Why Restricting Tourist Visas to Russians is Legitimate

Sanctions, EU law and conditional gradualism of travel rights

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In the aftermath of Ukrainian President Zelenski's call on the EU to introduce a ban on short-term 'tourist' visas for Russians wishing to travel the Schengen area, a lively debate on the issue erupted, featuring important interventions not last on this website. For instance, this article by Sarah Ganty argues that an EU tourist visa ban would be ethically wrong and unlawful. However, the opposite is true. There is no absolute right to travel through the EU.

Arguments against a tourist visa ban

Typically, opposers of a tourist visa ban raise two points: First, they suggest that any form of 'Collective punishment' for government actions is ethically wrong and goes against fundamental EU law. Second, they argue that there are no provisions in existing EU migration law that enact such collective punishment and therefore there is no legal basis for a widespread reduction in short-term travel rights on the grounds of nationality.

These arguments are then often accompanied by other considerations on the political opportunity of such a ban; it is often suggested, for instance, that the limitation of short-term visas would undermine the capacity of the Russian liberal opposition to escape prosecution.

Is EU law against 'collective punishment'?

Opposers of a visa ban suggest that it would represent a form of 'collective punishment' which would violate a fundamental aspect of European law. This is, arguably, wrong: it is, in fact, in the very nature of the European Union – a hybrid organization where parts of the interactions between the European institutions and the individuals are mediated by national governments—to counter the wrongdoings of a country's government with decisions that impact all its citizens without discriminating for personal responsibility in such decisions.

Examples are countless, even though they do not necessarily apply to the field of migration: from macroeconomic conditionality in cohesion funds, to the rule of law mechanism used to control the flow of disbursements under the latest Multiannual Financial Framework, to the sanctions under the Excessive Deficit Procedure, to the sanctions for delayed or wrong implementation of EU law, to the cancellation of Horizon Europe ERC grants to British Citizens after the British failure to agree to scientific cooperation after Brexit—the list goes on and on. In all these situations, citizens collectively suffer -directly or indirectly—from the actions of their governments regardless of their personal responsibility in such actions. This is impossible to avoid in any multilevel institutional system, not only in the case of the EU, but also in the case of individual member states which organize some of the relationships between central and regional or local governments in a similar way. In sum, the principle that citizens as a whole bear responsibility for the actions of their government is *all over* European law, both primary and secondary; and it is part of virtually any national institutional system too.

This misconception likely originates in the way the war is framed in the discourse. If this is *Putin's* war, rather than *Russia's war,* then it only makes sense that Putin, and not the other Russian citizens, pay for it. The proponents of this approach seem to suggest, perhaps implicitly, that in countries without robust democratic processes, responsibility cannot be collective as citizens cannot be held accountable for actions of a government they have little choice upon. Such perspective not only deprives nations of agency—it is

entirely possible that some may in fact prefer non-democratic forms of government—but also ignores the reality of international politics of our times. The state remains the prime subject of international law; the Russian state and its public machinery, which mobilizes material and symbolic resources of the Russian nation, is the aggressor; not an atomistic aggregate of criminal individuals, but a collective organization. Where war crimes and crimes against humanity are committed, responsibility remains personal; but the responsibility for the war as such is squarely on the Russian nation-state.

Is EU migration policy different?

One may be tempted to argue that EU migration policy is a special case which differs from other forms of European public policy, and for some (political) reason, in the specific field of migration law there should be no response to government actions that affect individuals regardless of their responsibility. Under this perspective, the right to travel in the EU from elsewhere is considered akin a fundamental right. This, too, seems wrong- as a matter of principle, and as a matter of law.

When it comes to principles, one may ask whether the right to travel into the EU from elsewhere is a fundamental, inalienable right, or whether instead it is a matter of context. A thought experiment might help to clarify it. One may argue that traveling to Europe is a fundamental personal right that cannot be impacted by a government action. Yet, very few would argue that such a right is absolute no matter the international situation. If the Russian Federation were to invade, for instance, Finland, there would be no question whatsoever on whether to let Russian citizens into the EU with a tourist visa. If the individual right is not absolute, then the individual right is balanced against the right of a polity- the EU- to respond to international political developments. Whether the aggression against a candidate member state is really so minor, when compared to the aggression against a full member state, it is a matter of political preferences, not of law.

Since controlling a country's border is one of the fundamental prerogatives of a state and key element of public power and international politics, In European law (but also in national and international legislation) the *extent and conditions qualifying the right to move* stem from their citizenship of a third country. This is obviously noted in relevant legislation for in consideranda 5 of regulation 539/2001 on visa regimes, where of the right of one person to travel is conditional to the passport they hold.

Even more, the principle of horizontal reduction of travel rights (affecting individuals) following macro-level developments *already exists* in EU migration law: In particular, art. 8.2 of regulation 1806/2018 sets out the conditions according to which the regime of visa-free travel can be restricted. Some of these conditions are *macro* conditions. For instance, art. 8.2(d) indicates that visa-free regime with a country can be suspended if crimes committed by nationals of that country spike. This means that the right of future migrants is conditional on the behaviour of current migrants. Other norms link this visa-free right, instead, to the third country government actions. Now, if individual visa rights can already be changed from a level to another depending on their government's action, these rights can certainly be restricted further if the actions of the government deteriorate further. Of course, a ban on short-term tourist visa does not equate with an absolute ban to travel: other avenues (such as asylum, guaranteed under international law) remain.

In other words, the law *already includes* the principle of gradualism of travel rights dependent on third-country government actions**.** Such principle must have a legal basis in primary law; the crux is extending the applicability of the principle from a two-tiered system (visa-free or visa requirement) into a three-tiered one. This a matter of secondary legislation, not a matter of constitution; the constitutionally-granted right – the fundamental right to escape unjust prosecution – remains completely untouched by short-term tourist visa bans.

A political discussion

To conclude, the discussion about visa rights for Russian citizens is an eminently political discussion. Those who argue that visa travel through the EU is some sort of inalienable right suggest that proponents lack legal bases for their plans, but in fact the opposite is true- no such absolute right to travel through the EU exists, except in case of asylum, and EU migration law makes it clear by introducing gradualism in its visa-free regime. All in all, EU law provides enough flexibility with regard to whether such gradualism can be extended, even though (obviously!) legal texts will have to be amended if a ban to tourist visas is approved. This should not come as a surprise, since in times of crisis, legal bases are nearly invariably used to extend EU law so to ensure the EU can cope with the challenge. Not only the conditions under which a third-country citizen can travel to the EU are a necessary function of the relations between the third country and the EU, but also collective sanctions for wrong governmental behaviour are a well-established practice. Current EU law makes *extensive use of collective sanctions for governmental behaviour*, against member states and against third countries, in nearly all fields of law, including EU migration. Whether and why Russian tourists should be shielded from such approach is something that the opposers of the visa ban should first and foremost discuss in the political arena, rather than hiding their political preferences under the pretense of law.

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