# Some Legal Comments on Hon. Waruru Kanja's Petition for Executive Clemency*

By *S. B. O. Gutto*

## The Background

Hon. Waruru Kanja, M. P. for the Nyeri Constituency (as he then was) is a well known patriot. For his role in the nationalist liberation struggles he was convicted and sentenced to death by the colonialists in 1953. This was later reduced to life imprisonment, which he served until 1959 when he was released. He served in the Kenyatta regime as a member of Parliament since 1969 and was made an assistant cabinet minister (for local government) in 1979 by President Moi, apparently for his supportive role during the succession power struggles of the late 1970s. He, however, maintained his patriotic stand and was immediately relieved of his assistant-ministerial post in 1980 following his attack on some cabinet ministers whom he considered to be dishonest and abusive of their public offices. Specifically, he challenged the government to name the assassins of Tom Mboya (1969) and J. M. Kariuki (1975) and asserted that the then Minister for Constitutional and Home Affairs, Mr. Charles Njonjo, and the Minister of State in the Office of the President, Mr. G. G. Kariuki were being provided with security escorts by armed body-guards, unlike other ministers, because of their past crimes and sins; he further accused Mr. Charles Njonjo and the director of C. I. D., Mr. I. I. Nderi of being behind a plot to kill him so as to silence him.[1]

Hon. Kanja was later arrested, charged and convicted on 24th September 1981, by the Senior Resident Magistrate, J. S. Patel (now Acting Registrar of the High Court of Kenya)[2] of contravening Provisions of S. 4 (1) of the Exchange Control act, Cap. 113 Laws of Kenya, contrary to paragraph 1 (1) as read with Paragraph 1 (3) of Part II of the Fifth Schedule to the said Act. He was subsequently sentenced to 3 years imprisonment and forfeited to the state 2100 U.S. dollars, 460 dollars in travellers cheques, and 5 U. K. pounds.[3] In giving the sentence, the Senior Resident Magistrate stated that he was »constrained to say that the custodial sentence is inevitable«.[4]

* I wish to acknowledge, with thanks, comments on the earlier draft of this paper by my colleagues, Mr. G. K. Kuria, Department of Private Law, and Dr. Ooko-Ombaka, Department of Public Law, Faculty of Law, University of Nairobi. I alone, however, assume responsibility for the views and possible weaknesses in the paper.

1 See a complete coverage of the whole story in the **Weekly Review,** 21st November, 1980 at pp. 4–7.

2 Mr. J. S. Patel was actually appointed and sworn in as the acting Registrar of the High Court two days before he made the judgment in the Kanja case, see Daily Nation, 23rd September, 1981 p. 5.

3 R. v. W. K. Kanja, Chief Magistrate's Court at Nairobi, Cr. Case No. 1433 of 1981.

4 Judgment of 24th September, 1981 at p. 51.

Through his lawyers, Hon. Kanja appealed to the High Court on points of law and fact both against the conviction and sentence.[5] By a plea bargain, Kanja's lawyers were given an understanding by the State lawyers that if the former abandoned the grounds relating to the conviction, the latter would not oppose the grounds based on sentence and that a custodial sentence would not be necessary.[6] Kanja's lawyers relied on this plea bargain in good faith and acted on the footing that Kanja had committed the offence charged, although through forgetfulness. The State lawyers, however, failed to keep their part of the plea bargain and proceeded to argue before the High Court that the sentence imposed by the trial court was not excessive[7] with the result that in its judgement on 11th December 1981, the High Court only reduced the sentence from the 3 years imprisonment to 12 month imprisonment; the High Court indicated then that it might have imposed only a fine if the appellant had offered to pay the same through his lawyers when the appeal was being heard.[8]

Kanja's lawyers thereupon served notice of appeal to the Court of Appeal against the High Court's decision. Before the commencement of the appeal proceedings, however, the lawyers on further reflection, apparently based on the position the aforesaid abortive plea bargain had put them, decided to advice on and actually proceeded to withdraw the second appeal. In substitution, Kanja on 22nd December, 1981 exercised his silent constitutional right under section 27 of the Constitution by petitioning His Exellency the President for pardon. In his petition he cited, among other things, his aforesaid role in the independence struggles as well as during the succession power struggles of late 1970s and mentioned that, »it is difficult or impossible for me to obtain the fairest trial before those who may have no liking for my politics, even were they to adhere most meticulously to the technical procedures laid down by law.«[9] On the same day, 22nd December, 1981, Kanja caused to be delivered a letter addressed to the Hon. Speaker of the National Assembly in which letter he requested the Hon. Speaker to »postpone any action you might have contemplated taking under both section 39(1)(b) of the Constitution and the National Assembly and Presidential Elections Act until I hear from His Exellency the President.«[10]

