

The Invalidity of Suspended Declarations and the Consequences of a Missed Constitutional Election Date

A Comparative Constitutional Analysis with Special Reference to Kenya

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ABSTRACT

This paper examines the constitutional consequences that arise when a constitutionally prescribed election date passes without the required election taking place, and when a court suspends the operative effect of a declaration of constitutional invalidity.

The immediate case study is Kenya. On 7 August 2026, the High Court at Malindi, per Justice Mugure Thande, held in Owiso, Ashioya, Khelef v Attorney General & IEBC that Article 136(2)(a) places the next presidential election on Tuesday, 11 August 2026. The Court reasoned that the fifth year after the presidential election held on 9 August 2022 commenced on 9 August 2026, and that the second Tuesday in that August was therefore 11 August 2026. The Court further held that the Constitution guarantees no fixed five-year presidential term: the term begins on swearing-in and ends when the next elected President is sworn in.

This paper agrees with the Court's interpretation of Article 136(2)(a), but challenges its remedial order. Kenyan jurisprudence now establishes that courts may, while interpreting statutes and in appropriate and exceptional circumstances, suspend declarations of constitutional invalidity. The Supreme Court in Cabinet Secretary for the National Treasury and Planning & 4 Others v Okiiti & 52 Others [2024] KESC 63 expressly recognized that remedial jurisdiction for review of statutes and supplied guidelines for its exercise. The stronger objection, therefore, is not that suspension is categorically unavailable, but that the particular suspension in Owiso is difficult to reconcile with the limits, purpose and proportionality requirements of that jurisdiction within Kenya's constitutional framework.

The paper argues that the Owiso suspension is constitutionally vulnerable for five principal reasons.

First, it suspends the consequence of a finding concerning a constitutionally fixed electoral date rather than temporarily preserving an ordinary statutory scheme while Parliament cures a defect.

Second, the order runs "until after the next general election," although that very election, if held on the 2027 timetable condemned by the Court, is the event whose constitutional validity is in issue.

Third, the order does not prescribe a short and definite cure period tied to corrective action before the impugned election.

Fourthly, the Owiso court appears to have misadvised itself as to the nature of the enactment it was reviewing. A statute can be reviewed for conformity with the constitution. If found not to conform, Courts have jurisdiction under Art. 23 to issue appropriate remedies. However, the Owiso court was not reviewing a statute but rather, a constitutional directive that the Executive has mal-administered.

Courts do not possess jurisdiction under Art. 23 to frame remedies that permit the Executive jurisdiction in timely compliance with constitutional directives. To permit this is to open the door to Courts to amend the Constitution using Art. 23 remedies.

Fifth, that even if minded to fashion an appropriate remedy to assist the Executive, the judgment does not fully apply the proportionality and remedial factors subsequently emphasized in Kenyan appellate jurisprudence: rational connection, minimal impairment, prejudice to constitutional rights, legal vacuum, available alternatives, and the balance between good government and constitutional supremacy.

The paper draws upon County Assemblies Forum v Attorney General [2022] KESC 66, Attorney General v Andrew Kiplimo Sang Muge [2017] KECA 191, Karani v Attorney General [2017] KEHC 2184, and Kenyan Supreme Court suspended-declaration authority, Cabinet Secretary for the National Treasury and Planning & 4 Others v Okiiti & 52 Others [2024] KESC 63.

Comparatively, the paper examines the South African Constitutional Court's insistence in Electoral Commission v Minister of Cooperative Governance and Traditional Affairs [2021] ZACC 29 that elections proceed within the constitutional deadline despite the COVID-19 emergency, and the Nigerian Supreme Court's refusal in Senator Rashidi Adewolu Ladoja v Independent National Electoral Commission [2007] NGSC 26 to extend a governor's constitutional term after unconstitutional removal. These authorities reinforce the narrower principle that judicial remedies should not become devices for altering entrenched constitutional time.

The paper distinguishes constitutional continuity, expiry or exhaustion of electoral mandate, prorogatio or diminished authority, constitutional self-extension, and a vacuum of renewed democratic mandate. It proposes "borrowed constitutional time" as an analytical description of authority continuing after the constitutionally prescribed opportunity for electoral renewal has passed. It further argues that post-11 August 2026 legislation may face serious constitutional challenge if the synchronized election-date reasoning is extended to Article 102, while acknowledging that this consequence has not itself been judicially declared in Owiso and remains open to authoritative determination.

The central question is one of popular sovereignty: what becomes of delegated sovereign authority when the constitutionally prescribed opportunity for the people to renew that authority passes without an election, and what are the lawful limits of judicial remedial power when strict compliance has become practically impossible?

1. INTRODUCTION

Kenya's 2010 Constitution fundamentally altered the relationship between elected office-holders and the electoral calendar. Under the previous constitutional order, election timing could become part of presidential political strategy. The 2010 Constitution sought predictability by fixing the electoral cycle constitutionally.

Article 101(1) provides:

"A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year."

Article 136(2)(a) straps the presidential election to that same day. Article 177(1)(a) uses substantially the same formula for Members of County Assemblies. Article 180(1) applies the same timetable to county governors.

Kenyan courts have repeatedly recognized that the constitutional architecture was designed to produce a synchronized general election for the principal elective positions at national and county level.

The difficulty presently confronting Kenya is therefore not that the Constitution contains no electoral calendar. It contains one. The impediment is that a High Court has interpreted that calendar as requiring an election on 11 August 2026, while the electoral institutions have prepared for an election in August 2027.

On 7 August 2026, the High Court (Hon. Justice Mugure Thande) at Malindi delivered judgment in Owiso, Ashioya, Khelef v Attorney General & Independent Electoral and Boundaries Commission [2026] KEHC 12762 (KLR), [hereinafter “Owiso”]. The Court correctly held that the next presidential election is constitutionally due on 11 August 2026. It also held that the Constitution guarantees no elected official a fixed five-year term, and that the presidential term begins on swearing-in and ends only when the next elected President is sworn in.

The Owiso Court then took a remedially consequential step. Having declared the constitutional date and the invalidity of a contrary election date, it suspended the declaration of invalidity until after the next general election.

This paper addresses six interconnected questions:

First, was Justice Thande’s interpretation of the election date correct?

