

NOTE

BALANCING GOVERNMENT ACTION FOR PUBLIC WELFARE WITH PROTECTION OF INDIVIDUAL RIGHTS: PUBLIC HEALTH EMERGENCIES IN JAPAN AND NIGERIA

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ABSTRACT

During public health crises, especially those involving highly pathogenic disease like Ebola and avian influenza, the need for the government to override certain individual rights is apparent and accepted for the health and welfare of the population as a whole. However, the usurpation of individual rights should not continue longer than is necessary given the circumstances, and striking a balance between necessary action for public welfare and individual liberty interests is often difficult to achieve. This Note explores the available protections for individual rights in times of public health emergencies in Japan and Nigeria, with a specific focus on H5N1 avian influenza and Ebola.

I. INTRODUCTION

In 2004, Le Thi Yen, a mother from Ha Noi, Vietnam lost her young son after the family ate diseased chickens.¹ She was one of many across several Asian countries to lose family members to the avian influenza virus within the span of only a few months. Others, while physically unharmed by the virus, were severely affected financially by the rapid infection and deaths of more than 140 million birds between January 2004 and May 2005.² This highly pathogenic outbreak of the avian influenza virus in 2004 greatly affected poultry farmers in Japan, as approximately 274,654 poultry died or were slaughtered to stop the spread of infection.³ The implementation of an intensive eradication campaign enabled Japan to stop

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1. See WORLD HEALTH ORGANIZATION WESTERN PACIFIC REGION, STOP THE SPREAD: MEASURES TO STOP THE SPREAD OF HIGHLY PATHOGENIC BIRD FLU AT ITS SOURCE 2 (2006), <https://apps.who.int/iris/handle/10665/207541> [<https://perma.cc/YF4M-44AU>].

2. *Id.* at 4.

3. A. Nishiguchi et al., *Control of an Outbreak of Highly Pathogenic Avian Influenza, Caused by the Virus Sub-Type H5N1, in Japan in 2004*, 24 REV. SCI. TECH. 933, 933 (2005).

the outbreak in less than four months.⁴ Avian influenza (H5N1), commonly referred to as “bird flu,” devastated the Asian economy in 2004 and posed a serious threat to human life. The high case fatality rate and the potential for human epidemics made avian influenza a particularly concerning disease.⁵

In 2014 in Western Africa, a two-year-old boy in southern Guinea died after experiencing a high fever, vomiting, and blood in the stool for a few days.⁶ But before his death, he passed Ebola on to his sister, mother, grandmother, and a midwife.⁷ The outbreak in Guinea reached many people, with the typical symptoms being a headache and high fever, followed by vomiting and diarrhea.⁸ This pattern of rapid transmission and death began occurring throughout a number of African countries, including Nigeria. While it is unlikely that there was a single “patient zero,” the boy’s story is indicative of the rapid transmission of the disease. The Ebola outbreak of 2014 in West Africa was “the deadliest occurrence of the disease since its discovery in 1976.”⁹ Beginning with the first reported case on March 23, 2014, the World Health Organization (WHO) estimates 11,315 reported deaths from Ebola and more than 28,000 infected, although this is considered to be an underestimate given the difficulty of collecting data.¹⁰

During a national emergency, specifically a public health emergency or crisis, it naturally becomes necessary for the government to exercise a certain amount of oversight and power to act in the best interest of the nation as a whole. Actions such as quarantines of potentially infected individuals, prohibitions on traveling, and mandatory medical examinations and vaccination may be necessary to prevent the spread of a pathogenic disease like Ebola.

But the dangers of unlimited and unchecked government power to override individual rights are also evident, as well as the poten-

4. *Id.*

5. Giovanni Rezza, *Avian Influenza: A Human Pandemic Threat?*, 58 J. EPIDEMIOLOGY & COMMUNITY HEALTH 807, 807 (2004).

6. Michaelleen Doucleff, *Could a 2-Year-Old Boy Be ‘Patient Zero’ for the Ebola Outbreak?*, NPR (Aug. 25, 2014), <https://www.npr.org/sections/goatsandsoda/2014/08/25/343186293/could-a-two-year-old-boy-be-patient-zero-for-the-ebola-outbreak> [<https://perma.cc/2UPZ-EHFD>].