5 »Memorandum of Appeal«, dated 28th November, 1981 and signed by advocates for the appellant.
6 Hon. Kanja's Petition to His Excellency the President, Paras. 12 and 15.
7 **Ibid.**
8 **Ibid.**
9 **Daily Nation,** December 23, 1981, P. 1; **Standard,** December 24, 1981, P. 3; the extracts in the papers were drawn from page 2 of the preamble to the petition to His Excellency.
10 The full text of the letter to the Speaker reads as follows:–

The Speaker 16th December, 1981
Kenya National Assembly,
Parliament Buildings,
**NAIROBI**.

Dear Sir,
**Hon. WARURU KANJA THE MEMBER OF PARLIAMENT FOR THE NYERI CONSTITUENCY AND THE HIGH COURT OF KENYA.**
As you no doubt know, the High Court of Kenya on December 11, 1981 substituted a twelve months' impri-

A day following the delivery of the aforesaid letter to the Speaker and many days before His Exellency the President had made a decision on the petition, the Speaker signed a Gazette Notice declaring the seat for the Nyeri Constituency vacant persuant to section 18 of the National Assembly and Presidential Elections Act (Cap. 7).[11] His Exellency the President exercised his constitutional powers under section 27 of the Constitution on 29th December, 1981 and announced his rejection of the petition; the decision was announced the same day on a Voice of Kenya afternoon radio bulletin.[12] The material part of His Exellency the President's statement of rejection stated:

> Having read the contents of your petition, I find it extremely difficult to accept your petition that our courts will not give you a fair trial. This amounts to a question of the integrity and impartiality of our judiciary. Accordigly, I find no merit in pardoning you.[13]

On the same day the President's decision was announced, the Deputy Supervisor of Elections, Mr. N. W. Kimani, gave an election notice for the parliamentary seat previously held by Hon. Kanja.[14] The election has since been held and a new M. P. elected.

Of peripheral relevance to the foregoing background but all the same important to our analysis herebelow for historial reasons is a scathing newspaper editorial in the **standard**

sonment for one of 3 years which the trial court had imposed on me. It is in conncection with twelve months' imprisonment that I now write to you. Under section 27 (a) of our Constitution, I have petitioned His Excellency, President, for a pardon. That section provides as follows,

The President may –

a) grant to any person convicted of any offence – a pardon either free or subject to lawful conditions;

If my petition succeeds section 39 (1) (b) of our Constitution which provides that a member of Parliament loses his seat when sentenced to imprisonment for more than 6 months will not apply to me. That section reads as follows,

A member of the National Assembly shall vacate his seat if –

. . . . . .

(b) any circumstances arise that if he were not a member of the Assembly would cause him to be disqualified by section 35 (1) of this Constitution or any law made in pursuance of section 35 (3) or section 35 (4) of this Constitution to be elected as a member.

In my own case, the relevant provision is section 35 (1) (b) which provides as follows,

A person shall not be qualified to be elected as an elected member if at the date of his nomination for election he –

. . . . . .

(c) is under sentence of death or ist under sentence of imprisonment (by whatever name called) exceeding six months imposed on him by such court or substituted by competent authority for some other sentence imposed on him by such court.

In light of the aforesaid, I request you to postpone any action you might have contemplated taking under both section 39 (1) (b) of the Constitution and the National Assembly and Presidential Elections Act until I hear from His Excellency the President. Any action taken before His Excellency, takes a decision on my petition will violate my rights. Besides it will cause embarassment which can be avoided.

Yours faithfully,

**HON. WARURU KANJA**

**KAMITI MEDIUM SECURITY PRISON**

11 Gazette Notice No. 3992 dated 23rd December, 1981, **The Kenya Gazette,** 31st December, 1981, p. 1628.

12 **Daily Nation,** December, 30, 1981. p. 1.

