

The COVID Passport Quandary

Introduction

Ever since March 2020, when international travel effectively ground to a halt because of the COVID-19 pandemic, so-called COVID passports have been held up as a panacea. Some sort of widely recognized health certification could, we keep hearing, ameliorate this unprecedented and ongoing crisis in cross-border mobility, and allow us to return to a situation of semi-normality until the virus is vanquished (we hope).¹ However, the challenges to the establishment of a global or even regional COVID passport regime are multiple—which helps explain why, despite all the talk, they still do not exist. Over a year ago, the World Health Organization reported that “[s]ome governments have suggested that the detection of antibodies to the SARS-CoV-2, the virus that causes COVID-19, could serve as the basis for an ‘immunity passport’ or ‘risk-free certificate’ that would enable individuals to travel.”² Things have become even more, not less, complicated since then. There are obvious issues, such as how to ascertain recovery or vaccination status, by whom and with what, since not all regulatory authorities have approved the same serums, and debate remains as to how long antibodies remain effective. These questions bridge national and international, immigration and public health law.

One unique way to ascertain the real pitfalls that exist in the way of a quick rollout of COVID passports is by looking at the history of travel documents and the rise of the modern passport. The story of how we came to the current global passport regime is long, idiosyncratic, and counterintuitive. This *Insight* explores that history, and the lessons we can draw from it in confronting the current challenge.

The Challenge

When COVID-19 became a truly global concern in March 2020, amid all the other distress and sadness, many inveterate travelers were left bewildered. Gone suddenly was something we had long taken for granted: our ability to grab our passport, hop on a plane, and be in a new country—sometimes even without the hassle of obtaining a visa. While some people had the impression that international travel ceased entirely, in truth, countries adopted a scattershot approach to the difficult questions at the nexus of mobility and public health.³ Some kept their borders essentially shut, like Thailand, which reopened only in July after almost a year and a half shuttered. At one point, Italy refused entry to its own citizens, in possible violation of the International Covenant on Civil and Political Rights, which asserts that “[n]o one shall be arbitrarily deprived of the right to enter [their] own country.”⁴ At the other extreme, some states allowed for much traffic with only minimal medical oversight. In between, governments have mandated official or home quarantines for travelers, established travel corridors or bubbles with states with similar infection patterns, or granted special permissions for those proven to be inoculated against or recovered from the virus. In almost all cases, there are reams and reams of new documentation required.

For example, when Qatar, where I live, announced that those vaccinated here would be exempt from quarantine upon re-entry, I traveled for the first time in over a year—to the United States. But now, in addition to the usual necessities and a big bag of facemasks, I made sure to carry my (U.S. government-and Qatar Airways-required) PCR test results from within the previous three days, both my vaccination card and official Ministry of Public Health vaccination certificate, an exceptional return permit (for months, these were very hard to come by as Qatar had basically closed its borders too)—all photocopied in triplicate.

Beyond the confusing and sometime conflicting rules and requirements, and all the new red tape they entail, a more subtle but even greater impediment to easy and well-organized travel in the wake of COVID-19 exists. That is, the pre-pandemic status quo was not, actually, all that orderly. We were simply used to it. While some of us, especially those with “powerful passports,” took for granted our relatively easy international mobility prior to March 2020, we likewise overlooked the fact that the entire system of passports, visas, and the like is, in fact, extremely ad hoc. It is a complex mix of sovereign prerogative and bilateral or regional arrangements and, therefore, not dissimilar to the mass of mixed responses to COVID-19.⁵ Most people, even many lawyers, are surprised to hear that passports are largely unregulated in international law—so much so, that a colleague at the Max Planck Institute for Comparative Public Law and International Law once told me,

“passports aren’t even a topic of international law.”⁶ The current system of passports came about through a process of informal formalization and contingent quirks, not proactive lawmaking. Examples from this story, of how modern passports developed haphazardly during the 20th century, illustrate some of the underlying obstacles to any easy appearance of COVID passports in the 21st.

The Historical Context

Travel documents go back to the beginning of recorded history.⁷ Rulers and other powerful figures issued letters of introduction or other credentials to travelers to help them on their way. This legacy is evident in the antiquated and flowery language still inscribed on the inside cover of my Canadian passport: The Queen requests “all those whom it may concern to allow the bearer to pass freely, without delay or hindrance, and to afford the bearer such assistance and protection as may be necessary.”

Having come and gone through much of European history, by the mid-19th century, passports were largely abolished for travel on the continent. The reasons were varied but an important one was practical: as greater numbers of the upper and middle classes journeyed by railroad, governments had neither the interest nor the capacity to regulate the movement of the affluent.

One exception was in times of civil strife or conflict. Thus, when what we now call the First World War broke out, passport controls were introduced “temporarily.” A U.S. Citizenship Bureau official observed in late 1914 that, hitherto, “[p]assports were not taken very seriously.”⁸ One great irony of this history is that what we now consider to be a ubiquitous and ultra-necessary document developed fortuitously, in a moment of calamity not unlike the one in which we now live. By 1920, the London *Daily Chronicle* published an article disparaging them as “an expensive farce, and one which wastes an enormous amount of time.”⁹ They were, nevertheless, here to stay.

But not for want of effort to eliminate them. The new League of Nations endeavored to return to the pre-war idyl of unrestricted movement.¹⁰ A Provisional Committee on Communications and Transit held a Conference on Passports, Customs Formalities, and Through Tickets in Paris in 1920. The conference’s aim was “to see gradually re-established in the near future” the pre-war status quo and, failing that, deal with the many problems created by the new passport regime. For example, they tried to get all countries to agree to a common format. This conference, and another meeting in 1926, failed to achieve these aims. At best, they issued recommendations that countries could voluntarily adopt.