Second, although Kenyan courts possess a limited jurisdiction to suspend declarations of statutory invalidity, was that jurisdiction lawfully and proportionately exercised in Owiso?

Third, what is the legal status of institutions and legislation after 11 August 2026 if the Court’s interpretation of the synchronized electoral calendar is applied beyond the presidency?

Fourth, can Article 259 harmonize away the textual differences in tenure provisions?

Fifth, what does African and comparative constitutional law teach us about delayed elections and the limits of judicial power over constitutional time?

Sixth, what is the prescriptive pathway to constitutional restoration?

The first question has received a High Court answer that remains legally significant unless stayed, varied or overturned on appeal. The second requires analysis against Kenya’s existing jurisprudence on suspended declarations. The remaining questions are urgent but, in important respects, remain unsettled.

2. THE INTERPRETIVE SETTLEMENT: WHY 11 AUGUST 2026 WAS CONSTITUTIONALLY PRESCRIBED

2.1 The Textual Architecture

Article 101(1) and Article 136(2)(a) employ identical language. Both require elections to be held "on the second Tuesday in August, in every fifth year." The phrase "in every fifth year" is not synonymous with "after five years have elapsed."

A year is a unit of time measured from a starting point. The "fifth year" following an event that occurred on 9 August 2022 commences on 9 August 2026 and ends on 8 August 2027. An election held "in" that fifth year must therefore occur between 9 August 2026 and 8 August 2027. The Constitution narrows that window by specifying "the second Tuesday in August." In 2026, that date was 11 August.

The alternative argument—that five complete calendar years must pass before an election can occur—would require the Constitution to have used language such as "after the expiry of five years" or "upon the completion of a five-year term." It did not. The deliberate choice of "in every fifth year" reflects a constitutional intention to anchor the electoral cycle to anniversary-based year-counting, not to term-completion arithmetic.

2.2 The Synchronized System

The Constitution establishes a single electoral event. The President, Members of Parliament, governors, and Members of County Assemblies are all elected on the same day. This synchronization would be fractured if the presidential election were permitted to drift to 2027 while other elections followed a different calendar. The harmonization of the electoral system supports the anniversary-based reading.

2.3 The Court of Appeal in *Muge* and the Arithmetic of the Fifth Year

In *Muge* the Court of Appeal applied Article 259(1)(c) to compute the fifth year following the first general election under the 2010 Constitution, held on 4 March 2013. The Court held that "the second Tuesday in August, in the fifth year from 4th March, 2013 fell on 8th August, 2017." The Court then computed subsequent years from that date and concluded that "the second Tuesday in August in every fifth year, after the elections of 8th August, 2017 would take the next general election date to 11th August 2022."

Justice Thande correctly observed, however, that "looking at the calendar, the second Tuesday of August in that fifth year was actually 9 August 2022 and not 10 August 2022." The 2022 election was in fact held on 9 August 2022. This demonstrates that even the Court of Appeal has struggled with the computation, and that the 2022 election was itself the product of the "fifth year" formula, not a "five complete years" formula. The established sequence of 2013, 2017, and 2022 therefore supports, rather than undermines, the 2026 date.

The Court of Appeal in *Muge* also held that there is no contradiction between Articles 177(1)(a) and 177(4), stating: "Articles 177(1)(a) and 177(4) cannot, as the learned trial judge had erroneously held, be construed to be in conflict or to contradict each other." The Kenya Supreme Court in *County Assemblies Forum* affirmed this holding. The synchronized date governs; the five-year term in Article 177(4) operates within that framework.

2.4 The Present Legal Force of the Interpretation

Justice Thande resolved the Article 136(2)(a) question at High Court level by holding that the presidential election was constitutionally due on 11 August 2026. Unless stayed, varied or set aside by a competent appellate court, that judgment has legal force between the parties and carries substantial precedential weight at High Court level. It should not, however, be described as a final constitutional “settlement” in the jurisprudential sense: the Court of Appeal and Supreme Court remain capable of reviewing the interpretation.

The Court also made a positive finding of contravention by the IEBC. It took judicial notice of the IEBC Chairman’s statement that Kenya would hold the fourth general election under the 2010 Constitution on 10 August 2027, and held that a presidential election on a date other than 11 August 2026 would violate Article 136(2)(a). That is more than a hypothetical dispute. It is an adjudicated finding at first instance, albeit one whose remedial consequences were suspended and whose correctness remains open to appellate review.

3. THE REMEDIAL PROBLEM: THE LAWFUL POWER TO SUSPEND, AND ITS LIMITS

3.1 The Exact Wording of the Suspension

Having interpreted Article 136(2)(a), Justice Thande ordered: “The declaration of invalidity of the election is suspended until after the next general election is held to allow the 2nd Respondent to correct the defect.” The constitutional problem lies not in the mere existence of a suspension remedy, but in whether this particular order falls within the legitimate purpose and limits of that remedy.

3.2 Kenyan Law Recognizes Suspended Declarations

Any categorical proposition that Kenyan courts lack power to suspend a declaration of invalidity is no longer sustainable. Kenyan courts have used the remedy in constitutional litigation for more than a decade. In Constituencies Development Fund Board v Institute for Social Accountability, the High Court treated suspension as part of the court’s just and equitable remedial jurisdiction. In Marilyn Muthoni Kamuru v Attorney General, the High Court suspended invalidity to avoid disruption to a constitutionally essential Cabinet. In Law Society of Kenya v Kenya Revenue Authority, the High Court accepted the existence of the remedy while emphasizing that it must be cautious, sparing and consistent with constitutional supremacy.

The decisive authority is Cabinet Secretary for the National Treasury and Planning & 4 Others v Okioti & 52 Others [2024] KESC 63. The Supreme Court held that Article 23(3) provides wide remedial latitude and expressly endorsed suspension of declarations of statutory invalidity where necessary. It set out factors including the risk of a legal lacuna, comparative injustice, availability of legislative cures, impact on rights, good government, prejudice, and the appropriate period of suspension. The Court of Appeal in National Assembly & 47 Others v Okioti & 169 Others [2024] KECA 39 similarly described the jurisdiction as narrow and appropriate only in limited circumstances.

We take the liberty to cite four full holdings in the Supreme Court case of Cabinet Secretary (above) because this jurisdiction is the contested battleground of this article.