7. *Id.*

8. Ebola Virus Disease, NHS INFORM, <https://www.nhsinform.scot/illnesses-and-conditions/infections-and-poisoning/ebola-virus-disease> [<https://perma.cc/RRJ5-6AUQ>] (last updated July 9, 2019).

9. *Ebola: Mapping the Outbreak*, BBC (Jan. 14, 2016), <http://www.bbc.com/news/world-africa-28755033> [<https://perma.cc/YY76-3RA8>].

10. *Id.*

tial for harm if these powers are used beyond the necessary circumstances.¹¹ Thus, it is essential that considerations of the limits of governmental power in times of public health emergencies are incorporated into the procedures and preventive measures. Looking to a country's constitution and statutes governing public health emergencies, the language and provisions detailing individual rights and the exceptions to those liberties illustrate the level of commitment to protecting those rights. Specifically, quarantine laws in Japan and Nigeria provide a particularly useful platform for the evaluation of individual rights protection in public health emergencies. As both Japan and Nigeria are large port countries for their respective continents, quarantine law plays a large role in public health emergencies, especially for infectious diseases.

This Note examines the approaches of Japan and Nigeria in confronting public health emergencies and looks to each nation's constitutional and legislative provisions surrounding the exercise of the government's emergency powers and the protection of individual rights. This Note focuses on protections of the individual rights of mobility and property in public health emergencies, looking to the constitutions and quarantine laws of Japan and Nigeria. Focusing on the H5N1 avian influenza strain and Ebola, this Note compares the approaches of Japan and Nigeria using a four-factor system to evaluate each country's individual rights protections. As it currently stands, Nigeria's approach in public health emergencies, especially in cases of pandemic diseases, lacks adequate measures to protect individual rights. Japan, while economically and socially distant from Nigeria, shares many characteristics that enable comparison with Nigeria in terms of public health measures and individual rights protection. This Note advocates for Nigeria to adopt four specific aspects of the Japanese approach to protecting individual rights during public health emergencies. Nigeria is particularly well-positioned to incorporate these changes and improvements in light of the government's success in managing the Ebola outbreak.¹²

Part II describes the Japanese and Nigerian federal governments and details Japanese and Nigerian approaches to individual rights protection during public health emergencies, particularly in the

11. See Ronald Bayer, *The Continuing Tensions Between Individual Rights and Public Health*, 8 EMBO REP. 1099, 1099 (2007).

12. See generally Obinna Ositadimma Oleribe et al., *Nigerian Response to the 2014 Ebola Viral Disease Outbreak: Lessons and Cautions*, 22 PAN AFR. MED. J. 1 (2015) (commenting on how Nigeria responded to the 2014 Ebola outbreak).

context of avian influenza and Ebola. Part II also includes a discussion of the international standard established by the WHO. This Part also discusses the relevant constitutional and statutory provisions of both countries and proposes a four-factor analysis for commitment to protection of individual rights.

Part III examines the constitutional and statutory constructs protecting individual rights and curbing the use of government authority to override those rights in times of public health emergency, and synthesizes four factors from language in the WHO guidelines and general constitutional principles. Using these factors, this Note discusses both direct and indirect language in each country's constitution and various statutes, and analyzes how well these protections are enforced. Following the analysis, two proposals suggest that Nigeria adopt certain aspects of Japan's statutory provisions and approach to public health emergencies involving pathogenic diseases. Notwithstanding the social and economic gap between the two countries, Nigeria's implementation of certain of Japan's strategies will provide increased protection for individual rights.

II. BACKGROUND

A. *Government Structures and Constitutions: Japan and Nigeria*

The governments of Japan and Nigeria, while both modeled on democratic structure, are markedly different in their approach to federal governance. An understanding of each government's structure and approach to governance is necessary to appreciate the differences in approach to individual rights protection.

