เรื่องเสร็จที่ ๖๔/๒๔๗๖

Office of the Legislative Adviser,
Bangkok, th. February 1934.

Dear Prince Varnvaidya,

I am in roceipt of your letter dated 10th. Inst. concerning the legal and constitetional questions in connection with the death sentences by the Special Court.

I see the questions as follown.

(1)

question of Procedure: Shether the Royal Sanction is required for the execution of the sentence or not?

A sentence of death in Siam is governed by Section 30 of the transitory Criminal Procedure Act 27th. April R.S. 115, which (in my translation) reads:

Any final judgment inflictiing the punishment of death, condmseation of propeaty of imprisonment for life shall be xubmitted by the Mintster of Justice to His Majesty together with any dika in respect to such judgment which may be made by the accused. Then his Majesty's plecsure has been ascortained, shether confirming the sentence or orarcising the Royal prerogative of maroy, the orders of His Najesty shall be carried out is every respect."

H.S.H.Prince Varnvaidya,

Adviser to the Ministry for Foreign Affairs.

In other words, no final judgment of death in Siam may be executed if the Fing has not confirmed the sentence. Section 39 says that the rule applies always when there is "a final judgment inflicting the punishment of death". That is a "final judgment" is to be decided in each case. In the case of the Special Court, since there is neither appeal nor diks, the judgment is final as soon as uttered by the Special Court. And there is nothing to prevent the application of the normal rules of criminal procodure, espectally Section 39. Besides Section 14 of the Final Code, which concernn also enecation, reainds the reader of the provision in Section 39 Criminal Code when it says that the execution shall take place only "after Royal Sanction has been obtained". Section 14 P.C. also is gensral and applies to all final sentences of death given in Siam.

The provisions hereabove reminded are imperative. Then one move beside that the Special Court has adopted the procedure of the Mlitary Courts, which themoelves apply the genaral Criminal Procedure law when there is no special solution in the Military Procedure, one understands that all the procedings provided in the Criminal law Acts (including Section 39 of the Transitory Act R.S. 115) must apply unleso there is something contrary in the Act itself constituting the Special Court (for instance, the acppression of appeal and dika).

To apply to the sentences of the Special Court all the provisions of the usual proccedings (when there is no contrary provision in the Act itself), and suddenly to refuse the application of Section 39 of the Sriminal Procedure Code, which is general, should be charged with arbitrary decisiion. It looks too much an a wich to get rid of a provision of Criminal Procedure because it is incommedious and makes a certain purpose difficult.

I am frankly afraid that, if execution should have had, or should procced on, without applying Section 39, the impression abrcad would be very bad. Of course many think that this is a purely istermal Sinnese affair, are that forsign opinion is to be disconsidared entirely. Quite so one century ago. But the "affaire preyfus" in France was also a purely internal French affair however irregularities in procedure have raised the indignation of the whole world, which practically compelled to revise the came in spite of some Prench fanstic pecple. More recontly the case of Sacco and Vanzetti in U.S.A. was also a purely internal amarican affair: however some alleged injustice in the procedure or sentence have made it a world affair. A few weeks ago, the arson in Reichstag was also a purely internal Cerman affair: the world has however seen without any surprine a so-called Court of lawyers of several natienslities examining the case in lenden. Of course, Singes affairs are as a rule unknown abroad. But it is enough that some journalist or correspontent finds out the case and gives it publicity to haven it beconing a world affair as in the esses hereabove queted, at least in the neighbouring countries such as French Indoclrins, British Malays, Japan., etc. It is my duty to call the attention upon the possibility of such highly embarrnceding development. They are to be feared more especially in matter of Criminal law where faiture to comply atrictly with the law is always seversly apprecinted. So much the more because death puninhment for politieal offences has been abolished in almost all countries.

Now, Your Screne Highmeas wants to examins whether the Royal Sanction has the character of a judicial or executive Act.

The question for me may have only little interest in the present case for reason which I will explain hereafter. But however let us consider it.

It is noticeable first that we can get no help from precedents in the other countries: because the provision of Section 39 is special to Siam, and, as far as I know, does not exist else here. Elemmbre the Chiel of the State interferes only in sentence of death when the question of capion prises.

If we take the position in Siam as it is, to decide between the julicial or wxecutive character of the Royal Senction is certainly very contentious.