50. Kenya was a democracy. Any legislation enacted was deemed to be responsive to the needs of the people. The proper procedure before reaching such a manifestly far reaching finding, was for there to have been a specific plea for unconstitutionality raised before the appropriate court. The plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against the Constitution before finding it unconstitutional and specify the reasons for such a finding. Once a court was satisfied that a statute or provision was unconstitutional, the next step was to make a declaration to that effect. In Kenya, the position was that the impugned statute was no longer deemed to exist and could not be the subject of adjudication. The effect of a declaration of unconstitutionality was that the status quo ante was restored.

51. Where a declaration of invalidity posed an existential crisis, courts had tailored mechanisms for handling the same. One of them was the remedy of suspension of invalidity. A suspended declaration should only be issued where in the public interest, there existed a set of facts that were very unique and demanded for that suspended declaration, such as to avoid a vacuum in the law, a threat to the rule of law, lawlessness, chaos or anarchy. Certainly, it may apply to the questions posed hereinabove as to resolving a possible crisis in public law policy and practice.

55. In the event that a declaration of unconstitutionality of a statute or part of thereof, was sought:

1. there was a general but rebuttable presumption that a statutory provision was consistent with the Constitution.
2. The party that alleged inconsistency had the burden of proving such a contention.
3. In construing whether statutory provisions or part thereof offend the Constitution, courts must subject the same to an objective inquiry as to whether they conformed with the Constitution.
4. The court must determine the object and purpose of the impugned statute and consider the mischief which the statute sought to cure and/or arrest.
5. The court must clearly set out what provision was unconstitutional by juxtaposing the offending provision against the Constitution.
6. A court must clearly and with precision explain the finding of unconstitutionality.
7. The court must consider the effect of that declaration and, where necessary, suspend the application of that unconstitutionality for a prescribed time to allow for parliament to change the law by either making it achieve its purpose without being unconstitutional or by removing the unconstitutional provision.

56. The following guidelines may be helpful where the court was minded to issuing a suspension of declaration of invalidity:

1. suspension of invalidity was a remedy that ensured the just and equitable relief, while ensuring that there was no disruption to the regulatory aspects of the statutory provision that was invalidated.

2. The declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship.
3. Whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect than would be the case if the measure were kept functional pending rectification.
4. Whether there were multiple ways in which the Legislature could cure the unconstitutionality of the legislation.
5. The right in question will not be undermined by suspending the declaration of invalidity.
6. Whether the suspension would be in interests of justice and good government, that was, whether the declaration of invalidity caused more than an inconvenience but did not go so far as to require the threat of a total breakdown of government.
7. A court must balance the interests of the successful litigant in obtaining immediate constitutional relief and the potential of disrupting the administration of justice.
8. Whether there would be any countervailing considerations of hardship, prejudice or harm that would result from the continued operation of the statutes.
9. Period of suspension: the court should consider:
 - i. the government's conduct;
 - ii. whether there was any legislation in the pipeline; and
 - iii. the nature and severity of the continuing infringement.

The correct doctrinal question is therefore not “Can a Kenyan court ever suspend invalidity of a statute?” It can. The question is: “Can a Kenyan court suspect the invalidity of Executive actions that expressly violate the Constitution and if so, what exactly may be suspended, for what purpose, for how long, and with what effect where the underlying command is an entrenched constitutional election date rather than an unconstitutional statutory provision?”

3.3 Why Owiso Is Materially Different from the Leading Suspension Cases

The leading Kenyan suspension cases largely concern statutes, institutional arrangements or regulatory schemes that a legislature or other constitutional actor can repair during a defined interim period. The temporary continuation preserves order while the defect is cured. Owiso is different. The constitutional text itself fixes the electoral formula. Neither IEBC nor Parliament can amend Article 136(2)(a) by ordinary administrative or legislative action.

That difference matters. A suspended declaration is easiest to justify where the suspension creates time in which a competent institution can cure an unconstitutional statutory law. In Owiso, the order extends “until after the next general election.” If that election is held in 2027, the suspension does not merely preserve an interim legal framework while a defect is repaired; it permits the constitutionally disputed event itself to occur before the declaration revives. The remedy therefore risks consuming the right it purports to preserve.

3.4 The Supreme Court’s 2024 Guidelines Applied to Owiso

Applied to the Supreme Court’s Okoiti framework, the Owiso order raises at least six difficulties.

First, cure. The order says the suspension allows IEBC “to correct the defect,” but it does not identify a lawful corrective step that can be completed after the allegedly unconstitutional 2027 election. A cure should ordinarily precede the event whose validity is disputed.

Second, duration. The Supreme Court emphasizes a prescribed period of suspension. “Until after the next general election” is event-based and potentially self-defeating rather than a short, definite period calibrated to the minimum time necessary for corrective action.

Third, rational connection. Avoiding chaos is a legitimate judicial concern, but the remedy must be rationally connected to constitutional compliance. Allowing the disputed election date to arrive before the declaration takes effect requires a more specific explanation of how the suspension advances, rather than postpones, compliance.

Fourth, minimal impairment. The judgment does not appear to demonstrate why less constitutionally intrusive alternatives were unavailable: for example, an expedited compliance timetable, a short suspension accompanied by mandatory IEBC reporting, directions for urgent appellate review, or other structural relief designed to move the system toward the earliest constitutionally defensible election.

Fifth, prejudice. The suspension protects institutional stability but burdens the electorate’s asserted Article 38 interest in electoral renewal at the constitutionally prescribed time. The judgment needed to weigh those competing constitutional interests expressly rather than treating logistical disruption as effectively decisive.

Sixth, legal vacuum. The strongest traditional justification for suspension is avoidance of a regulatory vacuum or breakdown in government. Yet the Constitution itself contains continuity language for the presidency, and other offices require office-specific analysis. That reduces the force of a generalized assumption that immediate legal recognition of the breach would necessarily extinguish government.

3.5 Interpretation, Invalidity and Remedy Must Be Kept Distinct

The judgment usefully demonstrates why constitutional interpretation and constitutional remedy should be separated. Interpretation asks what Article 136(2)(a) requires. Invalidity identifies the legal consequence of inconsistency under Article 2(4). Remedy determines how a court should manage the consequences of its finding within its constitutional jurisdiction.