1. Japan

Japan is a constitutional monarchy composed of forty-seven prefectures, with the emperor representing a symbol of the state and unity of the people.¹³ The Japanese government is based on a constitution that enforces the separation of powers between the legislative, executive, and judicial branches.¹⁴

The Japanese Constitution provides a great deal of autonomy to local governments, which are elected by direct public vote and deal

13. See *Japan*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Japan/-society> [<https://perma.cc/EN46-8T7X>] (last visited Aug. 15, 2019).

14. See generally NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan), English translation available from the Prime Minister's Office of Japan at https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html [<https://perma.cc/AM8Q-SEYD>] [hereinafter JAPAN CONST.].

with many matters of education, social welfare, health and disaster prevention.¹⁵ Prefectural governments are administered by governors and assemblies.¹⁶ This heavy reliance on local government and deference to the governors and assemblies of local communities is evident in the constitutional construction and language explicitly dictating local government control.¹⁷ However, there is a noted difference between the *de jure* powers granted to local governments and the *de facto* reality.¹⁸ The Japanese government is best understood as a system “in which aspects of both central control and decentralization have co-existed but, over time, the balance has shifted gradually towards the latter.”¹⁹

Japan’s current constitution was adopted in 1947 during allied occupation of Japan after World War II.²⁰ With American and Japanese input in the constitutional process, the document moved through multiple drafts, incorporating American ideals of democracy and federalism with elements of Japanese thought and culture.²¹ This duality is reflected throughout the document, especially in the provisions addressing individual liberties.²² The western focus on individual rights and protection from government intrusion upon those rights is strong. However, it remains in the context of a culture with particular emphasis on unity.²³ While there has been considerable debate as to the workability of the Constitution over the years, it has not been amended since its adoption.²⁴

15. *Japan*, ENCYCLOPEDIA BRITANNICA, *supra* note 13.

16. *See id.*

17. *See* Naikaku kanbō [Cabinet Secretariat], *Shingata infuruenza tōtaisaku seihu kodo keikaku* [National Action Plan for Pandemic Influenza and New Infectious Diseases], at 13 (June 7, 2013), <https://www.cas.go.jp/jp/seisaku/ful/keikaku/pdf/national%20action%20plan.pdf> [<https://perma.cc/CG28-25AV>]. Anticipating that prefectures will act independently to address local incidents during public health emergencies, the National Action Plan specifically provides general standards for prefectural governments to use when formulating their action plans. *Id.* at 3. The National Action Plan was amended in 2017, and there is not yet an official English translation available. *See* Naikaku kanbō [Cabinet Secretariat], *Shingata infuruenza tōtaisaku seihu kodo keikaku* [National Action Plan for Pandemic Influenza and New Infectious Diseases] (amended Sept. 12, 2017), https://www.cas.go.jp/jp/seisaku/ful/keikaku/pdf/h29_koudou.pdf [<https://perma.cc/QV93-EXMQ>].

18. *See* FARRUKH IQBAL, *EVOLUTION AND SALIENT CHARACTERISTICS OF THE JAPANESE LOCAL GOVERNMENT SYSTEM* 3 (2001).

19. *Id.* at 4.

20. *See* Lynn Parisi, *Lessons on the Japanese Constitution*, JAPAN DIGEST, Nov. 2002, at 1.

21. *Id.*

22. JAPAN CONST., art. 12.

23. *See id.* art. 1.

24. *See* Parisi, *supra* note 20, at 1.

2. Nigeria

Nigeria is a federal republic composed of thirty-six states and a Capital Territory.²⁵ Much like Japan, there are three separate branches of government: the executive, legislative, and judiciary.²⁶ With the largest population of any country on the African continent, Nigeria has a great diversity of cultures. The current population of Nigeria is just under 200 million, and a 2017 U.N. report projected that Nigeria “will become the world’s third largest country by population.”²⁷

While the power given to the legislature is not absolute, it is given significant leeway to ensure that “existing programs are implemented and administered efficiently, effectively and in a manner consistent with legislative intent.”²⁸ In addition, “[l]egislative oversight seeks to . . . protect the rights and liberties of citizens by curbing the excesses of the government.”²⁹ Specifically, the Nigerian Constitution provides that “[t]he National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof” and “the security and welfare of the people shall be the primary purpose of government.”³⁰

However, while legislative oversight is essential to separation of powers, in reality the legislature often does not possess or exercise the level of power potentially available as stated in the Constitution.³¹ In the young democracy of Nigeria, disconnect between the ideals of separation of powers and how the three branches of gov-

25. *Nigeria*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Nigeria/society> [https://perma.cc/SSA8-BS7N] (last visited Aug. 15, 2019).