On one par, those who claim that the Royal Senction is a juiicial Act interprate Section 39 as creating a Royal Senction of the final judment. This, in their opinion, is shesn by the inct that the provision is purposely in a Code of Criminal Procedure (Chapter 6 "ezecution of judgment"), and that the provision says that the Sing is submitted the judgment in the same way as to is submitted a dika (when there may be a dika). Cons quently Section 39 monns only that the King admits that the final judgment is not contrary to law and the puniabment of death is adequate to the offence courtted. Theconsequence is that the Royal Senction will parmit to the Administrative Autherities to execute the sentence. In that opinion, the Royal Senction appears as a romaining of the old times, when the King was taken as a Judge of all cases in His Kingdom,and was the highest authcrity to say, in a matter so sericus as d death seniance, that be agreed, as the supreme judge, that everything was in order from the legal point of view.

On the other part, those who claim that the Royal Sanction is an Exeentive act, interprete Section 39 as having nothing more to do with the judgment which is final. Instead of being the last part of the judicial proceedings, the Royal Senction is then the first part of the administrative proceedings. The King, as the Hend of the Executive Tower, directs the administrative authorites (that is to say the suthorities in charpe of the execution of the judgments) to execute the sentance. In minor cases, the King does not interfore, and the administrative authorities proceed on

the execution by thammelves. But, in a matter so cerious as a death sentence, the order of the King, as the Suprome Head of the Executive, in necessary. And as soon as the order is given the exceution can procestion.

Connsquantly, if the King gives the Royal Sanction, it is of no interest that he does it as the suprems Juige (judicial act) or as the Supreme Head of the Executive (executive act) since the effect is the same, namely that the sentence may be executed at once.

But if the King refuses the Royal Sanction, or if he keeps silent, it must be reminded that, in both cases also, Section 39 remains very strong. It does not say that the King shell give His decinion within a cerfain period of time. It results from its provisions that "the orders of His Majesty shall be carried out in every respect", when his pleasure has been ascertained. In those conditions, under the Act R.S. 115, to say that the silence of the King should be interprated as an order to carry on the sentence, or to say that is case of conflict between the King and the Government the opinion of the Government shall neceasnrily prevall upon the King's opinion, should have been as arbitrary solution raising serious difficultics.

But is the same solution to be given under the Copstitution R.S.2476, that is to say since Siam has become a Constituticnal Mocarehy The special principle of a "Royal Sanction" in case of sentences to death, etc., has cortainly nothing centrary to the Constitution. As to the exercise of the said Sanction, one may cortainly agree that the wording of Section 39 is more suitable with an Absolute Nonarchy than with a Constitutiional Nonarchy. The powers of the Soversign in a Constitutiional Nonarchy are so limited, that it may be well contended that in a cecstion of procedure, either judicial or administrative (and the Royal Sanction is nothing else), the executive power of the King, being exercised through the State Compoil (Constitution Section 7), cannot result in enother decision than the decision of His Government. It reading that the question is specially delicate, because it is one of life or death, likely to stir up the public opinion; but this comes to the politieml dangers of the dectsion.

Now, in the present case, the question of the "Royal Sanction", in my opinion, has become caiirly irrelement. Why? Because the question of the Royal Sanction is in any case a question of procedure (judicial of administrative). And, as soon as a petition for pardon springs up, the executive must be postponed (oven if a Royal Sanction has been alresdy given) as long as there in no decision as to the question of pardom itself. The question is brought in another field. The important point is to realice that the question of pardom supersedes the question of the Royal Sanction. And then us come to conaider the question of pardon, when it arises by the fact of a petitiion. It is unnecessary to say that, should the Royal Sanction be obtained in a way or another, to omler the execution pending the exammination of a petition of pardom would mise a storm of proteat if the public opinion here and abrcad.

(2)

question of pardon.- Under Section 55 of the Constitution, "it is the King's prerogative to grant pardon". Whichever may be the exact wording of the section, it is above any doubt that the intention has been to invest the shief of the state in Siam an elsewhere with the well-known prerogative of pardon, which is probably as old as have been Chiefs of States themolves.

As a rule, in the countrics where the Chief of the State has the proregative of pardon without any Constiiutionl limitation., his right is constructed widely: that is to say, he can decide in the last resort if he pardons or if be does not

pardon[1]. If the prerogative of the King was in fact reduced in such a way that he could pardon only when the Government does agree, the prerogutive should be a more mookery, and, in the adlence of the Constitution, we cannot admit that it was intended to construct much a high prerosative in that way.

I want to insist here upon the special character of the prerogative of pardon. It is too narros to consider it from the point of view of criminal of alministrative law. By essence, it is something higher, something "sui generis". Why? Because the praregative of pardon is in itself a remsining of the divine character which was invested in Govereigus in the old times, aspecially Monarchs. To take the life of a man or to save his life is something which surpseens the legal questions. This only can justify the mubsistence of the prerogative, which is as a fact the only subsistence in the hanis of the Govsreigns of their former extensive power. It is why, in my opinion, they can use it without justification and oven contrary to public opinion or to the Assembly's or the Goverment's opinion. Otherwise, it is to trussform the nature of the pardon, and it is elear that the prerogative could in that case be invested as well in the Government itself of in the Minister of Justice (this has been made in some Constitutions) without giving to the Chiel of the State a deceiveing power.