A court may possess remedial power to delay the practical consequences of invalidity without possessing power to rewrite the constitutional command itself. The analytical error would therefore

be to say that Owiso Court's suspension changes the text of COK 2010 Article 136(2)(a). More precisely, the concern is that an overbroad suspension can produce a practical result indistinguishable from temporary non-enforcement of the command. That is why the jurisdiction must remain exceptional, tightly reasoned and temporally limited.

3.6 The Separation-of-Powers Concern Reframed

The separation-of-powers objection is strongest when framed as a limit on remedy rather than a denial of jurisdiction. Courts necessarily fashion constitutional remedies. But they do not possess constituent power under COK 2010 Chapter sixteen, Articles 255-257. A remedy that effectively authorizes a different electoral cycle without a clear route back to compliance risks crossing the boundary between managing constitutional consequences and altering constitutional time.

3.7 Conclusion on Suspension

The suspension in Owiso should therefore be challenged as an arguably improper exercise of an existing remedial jurisdiction. This narrower proposition is doctrinally strong. The Supreme Court's recognition of suspended declarations is examined, yet this article maintains that the remedy must not become a mechanism through which a constitutionally fixed election date is displaced for an entire electoral cycle. The decisive issue is proportionality, purpose, duration and the availability of less impairing remedies.

4. THE NO FIVE-YEAR TERM FINDING: WHY THE DISRUPTION ARGUMENT FAILS

4.1 The Court's Explicit Holding

Justice Thande made a finding that is devastating to the IEBC's position and powerfully supports the Petitioners' case. The Court held:

"It is clear that the term of office of the President is not pegged on years. The provision states unequivocally that the term of office of the President shall begin on the date the President is sworn in and shall end when the person next elected President pursuant to Article 136(2)(a), is sworn in. The wording is explicit and there can be no other way of interpreting it other than as provided. As such, contrary to the assertion by the Respondents, there is no provision in the Constitution that guarantees to the President a 5-year term."

And further:

"Declarations were made that, by operation of Article 136(2)(a) of the Constitution, the term of office of the President is not 5 years, and neither Article 142 nor any other provision of the Constitution confers upon the President a five-year term in office."

4.2 The Implications

This finding directly rebuts the IEBC's argument that the Petitioners' interpretation would "truncate" the President's term. The Court found there is no guaranteed term to truncate. The President's term is not a fixed five-year entitlement that begins on election day and expires automatically after five calendar years. It is a contingent term that begins on swearing-in and ends only upon the swearing-in of a successor.

The Supreme Court in County Assemblies Forum reinforced this position, holding that "public office to which a portion of the sovereignty of the people... attaches.. does not vest in the holder of the office the right to property of the office." The Court cited with approval the Court of Appeal's finding in Justice Philip K. Tunoi v Judicial Service Commission that "security of tenure in public office simply means that a public officer shall not be suspended or removed or dismissed except for cause as provided by law and after due process. It cannot be expanded to grant a right to public office."

The same logic extends, by structural implication, to other elected offices. Article 142(1) is explicit. Article 102(1) ties parliamentary expiry to the election date, not to a five-year anniversary. Article 177(4) does provide a five-year term for county assemblies, but even that is synchronized to the general-election date under Article 177(1)(a). The Constitution does not create a uniform five-year entitlement across all offices.

The "disruption" argument therefore fails at its root. There is no vested five-year entitlement to disrupt. The Constitution prescribes an election date. The institutions failed to honour it. The resulting disruption is a consequence of institutional default, not of judicial interpretation.

5. WHAT HAPPENED AFTER 11 AUGUST 2026?

Nothing in the judgment means that Kenya ceased to exist as a State at midnight on 11 August 2026. Existing laws did not evaporate. Courts did not lose jurisdiction. Public servants did not cease working. Police officers retained lawful authority. The Treasury continued operating.

However, something constitutionally significant occurred on the logic of the High Court judgment: the date identified as the constitutionally prescribed moment for presidential electoral renewal passed without that election taking place. The formal declarations in Owiso were limited to the presidential election under Article 136(2)(a). They did not adjudicate the expiry of Parliament, county assemblies or governors.

The analysis that follows therefore does two different things and must keep them distinct. First, it describes the direct legal consequences of the Owiso holding for the presidency and IEBC. Second, it tests whether the Court's method of calculating the synchronized election date should, by textual and structural reasoning, extend to Articles 101, 102, 177 and 180. Those extensions are arguments advanced by this paper; they are not holdings of Justice Thande.

This produces what the paper calls a condition of "borrowed constitutional time": a descriptive framework for examining institutional continuity after the constitutionally prescribed opportunity for renewal has passed. The phrase does not itself determine legality. The consequences must be derived office by office from the relevant constitutional text.

6. ARTICLE 259 AND THE LIMITS OF STRUCTURAL HARMONIZATION

6.1 The Harmonization Argument

Article 259(1) requires that the Constitution be interpreted in a manner that promotes its purposes, values, and principles, and that promotes coherent governance. A court might argue that despite different formulations in Articles 102, 142, 177, and 180, the structure of the Constitution demands a

harmonized reading: all terms should be read as expiring and renewing on the same synchronized election date, with continuity provisions applied by analogy where necessary.

6.2 Why Harmonization Cannot Override Clear Text

This argument has force, but it has limits. Article 259 is an interpretive directive, not a license to ignore textual specificity. The Constitution does not use one formula for all offices. It uses several:

The President: Article 142 ties the end of the term to the swearing-in of the next elected President.

Parliament: Article 102 says the term of each House expires on the date of the next general election.

Governors: Article 180 fixes their election to the synchronized date, but provides no Article 142 equivalent for every ordinarily elected governor.

County Assemblies: Article 177 synchronizes their election but separately says the county assembly is elected for five years.

These are not stylistic variations. They produce different legal effects. Article 259 cannot transform "expires on the date of the next general election" into "continues until the successor assumes office." That would not be interpretation. It would be redrafting.

The Supreme Court in County Assemblies Forum held that "no constitutional provision is more superior to the other. They all rank equally and must all be interpreted and applied together to give them their full tenor and meaning." But the Court also held that the two provisions can "both be given effect at the same time"—meaning that the five-year term in Article 177(4) operates within the framework of the synchronized election date in Article 177(1)(a). The Court did not hold that Article 177(4) overrides the election date, or that Article 102 can be read as providing continuity beyond the election date.