Another general conference on travel, this time under the aegis of the United Nations in 1963, came to no more success than its League predecessors.¹¹ Instead of officially driven change, contingent factors continued to impact the document. For example, the International Civil Aviation Organization encouraged countries to make their passports machine-readable in the 1970s and 1980s because the boom in international air travel made checking each and every passenger in, by hand, much too cumbersome. Just like the gradual inclusion of photographs in the 1920s, since the 1990s more and more countries have included biometric data in their passports. In my passport, in the very same booklet that includes the archaic request from The Queen, there is “a contactless integrated circuit, which is an electronic device.” This incongruity illustrates a deeper truth: in recent years, as passports have become evermore complex, they are no more governed by international law than before.

Lessons for the Present

So, one lesson from the history of passports is that, for some reason, for this particular topic, it is remarkably challenging to get countries to agree. While so much of modern life is managed, often behind the scenes, to some degree by international law, cross-border movement may well remain an exception. If the history is any indication, innovations will *not* be driven by proactive and formal arrangement between states, which failed in 1920, 1926, and 1963. Rather, just as passports were largely abolished in the 19th century and made machine-readable in the 20th, because of expanding modes of travel, external factors will likely drive change.

Put another way, despite all the talk, no one should hold their breath waiting for a globally recognized and UN-sanctioned COVID passport.

Another lesson is that “temporary” responses to extreme events can calcify into a new reality. The First World War as much as September 11th shows this to be true with respect to the infrastructure of travel. For this reason, perhaps we should be grateful that slapdash responses to COVID-19 have *not* been globally adopted—although a giant wad of paper like the one I brought with me to the United States may simply become another accoutrement of travel.

Indeed, we may come to see the past decades as the exception, not the rule, to having to prove health status to travel. Just like travel letters and safe conduct passes, religious injunctions to control movement in times of plague or other health disasters date back to ancient times.¹² Legal measures gradually developed and, as corollaries, documentation existed to permit travel during health crises. A medical *laissez-passer* is among the

profusion of travel documents that prefigure modern passports. Certificates, for example, attested that people could depart an “area where there is no worry of contagious disease,” during an outbreak of the plague around Marseille in 1720. Bureaucratic consistency in French history means these documents are not dissimilar to the “Attestation de déplacement dérogatoire” that has at times been necessary to leave one’s home in France during the COVID-19 crisis.¹³

Just like European and North American elites, who nostalgically remembered the halcyon days before 1914 when they took passport-free moment for granted (emphasis on elites; the story for almost everyone else was different), we may forevermore look back to pre-pandemic times fondly, when we needed *only* a passport to travel (again, for those of us fortunate enough to have a powerful one).¹⁴

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¹ See, e.g., Sheryl Gay Stolberg and Adam Liptak, *Likely Legal, ‘Vaccine Passports’ Emerge as the Next Coronavirus Debate*, THE NEW YORK TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/us/politics/vaccine-passports-coronavirus.html>.

² Cited in Colin Dwyer, *‘No Evidence’ Yet That Recovered COVID-19 Patients Are Immune, WHO Says*, NPR (Apr. 25, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/25/844939777/no-evidence-that-recovered-covid-19-patients-are-immune-who-says>.

³ *COVID-19 Travel Regulations Map*, INT’L AIR TRANSPORT ASS’N TRAVEL CENTRE, <https://www.iatatravelcentre.com/world.php> (visited June 5, 2021).

⁴ *Italian Nationals Returning to Italy and Foreigners in Italy*, MINISTRY OF FOREIGN AFF. & INT’L COOPERATION (May 13, 2020), <https://www.esteri.it/mae/en/ministero/normativaonline/decreto-iorestoacasa-domande-frequenti/focus-cittadini-italiani-in-rientro-dall-estero-e-cittadini-stranieri-in-italia.html>; OHCHR, International Covenant on Civil and Political Rights, art. 12(4).

⁵ For a bilateral arrangement, see, e.g., *Visa Requirements – Citizens and Permanent Residents of Canada*, U.S. DEP’T STATE BUREAU CONSULAR AFF., <https://travel.state.gov/content/travel/en-us-visas/tourism-visit/citizens-of-canada-and-bermuda.html> (visited June 5, 2021); for a regional arrangement, Treaty on European Union, art. 3(2) (2007); Treaty on the Functioning of the European Union, art. 21, and Titles IV and V (2009); Charter of Fundamental Rights of the European Union, art. 45 (2000).

⁶ Others think differently: see Sara Dehm, *Passport*, in INTERNATIONAL LAW’S OBJECTS 342-356 (Lessie Hohmann & Daniel Joyce eds., 2018).

⁷ See, e.g., the Old Testament, *Nehemiah* 2:7-9.

⁸ Cited in Craig Robertson, *THE PASSPORT IN AMERICA; THE HISTORY OF A DOCUMENT* (2010).

⁹ Cited in Dehm, *supra* note 6.

¹⁰ Conference on Passports and Customs formalities, carton R1092, dossier 5097; Passport Conference, Geneva, 1925, carton R1162-63, dossier 46598; and Conférence des passeports, Genève, 1926, carton R1166-7, dossier 48926, League of Nations Archives.

¹¹ Travel and Tourism Conference - Rome - August 1963, folder S-0859-0001-05, United Nations Archives.

¹² See, e.g., *Leviticus* 13:46.

¹³ Decree of 16 March 2020, Art. 1 (2020). With thanks to David A. Bell for a social media post on this subject.

¹⁴ *Passport Index*, <https://www.passportindex.org/byRank.php>.