26. *Nigeria: Past, Present and Future*, EMBASSY FED. REPUBLIC NIGERIA, <http://www.nigeriaembassyusa.org/index.php?page=nigeria-past-present-and-future> [https://perma.cc/B9R9-V6JH] (last visited Aug. 16, 2019).

27. Yomi Kazeem, *Nigeria’s Population Problem is the Result of Poor Policy Implementation—And It’ll Only Get Worse*, QUARTZ AFRICA (Jan. 5, 2018), <https://qz.com/1171606/nigeria-population-growth-rising-unemployment-and-migration-suggest-things-could-get-worse/> [https://perma.cc/J5J5-ER5U] (citing a U.N. report projecting Nigeria to become world’s third largest country by population by 2050).

28. POLICY & LEGAL ADVOCACY CENTER, *GUIDE TO LEGISLATIVE OVERSIGHT IN THE NATIONAL ASSEMBLY* 3 (2016).

29. *Id.* at 4.

30. CONSTITUTION OF NIGERIA (1999), §§ 4(2), 14(2)(b).

31. See Ejikeme Jombo Nwagwu, *Legislative Oversight in Nigeria: A Watchdog or a Hunting Dog?*, 22 J.L. POL’Y & GLOBALIZATION 16, 19 (2014) (citing corruption in Nigeria rendering the legislature “truly not independent of the executive” and “incapacitated from acting as the watchdog of executive activities”).

ernment actually work may result in conflicts that hinder effective governance and ultimate protection of citizen rights.³²

The current Nigerian Constitution was finalized in 1999. Following the American model, the Nigerian Constitution provides for a federal system.³³ Chapter Four of the Nigerian Constitution covers the fundamental rights of the individual and details the applicable exceptions for each enumerated right.³⁴

B. *Avian Influenza and Ebola: How the Diseases Affect Japan and Nigeria*

Despite their different histories, both countries are working with relatively new democratic systems. Checks on the executive power to declare a national public health emergency and take emergency actions are implemented in different ways. For example, Japan relies heavily on prefectural governments to administer the necessary actions, while Nigeria uses a federally-focused approach, with the federal government assuming the authoritative role.³⁵ These differences in approach and allocation of authority have distinctly impacted the effectiveness of the government's response. The examples of avian influenza and Ebola allow for in-depth comparison of how Japan and Nigeria approach public health emergencies.

1. Avian Influenza

Avian influenza is caused by influenza A viruses, and subtypes have been detected in more than ninety species of healthy wild birds.³⁶ Although wild waterfowl, such as ducks and gulls, are the natural reservoir of influenza A viruses, when domestic poultry are exposed to this influenza, they develop one of two forms: the mild or highly lethal.³⁷ The mild form of avian influenza produces subtle signs of illness and often escapes detection without regular testing.³⁸ On the other hand, the lethal form is characterized by "sudden onset of severe disease, rapid contagion and a mortality

32. See Fineface Ogoloma, *The Theory of Separation of Powers in Nigeria: An Assessment*, 6 AFR. RES. REV. 127, 132–33 (2012).

33. See generally CONSTITUTION OF NIGERIA (1999).

34. See *id.* ch. IV (containing sections 33–46).

35. Compare Sayuri Umeda, Japan, in LEGAL RESPONSES TO HEALTH EMERGENCIES 123–24 (2015), with Hanibal Goitom, Nigeria, in LEGAL RESPONSES TO HEALTH EMERGENCIES 163–65 (2015).

36. See WORLD HEALTH ORGANIZATION, AVIAN INFLUENZA: ASSESSING THE PANDEMIC THREAT, at 36, WHO/CDS/2005.29 (2005) [hereinafter AVIAN INFLUENZA].