Justice Thande used Article 259(1)(c) as a computational rule to determine the fifth year under Article 136(2)(a). She did not use it to harmonize away the textual differences between Articles 102, 142, 177, and 180. The Court's methodology therefore supports, rather than undermines, the position that textual specificity must be respected.

6.3 The Supreme Court's Methodology

Kenyan Supreme Court jurisprudence favors purposive interpretation. However, purposive interpretation still begins with text. The Court has never held that structural harmony can override express language where that language was clearly intended to establish distinct legal consequences.

The present case cannot be pointed to as one of latent ambiguity. The Constitution says different things about different offices. The most responsible interpretive conclusion is that the Constitution intended different consequences, or that the differences reflect drafting asymmetries whose structural effects must now be acknowledged rather than harmonized away.

6.4 Conclusion on Harmonization

Article 259 requires coherence, but coherence cannot mean uniformity where the Constitution has chosen differentiation. The textual discrepancies must be taken seriously. They determine the legal condition of each institution after 11 August 2026.

7. THE WAR EXCEPTION AND CONSTITUTIONAL SILENCE: ARGUMENTUM A CONTRARIO

7.1 The Expressio Unius Principle

Article 102(2) provides that when Kenya is at war, Parliament may extend its term by resolution supported by two-thirds of each House, for periods not exceeding six months at a time, subject to an overall limit.

The existence of this express extension mechanism generates a powerful interpretive inference. The Constitution contemplated at least one circumstance in which Parliament might need to remain beyond its ordinary timetable: war. It prescribed special procedures and temporal limits for that circumstance.

Under the principle of *expressio unius est exclusio alterius*, the express regulation of extension during war implies that no other extension mechanism exists for peacetime. If the Constitution had intended Parliament to continue indefinitely, or even temporarily, when an election is missed for non-war reasons, it would have said so. Its silence is constitutionally significant.

7.2 The Necessity Doctrine Objection

One might object that constitutional necessity permits temporary continuation to preserve the State, even without an express provision. Many constitutional systems recognize necessity doctrines.

Conversely, necessity in constitutional law is typically an emergency doctrine, invoked when the survival of the State is threatened and no other constitutional path exists. Here, a constitutional path does exist: the election should have been held. The failure to hold it was an institutional choice, not an unavoidable necessity. The IEBC had years to prepare. Parliament had years to legislate clarification. The "necessity" of continuing past 11 August 2026 was manufactured by administrative default, not by irresistible force majeure.

Moreover, necessity doctrines are temporary and self-limiting. They do not authorize indefinite continuation. The longer the delay, the weaker the necessity argument becomes.

7.3 Conclusion on the War Exception

Article 102(2) is not merely a war provision. It is evidence of constitutional intention. The Constitution knows how to extend parliamentary terms. It chose to regulate that extension only for war. The absence of a peacetime extension mechanism is therefore a deliberate constitutional silence, not an oversight to be filled by judicial inference or institutional inertia.

8. COMPARATIVE CONSTITUTIONAL LAW: AFRICAN AND GLOBAL PERSPECTIVES ON CONSTITUTIONAL TIME

8.1 The South African Constitutional Court: Elections Must Proceed Despite Emergency

In SA Electoral Commission, the South African Constitutional Court was asked to authorize the postponement of local government elections beyond the constitutional deadline. The Electoral Commission sought the postponement on the ground that the COVID-19 pandemic made it impracticable to hold voter registration and prepare for elections within the 90-day window after the expiry of municipal councils' terms.

The Constitutional Court refused. It declared the Minister's proclamation of the election date unconstitutional and invalid, and ordered that elections be held "on or before 1 November 2021, with or without a voter registration weekend." The Court made clear that "come what may, the elections had to be held on or before 1 November 2021." In the follow-up judgment [2021] ZACC 30, the Court reiterated: "This judgment does not detract from the importance of adherence to deadlines imposed by election timetables."

The significance for Kenya is stark. South Africa faced a genuine public health emergency — a pandemic that had disrupted every aspect of public life. Nevertheless, the Constitutional Court still held that the election deadline was constitutionally binding and that the Electoral Commission could not be relieved of its duty to comply. If a pandemic does not justify postponement, the IEBC's claim of administrative inconvenience in Kenya is manifestly insufficient.

8.2 The Nigerian Supreme Court: No Court May Extend a Constitutional Term

In Ladoja, the Nigerian Supreme Court confronted a case of severe constitutional disruption. Governor Ladoja of Oyo State had been unconstitutionally impeached and removed from office for a period of 11 months. The Supreme Court nullified the impeachment and reinstated him. The Governor then sought a declaration that his constitutional four-year term should be extended by 11 months to compensate for the period of illegal removal.

The Supreme Court refused. Mohammed JSC held explicitly:

"The Federal High Court, whose decision the Supreme Court affirmed on the merits, had explained that extending the term "would have the effect of elongating or extending the plaintiff's tenure of office beyond 29 May 2007, and push same to 29 April 2008. That is a thing that will clearly offend the provisions, particularly section 180(2)(a) and (b) of the Constitution."

The significance for Kenya is instructive and powerful. Even when a constitutional office-holder has been illegally deprived of office for 11 months — a genuine constitutional wrong requiring judicial remedy — the Supreme Court still held that no court possesses the power to extend the constitutional term. If a court cannot extend a term to remedy an actual unconstitutional deprivation, it certainly cannot suspend a constitutional election date to avoid administrative disruption.

The Ladoja principle reinforces the argument in Section 3 of this paper. Justice Thande's suspension was not merely an exercise of judicial restraint. It was an attempt to extend the constitutional calendar by 12 months. No Kenyan court possesses that power, any more than the Nigerian Supreme Court possesses the power to extend a governor's four-year term.

8.3 The Common African Constitutional Principle

These two decisions, from the apex courts of Africa's two largest economies, establish a consistent principle: constitutional time-limits for elections and terms are binding, non-extendable, and not subject to judicial suspension for reasons of practical convenience or even emergency.

The South African case establishes that election deadlines survive genuine public emergencies. The Nigerian case establishes that term ceilings survive actual unconstitutional deprivation. Together, they demonstrate that the "chaos" and "disruption" arguments accepted by Justice Thande are constitutionally insufficient.

