



Force Majeure in Wartime: Constitutional Doctrine on Emergency and Necessity

Intersection of public emergency powers and private contractual obligations during war

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The Universal Elements of Force Majeure

The legal elements for the qualification of an event as force majeure (vis maior, act of God, or similar doctrines) are:

- (i) that the event is of an external nature, originating outside the control or sphere of influence of the parties;
- (ii) that it could not reasonably be foreseen or prevented through ordinary measures of prudence and diligence; and
- (iii) that it renders performance of a contractual obligation impossible either absolutely or for a determinable period.

Judicial decisions across jurisdictions reveal a universal trend towards restrictive interpretation, ensuring that force majeure remains an exceptional defence.



War as Force Majeure: The Public Law Dimension

War possesses a unique character as force majeure precisely because it is of purely external nature vis-à-vis private law obligations. Unlike commercial impossibility or natural disasters, war's legal character is fundamentally governed by public law before it ever impacts private contractual relations.



Constitutional Emergency Regimes

Activation of special constitutional provisions designed to concentrate authority and enable rapid responses to existential threats to the nation



Governmental Restrictions

Limitations on movement, currency transfers, international trade, and strategic procurement imposed under emergency powers



National Security Measures

Export controls, currency restrictions, strategic resource allocation, and emergency requisition powers exercised in defence of vital state interests



Sanctions Architecture

International and domestic sanctions regimes, including counter-measures, that render certain transactions unlawful

These are fundamentally *public* acts which may render contractual performance impossible, unlawful, or temporarily restricted. War is thus a public law event before it becomes a private law consideration.

War's Impact on Constitutional and Legal Order



Fragmentation of the Legal Order

War produces legal fragmentation across geographical space:

- territories under belligerent occupation law,
- areas of active hostilities where normal legal processes have collapsed, and
- territories under martial law where civilian authority has been subordinated to military command.

Each zone operates under different legal regimes, creating extraordinary complexity for contractual obligations that span these boundaries.

Constitutional Transformation

The constitutional order itself transforms during wartime. Special rules, dormant in constitutional texts for decades or centuries, are triggered to address extreme conditions. These provisions typically grant executive authorities expanded powers whilst simultaneously imposing constraints designed to prevent permanent erosion of fundamental rights and democratic accountability.

The Intersection of Public and Private Law in Wartime

War as force majeure contains an unavoidable public law dimension, but it cannot automatically override private law obligations.

Public Law Influence

The public law consequences of war undeniably influence the interpretation of contractual duties. State emergency measures, requisition orders, sanctions, and security restrictions create the factual matrix within which contractual performance must be evaluated. These measures may render performance impossible, illegal, or commercially impracticable.

Private Autonomy Protection

Yet constitutional and rule-of-law constraints prevent war from becoming a blanket defence that eclipses private autonomy. The principle of *pacta sunt servanda* retains constitutional significance.

Public law measures cannot simply sweep away private obligations without meeting stringent constitutional tests of necessity, proportionality, and legitimacy.

❏ **Critical Principle:** Public law cannot simply override private law autonomy. The relationship between wartime emergency powers and contractual obligations requires careful constitutional balancing.

Constitutional Limits on Wartime Interference with Private Law

Even in wartime, fundamental private law principles remain protected by the Constitution. These protections ensure that emergency powers do not devolve into arbitrary interference with established legal relations.



Protection of Property and Legitimate Expectations

A state's wartime measure must remain lawful, non-arbitrary, and proportionate to the legitimate aim pursued.

However, war uniquely implicates national survival, territorial integrity, security of the population, and emergency reallocation of scarce resources. Constitutional doctrine treats these as **essential interests of the highest order**, capable of overriding legitimate expectations and property rights.



Pacta Sunt Servanda Still Applies

The foundational principle that agreements must be kept retains force during wartime. Contracts do not dissolve by operation of war unless performance becomes **objectively impossible** or performance becomes **illegal** under binding wartime measures with constitutional legitimacy.



Non-Derogable Rights Remain Binding

Certain fundamental rights remain non-derogable even during states of emergency (Art. 64(2) of Ukraine's Constitution). Access to courts, prohibition of discrimination on protected grounds, and minimum procedural fairness constitute limits on how far public law can intrude into private law spheres.

When Public Law Does Override Private Obligations

War may legitimately override private law obligations, but only in narrowly defined circumstances that satisfy constitutional requirements of necessity and proportionality.

01

Illegality of Performance

When performance is expressly prohibited by wartime legislation, executive orders, or applicable sanctions regimes, the contract cannot compel what the law forbids. The principle of legality supersedes contractual obligation. However, tribunals must verify that the prohibition genuinely applies to the disputed performance.

02

Physical or Legal Impossibility

Destruction of essential infrastructure, blockades, mandatory evacuation orders, closure of borders, or prohibition of specific transactions may render performance literally impossible.

03

Temporary Suspension

Public measures may suspend, rather than permanently extinguish, private obligations. Constitutional necessity doctrine favours the least restrictive means of achieving legitimate aims. Suspension allows obligations to revive once the emergency measure is lifted.

- ❏ This framework ensures that force majeure in wartime remains an exceptional defence, invocable only when genuine constitutional necessity justifies subordinating private contractual rights to overriding public imperatives.



Thank you!