13 Reproduced in the **Standard** editorial of December 30, 1981.

14 Gazette Notice No. 4023 dated 29th December, 1981, **Kenya Gazette,** 31st December, 1981, p. 1637.

under the title »Edicts from a Prisoner« which appeared on 24th December, 1981, a day following Hon. Kanja's presentation of the petition to His Exellency the President and the letter to the Speaker. The editorial itemized five »reasons« why, in the opinion of the paper, His Exellency the President ought to have rejected the Petition. These were:

(a) that the publication of the contents of the petition to His Exellency the President and those of the letter to the Speaker in the local newspapers was indicative of disrespect and showed that the same were addressed to the public at large;
(b) that Hon. Kanja had not exhausted judicial remedies before making the Petition and that this was wrong in law;
(c) that the statement in the petition (under footnote 9) made »apparent aspersions« on the judicial system by implying that the courts are not just, impartial or competent;
(d) that Hon. Kanja »instructed« the Speaker of the National Assembly not to declare »his seat« vacant thereby showing great disrespect to and contempt of Parliament; and,
(e) that Hon. Kanja was wrong in implying in his Petition that his role in the succession power struggles of 1970s where he was supportive of the President was relevant in a petition under section 27 of the Constitution.

The following analysis is specifically inspired by reason that now that the dust has settled over the Kanja case, it is vital that a fuller appreciation of the legal nature of petitions for pardon be made as a possible contributory guide to future action by any party concerned. We shall not bother focusing on the distortions of facts and the law by the said editorial as the same will be apparent in the wider analysis.

**Of the Kanja Petition and Presidential Prerogative of mercy**

It is imperative to observe at the outset that the Kanja Petition was of little Precedential signficance since numerous similar petitions are made to the President under section 27 of the Constitution by all sorts of convicted criminals. The President also has a constitutional power quite irrespective of any petition by convicts to pardon criminals as has been done in numerous national days such as Jamhuri (Independence) day. This is a well established practice in »civilized« states, including Britain[15] from where we have borrowed most of our constitutional principles. The Kanja Petition is important only because it received maximum publicity and thereby popularized the institution of executive clemency with the result that informed public discussion of the subject is apt.

In general constitutional law and practice, the exercise of prerogative of mercy is reserved to the head of state, the Chief executive, be it a monarch, an aristocrat, a popularly democratically elected ruler or any other head of state depending on the form of government. It is a recognised customary practice of states observed in the slave, feudal, capitalist through to the modern socialist social formations.

15 See R. F. V. Heuston, **Essays in Constitutional Law** (2nd Ed.) (London, Stevens, 1964) cap. 3 at p. 70.

Professor Bradley, writing on the nature of the royal prerogative, of which the prerogative of mercy is an aspect, has described the same as:

> certain powers, rights, immenities and privileges which were necessary to the maintenance of government and which were not shared with private citizens . . . A modern definition would stress that the prerogative has been maintained not for the benefit of the sovereign but to enable the government to function . . .[16]

The prerogative of mercy is then not a simple matter of personal whims of a head of state but rather a necessary public and legal power that enables a ruler to do justice beyond what the ordinary laws of the land may offer. It embodies the recognition that in special circumstances the work of the legislative and judicial arms of state have inherent limitations in dispensing justice. Although an integral part of the legal structure, the prerogative of mercy is **not** based on claims to legal rights. Lord Diplock recently made the judicial remark that, »[m]ercy is not the subject of legal rights. It begins where legal rights end«.[17] Heuston has stated that, »[a] pardon . . . does not affect the legality of the act done – it simply frees a guilty person from the legal consequences of his admittedly illegal act.«[18]

Bratain, however, has no formal constitutional document and although its constitutional practice has the greatest influence on our legal system, it is important that we look into the practice of states with written constitutions like we have for comparative reasons. Let us look at the position in the U.S.A. The American Constitution states that:[19]

> . . . he [the President] shall have Power to Grant Reprieves and Pardons of Offences against the United States, except in Cases of Impeachment . . .

