



## Occasional Talk

# Restoring Leviathan?

## The Kenyan Supreme Court, Constitutional Transformation and the Presidential Election of 2013

John Harrington, Professor of Law, Cardiff University  
Senior Research Fellow, British Institute in Eastern Africa, Nairobi

Monday 20 January 2014 at 5.00 pm, Room S1 ARB

This paper reviews the decision of the Kenyan Supreme Court in the challenge to the Presidential Election of 4 March 2013. The Court's reasoning in *Odinga v IEBC* is read against the background of the widespread violence and profound national crisis that resulted from Kenya's previous, disputed elections in December 2007. The report of the Kriegler Commission into the 2007 electoral process recommended the creation of a special court be created to deal with election disputes and this was realized with the passage of a new constitution for Kenya in 2010. The latter was also seen by reformers as marking a broader transformation; an attempt, as Makau Mutua put it, to 'tame Leviathan'. The petitions before the Supreme Court in 2013 were therefore widely seen as a test for the Court in relation to the resolution of disputed elections, and more broadly as a crucial moment in the early history of Kenya's new constitutional dispensation, held out as founding a second republic, designed to vindicate the rule of law where the colonial administration and the first independent republic had notoriously failed.

This review is concerned chiefly with the normative implications of the judgment and the critical issues of constitutionalism it raises, rather than with a factual assessment of the conduct of the election as such. It attends to the manner in which the Court produced and managed the boundary between politics and the law and, specifically, the nature and limits of legitimate executive power. In conclusion it can be argued that the pattern of reasoning in *Odinga v IEBC* reinforces rather than challenges the traditional, Hobbesian characteristics of the Kenyan state.