8.4 The Venice Commission and Global Standards

The Venice Commission's analysis of electoral postponement in Kyrgyzstan emphasized that continuation of a legislature beyond its mandate must be exceptional, justified, and limited in scope. The continuing legislature should principally preserve necessary governmental functions rather than use the period for extraordinary measures.

Kenyan law has not adopted prorogatio as binding doctrine. The comparative question remains instructive: if Parliament must continue temporarily, should that continuity carry the same unrestricted authority as a freshly renewed mandate?

8.5 The Moldovan Warning

Moldovan constitutional jurisprudence has warned against the "permanentisation" of interim governance. This is the precise risk Kenya now faces. A temporary arrangement, initially justified by administrative disruption, risks becoming a de facto amendment to the electoral calendar through institutional inertia.

9. THE DOCTRINE OF BORROWED CONSTITUTIONAL TIME

9.1 Definition and Scope

This paper proposes, as an analytical and doctrinal framework, the concept of borrowed constitutional time.

The doctrine describes the condition of an office-holder who continues to exercise constitutional authority after the constitutionally prescribed moment of electoral renewal has passed without that renewal occurring.

It is not a grant of legitimacy. It is a recognition of legal reality. The office-holder continues to occupy the office. The Constitution may even provide textual support for that continuity. Nonetheless, the office's democratic mandate has not been renewed. The authority is therefore held on loan from the constitutional text, not freshly delegated by the sovereign people.

9.2 Application to the Presidency

Article 142(1) states that the presidential term begins when the President is sworn in and ends when the person next elected President in accordance with Article 136(2)(a) is sworn in. Under present circumstances, no successor has been elected, and there is substantial textual support for continued occupancy.

It would be inaccurate to state that President William Ruto automatically became an unlawful occupant at midnight on 11 August. The Constitution prevents the presidential office from becoming empty merely because an election has not produced a successor.

Yet according to Justice Thande's interpretation, the constitutional occasion upon which citizens were entitled to renew, withdraw, or redirect presidential authority has now passed. The President therefore possesses institutional continuity without contemporaneous electoral renewal.

The distinction is simple: continuity answers who exercises power; electoral renewal answers from where the continuing mandate comes. Those are not the same question.

9.3 Application to Parliament

Parliament presents the sharpest extrapolative question. Article 102(1) states that the term of each House expires “on the date of the next general election.” Unlike Article 142, it contains no express provision that Parliament continues until a successor Parliament assumes office.

Justice Thande formally determined the presidential election date under Article 136(2)(a); she did not issue a declaration under Articles 101 or 102. Because the Constitution synchronizes the principal elections, this paper argues that her computation supplies a powerful basis for contending that 11 August 2026 was also the relevant general-election date for Article 102. But that conclusion remains an extension of the judgment and requires authoritative adjudication.

If a court accepts that extension, Parliament’s unrestricted post-11 August mandate becomes constitutionally vulnerable. If a court rejects it, Parliament’s ordinary authority continues. The distinction is crucial: the present paper advances a serious constitutional challenge; it should not present the expiry of Parliament as an already adjudicated fact.

The High Court in Karani declared that county assembly terms expire on the date of the next general election. By parity of reasoning, Article 102’s express language strengthens the argument that legislative authority is tied to the synchronized election date. The precise consequences of a missed election, however, remain to be determined.

9.4 Application to County Assemblies and MCAs

Article 177(4) says: “A county assembly is elected for a term of five years.” This differs from Article 102. The express five-year term gives MCAs a textual argument unavailable to Parliament in exactly the same form.

As against that, Article 177(1)(a) requires their election on the synchronized general-election date. The Supreme Court in County Assemblies Forum held that there is no conflict between these provisions: the synchronized date governs, and the five-year term operates within that framework. The Court of Appeal in Muge reached the same conclusion.

The High Court in Karani went further, declaring that county assembly terms expire on the date of the next general election. If that declaration is correct, then county assemblies face the same mandate-exhaustion problem as Parliament after 11 August 2026.

Granted that the five-year term in Article 177(4) provides a residual constitutional lifeline that Parliament lacks, the collision between the five-year term and the missed election date produces a distinct constitutional problem: the term may not have expired, but the constitutional mechanism for renewing the assembly has failed. The assembly therefore operates on borrowed time, but of a different character than Parliament’s.

9.5 Application to Governors

Article 180 synchronizes gubernatorial elections with the general election. But the Constitution does not contain for the ordinary elected governor a provision identical to Article 142(1). Article 182(6) applies specifically to persons assuming office through vacancy.

The Employment and Labour Relations Court in Kimeli v Governor, Nandi County [2023] KEELRC 2578 held that “the governor holds office until the next election when his term end together with the term of office of the county executive committee.” The Court cited Article 180(1) and noted that a re-

elected governor must constitute a fresh executive committee. This confirms that the governor's term is tied to the election cycle, not to a fixed five-year anniversary.

For an ordinarily elected governor, the textual basis for unlimited continuity is considerably less explicit than for the President. The governor's position therefore requires urgent judicial clarification. On the most rigorous textual reading, gubernatorial authority after 11 August 2026 rests on the slenderest effervescent constitutional thread.

10. THE PRESCRIPTIVE DIMENSION: THE PATH TO CONSTITUTIONAL RESTORATION

10.1 The Role of the Appellate Courts

The High Court judgment is capable of appellate review. Given the national importance and temporal sensitivity of the questions, the preferable route is an expedited appeal through the Court of Appeal and, if the constitutional threshold is met, the Supreme Court. The appellate courts should determine at least the following questions:

- (a) Was Justice Thande's interpretation of Article 136(2)(a) correct?
- (b) Was the suspension of invalidity a lawful and proportionate exercise of remedial jurisdiction under Kenyan constitutional jurisprudence?
- (c) What remedial orders can constitutionally respond to a missed election date without judicially rewriting the electoral calendar?
- (d) To what extent, if any, does the Article 136 computation govern Articles 101, 102, 177 and 180?
- (e) What is the legal status of legislation and other exercises of political authority undertaken after the date a competent court ultimately determines to be the relevant point of mandate expiry?