In the formative years of American Constitutionalism as then affecting the free citizens, one of the chief architects of the U.S. Constitution, Alexander Hamilton, under the pseudonym Publius, made the following observations:[20]

> Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrased. The Criminal Code of every Country partakes so much of necessary severity that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance to sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance . . . in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the

16 A. W. Bradley (ed.) **Wade and Phillips Constitutional and Administrative Law** (9th Ed.) (London, Longman, 1977) pp. 231–232.
17 In De Freitas v. Benny [1976] A. C. 239 at 249.
18 Heuston, **op. cit.** note 15 at p. 71.
19 The Constitution of the U.S.A., Article 2, section 2.
20 A. Hamilton, Madison and Jay **The Federalist Papers** (New York, New American Library, 1961) pp. 447–449.

tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwords to recall.

Hamilton's pleas took root and helped in laying the strong foundation for the U.S. constitutional law and practice, for whatever they are worth.

Two aspects of Hamilton's foregoing pleas are relevant in the discussion of Kanja's Petition and needs to be emphacised; these are

(a) that the ordinary courts are the proper organs for the administration of law but in the dispensing of justice the ordinary courts and even the law itself may be wanting, and (b) that respect for the exercise of prerogative of mercy can only be assured where the power of pardon or reprieve is exercised judiciously but selectively in deserving cases – cases which at times may be as serious as rebellion, treason or insurrection. In other words, irrespective of how good the laws are in a country – which is rare for the majority of the labouring classes in a class society – or the ability and reputation of the courts, the head of state may still intervene and dispense mercy no matter how serious the crime may be. A recent good illustration of this in Africa was in January 1982 when the dictator, Sergeant Samuel Doe, head of state in the military government in Liberia, pardoned six students who were sentenced to death for breaching a ban on Political activities. In announcing the pardon, the Sergeant properly observed that the so-called People's Redemption Council, »cannot ignore the gallant role students played in [the] revolution.«[21]

Hon. Kanja's appeal in the Petition to his role in the country's political struggles was therefore proper. Pardon and reprieve by the Head of State are normally made in sensitive cases that have strong public appeals. Any assertion to the contrary is simply incorrect and uninformed.

There may be some merit in arguing that the matter went to the press too early but it should be recognised that in a relatively young legal order such as the Kenyan one, experimentation with certain public processes should actually be encouraged since section 27 of the Constitution is silent on procedural questions, excepting those regarding the internal workings of the Advisory Committee on Prerogative of Mercy and the status of the Committee's recommendations as provided under sections 28 and 29 of the Constitution. In older legal systems such as that in Britain, it is well established that such petitions for clemency go through and are generally exercised on behalf of the sovereign by the Home Secretary (equivalent of our Minister for Home Affairs).[22] Public pressure **per se,** not even the recommendation of the aforementioned Advisory Committee, does not bind the President although it is clearly a factor that may influence the exercise ot the power one way or the other. The publication of Kanja's Petiton in the press should not therefore be viewed as an interference with the President's discretionary powers at all.

Was there a duty on the part of the petitioner to exhaust the available judicial remedies and, if so, was this done before the petition was presented to His Exellency the Presi-

21 Reproduced in **Daily Nation,** 30th January, 1982 at. p. 7.

22 Hood Phillips and P. Jackson, **Hood Phillips' Constitutional and Administrative Law** (6th Ed.) (London, Sweet & Maxwell, 1978) p. 378; Heuston, **op. cit.** at p. 69.

dent? This is an important issue. It is important to note that section 27 of the Constitution does not require the President to exercise the prerogative of mercy only after the case is **res judicata;** the President can intervene at any stage in the proceedings before or after the final decision.

This clear legal position notwithstanding, it may be conceded for purposes of the argument only that civility may require that a potential petitioner ought to exhaust the available judicial remedies before appealing for clemency to the executive arm of the state. The reasons for this may be first, that without exhausting the available judicial remedies, it becomes contemptuous, in the layperson sense, to try to by-pass the laid down system of justice, and secondly, that such by-passing of judicial process might lead to greater damage in that it might bring unnecessary conflict between the judicial and executive arms of the state. It could even lead to a lowering of the dignity of the courts and hence legality. In the present case however, the Petitioner **did** exhaust the available judicial remedies, the withdrawal of the intended appeal to the Court of Appeal notwithstanding. A litigant is generally free to decide the stage at which to discontinue litigation provided the rights of the co-litigant in a proceeding is not jeopardized. One need not necessarily have to go through the highest court in a judicial system before claiming exhaustion of judicial remedies.