Certainly, it is desirable, as you say, that some understanding could come between the Moversign and the State Council, the State Council enleavouring to fall in with the views of the Soversign, and the Sovereign being desirous to satisfy the State Council, This is perfect, when both partics are as reccomnble and comproudsing. But this is not our case. We must think of a case where both partise are unsempronisign, In that came, I see nothing in the Constitution, expecislly Sectoin 55, which will canpel the King to give up His personal opinion and to yield nesessarily to the adver opinion of the State Council.

Now, and subject to the foregning cosaiderations, it appears that the exerpise of the prerogative of pardon granted to the King by the Constitution is made difficult and questd canble by questions of procedure only: namely the fact that the Docreo by which the King exereises His prerogative must be countersigned by a State Counciller, and that the State Councillors (practically the Government) may rafuse to countersign it because they disegree upon the oppartunity to pardon.

The question is very delionte, and I would like to exemine which cause may happen:

a) the Soversign grants the pardon by issuing His decision in a decroe which He presents to the Government for the Constitutional ocuntersigning. The Government refuses to countersign. The conflict is open. (To be complete, the same would happen exactly in the contrary case, if the Sovereign would reject the petition by a formal Act, as is provided in some countries, and the Government refune to countersign it because they want a perion to be granted.) As to the solution of the corflict so open, I entirsly agree with the opinion of Your Sereme Highness, that is to say: "If the Sovereign insisted, then the Government would have to resign, but if the same Government is retiirned to power, that is to say, if the Government has the support of the majority of the Assembly, then the Sovereign would have to yield," but

[1] So is the case in France, where the Fresident is only given an advice by the Minister of Justion, and is not bound by it "Le droit de grace appartiont does toute as plenltude cu Prdsident de le Republique qui I' exerce sana rastriction ni reserve." (Uepertoire Fuzier-Kerman, Vo.Frace). This although the Decrce pranting pardon must be countarsigned by a Minister, exactly as in Siam. When there are exceptions to the full exarcise of the right of pardon, they are specified expressly in the Constitution (see Helgium Coust. Sect. 91, Denmark sect. 26, Gracce sect. 84, etc.).

I add “unless be profers to resign”. Of course that last consequence is much more striking in the case of a Nesarah, because cemplicrtions ariss on account of dynastical questions, successions, etc. But if you apply it irrespestive of the name of the Chief of the State,-say to a President of Republic-the resignation and election of a successer is quite prectical.

b) But supposing that there is only a passive resistance by the Chief of the State, which is the solution.

May I insist upon the point that we are now (Item 2) in the matter of pardon exclusively, and that this must not be confused any longer with the matter of Royal Sanction, as it has been explaine before. And that, even if the King had given the Rayal Sanction, the petition of pardon has created an entirely now psition of the question. Not to diseriminate should be a legal ceafusdom of two ditterent systems of law, and, when we are dealing with the question of pardon, we cannot retransfer the case in the domain of the Royal Sanction.

Being in the matter of the prerogative “sui generis” of pardon, the ..... of the King as to the pardon is true, and it is only the ..... of His decision which may be obstructed by the conflict.

Then, what is the solution of the conflict if the Sovereign shows a passive resistance; Again in that case it is not said in the constitution that the Sovereign must decide upon the petition of pardon and give his answer within a certain parlot of time. As long as the sovereign has not answered, no other answer can be substitated to his can, and it cannot be said that silance means rejection of the petition of pardon. This should be an arbitrary addition to the Constitution. The corflict by silence of the Sovereign is provided in the Conetitution in the case of wills (Section 39 canflict with the legislafive Fomer). But the conflict by silence of the Sovereign is not provided in the Constitutio in the case of decrces (Executive powers). Why? Because say conflict arising not between the Executive and Legislative, but “su soin” of the Executive power itself, shell neccessarily result into the disappearance of one of the two conflicidng parties, either the Chief of the State or the Government, and we come again to the same pasition as in number (a). It would moan practically that the Government should requre the Sovereign to ntify His decision, and, if He does not, should resign and leave the Assembly to suppert one of the two conflicting partics.

Of course it is regrettable that there is no provision in the Constitution to avert the cenflict between the Coversign and the Government as mentioned in (a) and (b) above. But that deficiency is far from being special to the Siemese Constitution alons.

Yours sincerely,
R.Guyon