยอดการวิจัยในบริบทของกฎหมายปกครองหรือกฎหมายมหาชน ในประเด็นขอบเขตความหมายของการเลือกปฏิบัติ เพื่อเปรียบเทียบและจำแนกความแตกต่างกับความหมายและขอบเขตในบริบทสิทธิมนุษยชนเพื่อให้เกิดแนวทางที่ชัดเจนในการพิจารณากฎหมายและแนวปฏิบัติที่เกี่ยวข้องต่อไป

เนื่องจากการวิจัยนี้มีวัตถุประสงค์หลักในการศึกษาภาพรวมของปัญหาทางกฎหมายเกี่ยวกับหลักความเท่าเทียมกันหรือหลักความเสมอภาคและการห้ามเลือกปฏิบัติในประเทศไทย โดยมีได้มุ่งศึกษาเฉพาะกรณีปัญหากรณีใดกรณีหนึ่ง ดังนั้น ในส่วนที่สองของงานวิจัยนี้จึงเป็นเพียงการหยิบยกประเด็นปัญหาต่าง ๆ ที่เกิดขึ้นจากการสำรวจศึกษา และการเก็บข้อมูลโดยการสัมภาษณ์ จัดกลุ่มสนทนา รับฟังความคิดเห็น มาทำการวิเคราะห์ภายใต้กรอบแนวคิดกฎหมายสิทธิมนุษยชน เพื่อสะท้อนให้เห็นปัญหาในภาพรวมว่าภายใต้กฎหมายที่มีอยู่ในปัจจุบันนั้น การคุ้มครองความเท่าเทียมกันและการห้ามเลือกปฏิบัติเพียงพอและครอบคลุมแล้วหรือไม่ เพียงใด ซึ่งผลการวิจัยชี้ให้เห็นว่ายังมีหลายกรณีที่กฎหมายปัจจุบันไม่ครอบคลุมถึง จึงนำไปสู่ข้อเสนอแนะในการมีกฎหมายกลางดังกล่าว ดังนั้น ในส่วนของการต่อยอดการวิจัย จึงเสนอให้มีการศึกษาประเด็นเฉพาะกรณีศึกษาเป็นรายกรณีในเชิงลึกต่อไป

## Executive Summary

Equality Principle was recognized by international human rights instruments and foreign laws. However, “Discrimination” which comprises of two important factors i.e. “Ground of Discrimination” such as gender, race, religious etc. and “Area of Discrimination” such as employment, education, good and service etc., could be regarded as an obstacle to achieve equality. However, the main problem of this research was to study whether the existing laws of Thailand has sufficiently covered practices relating to discrimination. This research used qualitative method and conducted comparative analysis with international human rights laws, foreign laws including laws of the EU, South Africa, Sweden, Finland, Canada, Australia, Singapore, Malaysia, India and the U.S. The results indicated that the legal meaning and scope of “Discrimination” varied depending on different dimensions and contexts. The main results of this research could be summarized as follows;

Regarding Equality Principle, the research found, by comparing foreign laws, that the constitutional structure relating to the protection of equality are 3 models; the first one classified equality as “general equality”, “specific equality” and “non-discrimination”. The second model divided only two principles, i.e. “equality” and “non-discrimination”. The third one only identified “non-discrimination”.

According to Thai Constitution and related Act, “Unfair Discrimination” was stipulated leading to the question whether such term is consistent to international humanitarian laws. The results indicated that foreign laws shared similar principle in classifying between “distinction of treatment that is prohibited” and the “distinction of treatment that is not prohibited”, however, the pattern of using this term can be categorized in 4 models, (1) categorizing “Unfair Discrimination” and “Fair Discrimination”, (2) categorizing “Unlawful Discrimination” and “Lawful Discrimination”, (3) categorizing “Discriminatory Practice” and “Non-Discriminatory Practice”, (4) categorizing “Differential Treatment” or “Distinction of Treatment” and “Discrimination” without using the “Fair or Unfair” element. In this regards, Thailand can be classified in the first model. However, constitution provided no clear definition of “Unfair” Discrimination. Thus, Court interpretation played vital roles in providing scope and meaning of such term. In addition, this research found, by comparing to international laws, that there is no element of “Fair or Unfair” because the differential treatment that was not fall under the scope of “Discrimination” was termed merely “Differential Treatment or Distinction of Treatment”.

As for the scope of discrimination in human right laws context, this research found that the “Discrimination” was used in several perspective in Thai legal system. The research then classified, by using human right laws framework, the use of such term in 3 cases; (1) differentiation of treatment falling within the scope of “Discrimination” and the one which is not “Discrimination” (2) the overlapping between the practices that falls in to the scope of “Discrimination” and the practices that violate other human rights such as personal right, freedom of religion, freedom of education and right in criminal justice system (3) “Unfair Discrimination” in the context of administrative laws which has different scope because it was based on different concept. According to such classification, the research would focus on the “Discrimination” falling within the scope of human right laws and explore whether such discriminatory practices could be sufficiently covered under existing laws of Thailand. However, the results showed that the existing laws were insufficient by classifying this part of results into ๓ findings;

Firstly, the analysis of “ground of discrimination” classified the issue in 4 cases; (1) Grounds of discrimination covered in Thai laws which were broader than international human right laws (2)



Grounds of discrimination covered in Thai laws which were narrower than international human right laws (3) Grounds of discrimination which were argued as ambiguous and the more interpretation was necessary (4) Grounds of discrimination which were not explicitly addressed in international human right laws but were clearly covered by some foreign laws such as “criminal record”.

Secondly, the scope of Thai laws relating to anti-discrimination, although there were specific laws in recent Thai legal system that can be applied to prohibit “Discrimination”, this research indicated that the problems of content, element, and scope of those laws make them inappropriate and insufficient to protect personal from discriminatory practices. The discriminatory practices which have not yet been covered were, for example, discriminatory practices in private sectors including employment, goods and service, discriminatory practices relating to certain grounds such as criminal record, breastfeeding, etc. Furthermore, there are no specific laws to apply in case of “Harassment” and “Hate Speech”.

Thirdly, according to the comparative analysis of foreign laws relating to anti-discrimination, this research developed “Model of Discrimination Law” which comprise 3 models; (1) Providing one comprehensive piece of legislation covering all grounds and areas of discrimination (2) Providing several specific laws for separate grounds and areas of discrimination (3) Providing both one comprehensive law and additional specific laws for certain areas or grounds of discrimination. The results found that currently Thailand was classified into model 2 but the existing laws were not sufficient as discussed.

Consequently, the proposals of this research can be classified in 3 levels;

Firstly, this research suggests the enactment of general law relating to Anti-Discrimination in order to cover grounds and areas of discrimination sufficiently in consistent to international human right laws.

Secondly, this research proposes the amendment of Constitution of Thailand in several issues such as introducing a clear concept of “Direct and Indirect Discrimination”, improving the explicit protection of discriminatory practices in private sector, revising of the term “Unfair discrimination” by using only “Discrimination” and “Differential treatment”, and adding more grounds of discrimination that has not yet been covered.

Thirdly, the research suggests that more researches could be done on specific cases of discrimination. In addition, the study for drafting “Anti-Discrimination Act” as a general law is proposed.