In the present case, the withdrawal of the notice of appeal in the Court of Appeal was done, as we have implied earlier, on competent legal advice of Hon. Kanja's lawyers since their abandonment of grounds relating to the conviction at the High Court, by relying on the promised plea bargain, automatically made the appeal to the Court of Appeal futile and redundant at law. Section 361(1) of the Criminal Procedure Code, Cap. 75, Laws of Kenya states clearly that:

> Any party to an appeal from a subordinate court my appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact.

The intended appeal to the Court of Appeal was precisely what that section of the C.P.C. does not permit since the High Court decision was made only as regards the sentence and not on questions of law for reasons of the betrayed plea bargain that has been underlined above. At law, therefore, the case had passed its final stage in the judicial process – all the available judicial remedies had been exhausted at the High Court and no appeal could lie to the Court of Appeal which is the highest court of justice in Kenya's legal system.

The next important aspect of the Petition regards the so-called, »apparent aspersions which this convicted individual [the Petitioner] casts on our judicial system«, as put by the earlier mentioned editorial comment. This issue is important in that, as has been indicated earlier in this essay, it is the stated ground on which His Exellency the President rejected the petition.

From what has been indicated in here, it is a well established fact that there ought to be nothing necessarily wrong in saying that certain laws and/or their administration by the courts (judges) may lead to injustices in particular cases. To quote Lord Atkin, »[j]ustice

is not a cloistered virture, she must be permitted to suffer scrutiny and respectful even though outspoken comments of ordinary men.«[23] Prof. v. Harry Street in **Freedom, The Individual and the Law**[23a] has put it that, »[i]t is desirable that the performance of judges be subject to examination and comment; even more obviously, the accuracy of the law laid down by them in their decisions should be the object of fearless scrutiny. Such freedom to criticize is essential if the high guality of judicial administration is to be maintained.« Were the law and the judges perfect, there would be no provisions such as those in section 27 of the Constitution for it is the realisation of the weaknesses inherent in the law and imperfection of the courts of law in any democratic society that give reason for the prerogative of mercy. In fact, there was nothing »inevitable«, as the trial magistrate stated, in imposing a custodial sentence on the petitioner since sections 24 to 39 of the Penal Code, Cap. 63 Laws of Kenya, provide diverse forms of punishment including forfeiture of the foreign currency involved, as was done, that could have been more appropriate and reforming than the custodial sentence.

It is vital for the development of democracy in Kenya for citizens to respect rather than have morbid fear of governmental institutions including the judiciary. Such genuine respect can only grow out of constructive criticisms of the workings of such institutions. Independence of the judiciary, like all other democratic ideals, is not a given; it can only be based on empirical observations and its predominance can not be derived from the level of theory alone. Both the courts and the public are responsible for ensuring the development of a relatively impartial judiciary. Indeed, it would be most unfortunate if Kenya were to adopt a dogmatic view on the impartiality of the judiciary since the world over now recognises that judges are actually belligerents in political battles that go on in all societies they live in – whether in Kenya,[24] Britain[25] or the U.S.A.[26] The old bourgeois mythology about political neutrality of judges does not hold any more although it is quite correct that most judges are able to conceal their political activities. As Lord Devlin, one of the leading English jurists also remarked, »[j]udges are appointed by the executive and I do not know of any better way of appointing them. But our history has shown that the executive has found it much easier to find judges who will do what it wants than it has to find emenable juries.«[26a] For these reasons, a citizen ought not to suffer solely on the ground that he or she is openly critical of the judicial arm of the state. This is particularly important in pardon cases since the President in exercising the powers under section 27 of the Constitution does not do so as an appeal tribunal.

23 In **Ambard v. A. G. of Trinidard & Tobago** [1936] 1 All E. R. 704, at 709.

23a (4th Ed.) (Middlesex, England, Penguin Books, 1977) p. 180.

24 G. K. Kuria and J. B. Ojwang, »Judges and the Rule of Law in the Framework of Politics: The Kenya Case«, *Public Law* Autumn, 1979, 254–281.

25 For examples, see J. Griffith, **The Politics of the Judiciary** (Manchester, Manchester University Press, 1977); R. Stevens, **Law and Politics: The House of Lords as a Judicial Body** (London, Weidenfeld & Nicolson, 1978).

26 Bruce A. Murphy, **The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices** (New York, Oxford University Press, 1981).