An advisory opinion under Article 163(6) should not be assumed to be automatically available. That jurisdiction is constitutionally limited to requests by specified public bodies on matters relating to county government. Any advisory route would therefore first have to satisfy the Supreme Court's jurisdictional requirements. Expedited appellate adjudication is the cleaner route in the existing dispute.

10.2 The Role of Parliament

Parliament should not presume either that its mandate has unquestionably expired or that the constitutional issue is inconsequential. Pending authoritative determination, constitutional prudence would support restraint on measures that would irreversibly alter the political or constitutional order.

Parliament can facilitate resolution by ensuring that any legislation genuinely necessary for electoral administration is processed urgently and transparently; by avoiding any attempt through ordinary legislation to alter a constitutional election formula; and by supporting expedited judicial clarification. If a court ultimately holds that Article 102's expiry date passed on 11 August 2026, the validity of subsequent parliamentary action will then require principled treatment under doctrines such as necessity, de facto authority, prospective relief and constitutional continuity.

10.3 The Role of the IEBC

The Independent Electoral and Boundaries Commission must immediately convene to determine the earliest practicable date for a general election. Its continued preparation for August 2027 proceeds on the assumption that the constitutional calendar has been judicially suspended. That assumption is wrong. The IEBC should treat 11 August 2026 as the missed constitutional deadline and organize the earliest possible election.

The Supreme Court in County Assemblies Forum approved IEBC's 2017 decision to hold elections on the earlier date specifically to avoid a constitutional gap. The IEBC in 2026 has done the opposite: it has created the very gap the Supreme Court warned against.

10.4 The Role of Political Parties

Political parties should nominate candidates and prepare for an immediate election. They should not treat the current condition as a de facto extension of the electoral cycle. To do so is to acquiesce in a constitutional default.

10.5 The Role of Citizens

Article 3 imposes the duty to defend the Constitution upon every person. Citizens should demand electoral restoration through lawful protest, litigation, and political pressure. Constitutional sovereignty belongs to the people. Its temporary delegation to office-holders does not become permanent through institutional inertia.

11. THE CONSTITUTIONAL VULNERABILITY OF POST-11 AUGUST LEGISLATION

11.1 The Parliamentary Mandate Question

Article 102(1) states that the term of each House of Parliament expires on the date of the next general election. The difficult premise is identifying that date for purposes of Article 102 after Owiso. Justice Thande did not formally decide that question. This paper argues, from synchronization and identical electoral language, that 11 August 2026 is a strong candidate; but until a competent court so holds, the proposition remains contested.

11.2 The Argument for Challenge

If a court holds that Parliament's term expired on 11 August 2026, legislation enacted thereafter would face a foundational competence challenge: Article 94 vests legislative authority in Parliament, but the authority of a particular Parliament is constitutionally time-bound.

That does not necessarily mean every post-date enactment is automatically void ab initio. Courts may have to consider de facto authority, necessity, reliance, prospective relief, severability, public order and the consequences of invalidation. The Supreme Court's remedial jurisprudence itself cautions against mechanically converting a finding of constitutional defect into avoidable institutional chaos.

The more defensible proposition is therefore that post-11 August legislation would become susceptible to constitutional challenge if Article 102 is judicially held to have expired on that date. The strength of any challenge would depend on the nature of the enactment, the institutional necessity involved, reliance interests, and the remedial orders a court considers just and constitutionally faithful.

11.3 The County Assembly Parallel

A related question arises for county assemblies. Karani declared that county assembly terms expire on the date of the next general election, while Article 177(4) separately provides a five-year term. County Assemblies Forum held that the synchronized election date and the five-year provision must be read together. A missed election exposes a tension not squarely resolved by those cases.

County legislation after 11 August 2026 may therefore be vulnerable if a court concludes that the relevant assembly mandate had expired. But, as with Parliament, invalidity should not be asserted as an accomplished judicial fact. The issue requires authoritative determination and office-specific remedial analysis.

11.4 Necessity, De Facto Authority and Remedial Consequences

If mandate expiry is established, a court would still have to decide what follows. Measures essential to public finance, security, health, elections and continuity of basic government may attract stronger necessity or de facto-authority arguments than partisan, structural or long-term transformative legislation. The relevant doctrines should be treated as remedial safeguards against collapse, not as substitutes for electoral renewal.

11.5 Conclusion on Legislation

The revised conclusion is deliberately narrower: laws enacted after 11 August 2026 are not presently proven by Owiso to be invalid. They may, however, become constitutionally vulnerable if the synchronized-date reasoning is extended to Article 102 or the relevant county provisions and if a court determines that the legislative mandate had expired. That formulation preserves the paper's central warning without converting an unlitigated implication into an adjudicated rule.

12. THE GOVERNOR AND MCA QUESTIONS REVISITED

12.1 Governors: The Missing Continuity Clause

Article 180(1) synchronizes gubernatorial elections with the general election. Article 182(6) provides continuity only for governors who assume office through vacancy.

The Constitution does not provide every ordinarily elected governor with an express continuity clause equivalent to Article 142. This is not a drafting oversight to be cured by judicial inference. It is a textual absence with legal consequences.

The Employment and Labour Relations Court in Kimeli held that the governor's term ends at the next election, and that a re-elected governor must constitute a fresh executive committee. The Court cited Article 180(1) and section 42 of the County Governments Act, which provides that the outgoing county executive committee remains in office only until a new committee is constituted after the election. There is no provision for reappointment or extension beyond that period.

The governor who continues after 11 August 2026 does so without the explicit constitutional protection available to the President. His or her authority is therefore more vulnerable to legal challenge. The proper question is not whether the governor physically remains in office—practical necessity ensures that—but whether the governor's continued authority possesses the same constitutional shield as the President's. It does not.

12.2 MCAs: The Five-Year Term Problem

Article 177(1)(a) requires MCAs to be elected on the synchronized general-election date. Article 177(4) says a county assembly is elected for five years.

The Supreme Court in County Assemblies Forum resolved the apparent tension between these provisions by holding that they are not in conflict and can both be given effect: the synchronized date governs the timing of elections, while the five-year term describes the duration of the mandate. The Court noted that the 2017 election reduced the first-term MCAs' tenure by approximately eight months as a transitional compromise, but that by 2022 the transition was complete and the cycle restored.

After 11 August 2026, the question is not whether the five-year term and the synchronized date can coexist in normal times. They can. The question is what happens when the synchronized date passes without an election. In that abnormal condition, the five-year term may provide a residual constitutional lifeline that Parliament lacks. Alternatively, the five-year term and the missed election date may together produce a condition in which the assembly's authority is simultaneously protected by time and undermined by the failure of electoral renewal. This ambiguity requires authoritative judicial clarification.

12.3 The Devolved Dimension

Article 1 declares that sovereign power is exercised at both national and county levels. The constitutional inquiry must therefore reach all 47 governors, all 47 county assemblies, and all elected MCAs. A theory of electoral renewal that discusses only the President and Parliament is constitutionally incomplete. Devolution is not an appendage. It is part of the sovereign architecture.

13. WHY THIS WAS NOT IDENTIFIED EARLIER: CONSTITUTIONAL VIGILANCE AND INSTITUTIONAL FAILURE

The Constitution was promulgated in 2010. The present Parliament has served since 2022. The IEBC has exercised continuous constitutional responsibility. Political parties employ lawyers. Parliament has legal counsel. The Attorney-General advises government. Kenya possesses an active constitutional bar.

The textual discrepancies examined in this paper were discoverable. They were not hidden in obscure sub-clauses. They appear in the principal provisions governing tenure. The Supreme Court in County Assemblies Forum had occasion to examine the relationship between Articles 177(1)(a) and 177(4), but the case was litigated as a compensation claim for shortened terms, not as a structural inquiry into what happens when the election itself fails to occur. The question of mandate expiry after a missed election date was therefore latent, not addressed.

One must therefore ask: Why did Kenya reach the eve of the disputed election date before the structural implications became a national crisis?

The answer lies partly in drafting and partly in vigilance. The Constitution's provisions may have been developed through different workstreams and assembled without final linguistic harmonization. Relevant institutions had sixteen years to identify and remedy those tensions. They did not.

A constitutional democracy depends not simply upon possessing a Constitution but upon institutions, representatives, and citizens continuously reading, examining, and testing its operation. The present crisis is therefore not merely a drafting problem. It is a problem of constitutional vigilance. Article 3 imposes the duty to defend the Constitution upon every person—not only upon judges during litigation.

14. CONCLUSION: THE CONSTITUTIONAL DEBT REMAINS UNRESOLVED

Kenya's present constitutional condition should neither be exaggerated nor minimized.

It would be an exaggeration to declare that every elected office-holder automatically became an illegal occupant at midnight on 11 August 2026. Owiso formally determined the presidential election-date question, not the tenure of every synchronized institution. The Constitution also contains different continuity and tenure provisions for different offices, and practical necessity weighs heavily against institutional collapse.

It would be equally mistaken, however, to conclude that nothing constitutionally significant occurred. A court of competent jurisdiction held that Article 136(2)(a) prescribed 11 August 2026 for the presidential election, and that date passed without the election. The Court then suspended the declaration of invalidity.

The critical correction made by this revised paper is that suspended declarations are not alien to Kenyan constitutional law. The Supreme Court has expressly recognized them in the context of statutory review. The constitutional challenge must therefore be more exacting: whether the Owiso suspension satisfied the narrow, exceptional and proportional remedial jurisdiction recognized by Kenyan courts, or indeed, can a constitutional imperative be suspended at the fiat of any High Court?

On that question, serious doubts remain. The suspension lasts until after the very general election whose timing is constitutionally disputed; it identifies no short, definite cure period; it does not clearly explain how IEBC can cure the defect after the disputed election has occurred; and it does not fully demonstrate why less impairing structural remedies could not preserve stability while moving the country toward compliance.

The constitutional debt identified in this paper is therefore not that government ceased to exist or that every post-11 August act is automatically void. The debt is the unresolved obligation to reconcile continued political authority with the electoral renewal that the High Court held the Constitution required.

That question takes the debate beyond personalities. It is not principally about William Ruto, individual MPs, governors or MCAs. It concerns the nature and temporal conditions of delegated authority.

The institutions of State are not sovereign. They exercise sovereignty on behalf of the people and under conditions prescribed by the Constitution. Elections are the recurring constitutional mechanism through which the sovereign people renew, redistribute or withdraw authority previously delegated.

When the constitutionally prescribed moment passes without an election, continuity may be necessary. But continuity and electoral renewal are analytically distinct. Necessity may explain why institutions remain operational; it does not by itself create a fresh democratic mandate.

The constitutional dilemma can therefore be reduced to three propositions. First, continuity may be indispensable to prevent institutional collapse. Second, continuity is not equivalent to electoral renewal. Third, exceptional continuity must remain directed toward restoration of constitutional normality rather than becoming an informal extension of political authority through inertia.

The High Court sought to avoid chaos. Kenyan law permits courts, in exceptional cases, to temper the immediate effects of constitutional invalidity. But that remedial power is bounded by constitutional supremacy, proportionality, duration, rational connection, minimal impairment and a demonstrable path to cure. The central appellate question is whether those boundaries were respected in Owiso.

Before 11 August 2026, Kenya could ask: “When is the presidential election constitutionally due?” After that date, the deeper question is: “On what constitutional and remedial terms may political authority continue after the judicially identified opportunity for electoral renewal has passed?”

That question requires urgent attention from the appellate courts, IEBC, Parliament, county institutions, constitutional scholars, political leaders and citizens.

The textual differences between “expires on the date of the next general election,” “elected for a term of five years,” and “until the person next elected assumes office” are consequential. They may produce different legal outcomes for Parliament, county assemblies, governors and the Presidency. Those outcomes should be adjudicated rather than assumed.

Article 3 acquires renewed significance. The obligation to respect, uphold and defend the Constitution belongs to every person. The ultimate safeguard of constitutional government is not merely the existence of courts, but a constitutional culture that understands political authority as delegated and conditional.

Kenya therefore enters the post-11 August period neither as a State without government nor as a country in which the constitutional question has disappeared. It enters a condition in which continuity persists while the legal consequences of missed electoral renewal remain unresolved.

That is the constitutional debt. It cannot be settled by institutional convenience or by the mere passage of time. Nor can it be settled by overstating what the High Court has already decided. It must be settled through authoritative adjudication and, ultimately, through electoral renewal conducted in accordance with the Constitution as finally interpreted.

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