26a. Sir Patrick Devlin, **Trial By Jury** (Rev. Ed.) (London, Stevens and Sons, 1966) at p. 159.

The last point for brief comment here pertains to the manner in which the Speaker of the National Assembly hurriedly signed the notice declaring the Nyeri Parliamentary seat vacant,[27] thus pre-empting the decision of His Excellency the President on the Petition. The Petitioner's humble request to the Hon. Speaker to delay taking action regarding the Petitioner's parliamentary seat has already been clearly established herein.[28] The legal point here is that regardless of what His Exellency the President's decision was likely to be, the Hon. Speaker had knowledge of the Petition and should have therefore waited for the decision before declaring the seat vacant. Section 18 of the National Assembly and Presidential Elections Act, Cap. 7 Laws of Kenya, which gives the Speaker authority to declare a seat in the National Assembly vacant, clearly requires the Speaker to be aided by sufficient evidence regarding the status of a seat before declaring the same vacant and also to ensure, where he is not certain, that he consults the Attorney-General on the matter.[29] From the way the Speaker took quick action on the matter, it is clear that the Speaker did not seek the necessary legal advice of the Attorney-General or, if he did then, the Attorney-General did not draw his own mind to section 27 of the Constitution. The need for restraint by the Speaker in such delicate issues can be demonstrated simply by assuming a case where a petition for pardon or reprieve is coming from a person sentenced to death. Failure to wait for a decision under section 27 of the Constitution in such a case would mean that by the time a decision is made on the petition, and if the same is favourable to the Petitioner, the prerogative would have been defeated! It becomes imperative that those persons holding important Constitutional Offices such as the Speaker of the National Assembly should act with the widest possible considerations regarding the implications of such actions or omissions. Hon. Kanja was not physically assassinated, as he had alleged to have been planned, but the Hon. Speaker's speedy action in declaring the seat vacant could easily have been interpreted as a contribution to a scheme for political assassination of the petitioner.

27 See footnote 11, above.

28 See footnote 10, above.

29 Section 18 of Cap. 7 reads:

If the Speaker has reason to believe that the seat in the National Assembly of a member thereof has become vacant, he shall call for such evidence on the matter as he thinks necessary and may if he thinks fit consult the Attorney-General, and shall thereafter –

(a) if he is satisfied that the seat has become vacant, declare that the seat has become vacant, and publish notice of the declaration in Gazette; or

(b) if he is not so satisfied, refuse to so declare.

# ABSTRACTS


**Some Legal Comments on Hon. Waruru Kanja's Petition for Executive Clemency**

By *S.B.O. Gutto*

Executive Clemency or sovereign powers of reprieve and pardons in criminal cases is a vital and integral component of any legal system in modern state social organizations. Such prerogative, whether constitutionally decreed or assumed from customary state practice operates to mitigate the harsh consequences that often arise from mechanical, abstract application of legal rules. In the common law legal tradition such sovereign prerogative exists beyond the limits of equity in dispensing substantive justice in special circumstances.

In Kenya, the Presidential Prerogative of mercy, as Executive Clemency is called, is provided for in Sections 27–29 of the Constitution. The operation of these sections have not been subject of any dispute or legal comment until late in 1981 when a Member of Parliament, Hon. Waruru Kanja, was charged and convicted of violation of foreign exchange laws. The circumstances of the indictment and trial were highly politically charged. Hon. Kanja's petition to the President for pardon was rejected in circumstances that raises constitutional and legal eye-brows particularly because the rejection could be interpreted to mean that clemency may not be granted since the courts of law are allegedly perfect and have exclusive jurisdiction in dispensive punishments in criminal cases, which is not his case.

This essay attempts to assess the nature and role of Prerogative of Mercy, its apparent unjustified denial in the Kanja's case and the implications of the latter to the future development and practice of constitutionalism in Kenya.



**Entwicklungspolitik »von unten« oder Bürgerkrieg**

von *Peter Moßmann*

Development policy »from below« is indispensable in view of the inefficiency of agent organizations. If it does not achieve an evident success for the majority of the population, there is a threat of civil war. Taking into account the steadiest Campesino-guerilla in Latin America, it seems that the development trend is traced out for Colombia. This trend is not relevant for one country alone: Columbia is geopolitically situated between Central America and the south of South America. Under the strategical aspect of revolution regarding major regions of retreat, this country is assigned a transmission function simi-