37. *Id.*

38. *Id.*

that can approach 100% within 48 hours.”³⁹ The ability of H5N1 to infect humans gave a new dimension and sense of urgency to what was previously considered a purely agricultural issue.⁴⁰

The primary risk factor for human infection with H5N1 avian influenza is direct or indirect exposure to poultry.⁴¹ Handling of live or dead poultry, such as slaughtering or defeathering, or consumption of improperly prepared contaminated poultry are the most likely avenues for infection.⁴² Therefore, efforts to reduce infection of healthy poultry and curb human exposure to contaminated birds has made controlling domestic bird populations a major method of protection. “Culling” is the term used to describe the reduction of an animal population by selective slaughtering.⁴³

a. Japan

Japan consistently battles with avian influenza, with recurring outbreaks among the poultry population often returning within several years of the previous outbreak.⁴⁴ Outbreaks occur almost every year, and culling of poultry on farms is a frequent practice when tests reveal contagious strains of influenza.⁴⁵ One of the most notable outbreaks in Japan of the H5N1 virus occurred in 2003.⁴⁶ While the threat of human infection is not as prevalent, new strains of avian influenza are proving more resilient and adept at human transmission.⁴⁷ This is particularly concerning for countries like Japan that regularly encounter poultry infections with highly pathogenic avian influenza.

39. *Id.*

40. *Id.* at 11.

41. *See Influenza (Avian and Other Zoonotic)*, WORLD HEALTH ORGANIZATION (Nov. 13, 2018), http://www.who.int/mediacentre/factsheets/avian_influenza/en/ [<https://perma.cc/9DZ2-XZ25>].

42. *Id.*

43. *See Cull*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/cull> [<https://perma.cc/8WF7-G8FW>] (last visited Aug. 15, 2019).

44. *See, e.g., Once Again, Bird Flu is in the Air*, JAPAN TIMES (Mar. 12, 2017), <https://www.japantimes.co.jp/opinion/2017/03/12/editorials/bird-flu-air/#.Wg9VrFuPLIU> [<https://perma.cc/6STT-3BXX>].

45. *See Japan Starts Culling Chicken After Confirming Bird Flu Outbreak*, REUTERS (Jan. 11, 2018), <https://www.reuters.com/article/us-health-birdflu-japan/japan-starts-culling-chicken-after-confirming-bird-flu-outbreak-idUSKBN1F1018> [<https://perma.cc/AH6S-DDKE>].

46. *See Masaji Mase et al., Characterization of H5N1 Influenza A Viruses Isolated During the 2003–2004 Influenza Outbreaks in Japan*, 332 *VIROLOGY* 167, 167 (2005).

47. *See Masaki Imai et al., A Highly Pathogenic Avian H7N9 Influenza Virus Isolated from a Human is Lethal in Some Ferrets Infected via Respiratory Droplets*, 22 *CELL HOST & MICROBE* 615, 615 (2017).

b. Nigeria

In Nigeria, anecdotal reports of high mortality outbreaks in poultry began in late 2005, and H5N1 was first reported in 2006 from a commercial farm in Kaduna State in northern Nigeria.⁴⁸ From 2006 to 2008, these outbreaks of the highly pathogenic avian influenza virus affected animal and human populations throughout Nigeria.⁴⁹ With an “estimated 140 million poultry, of which nearly 60% are raised in backyard flocks,” this posed a severe public health threat.⁵⁰ Even had the federal or local governments attempted enforcement of health and safety standards, it would be incredibly difficult because of the lack of organization in local towns and the difficulty of enforcing standards on those without the means to comply.⁵¹

2. Ebola

Ebola is a severe and often fatal illness in humans.⁵² The virus is transmitted to humans from wild animals and is capable of human to human transmission.⁵³ There is no proven treatment for Ebola, and the existing treatments include only care-rehydration and treatment of specific symptoms.⁵⁴ The 2014 Ebola outbreak was unprecedented in terms of the number of cases, deaths, and its geographic scope.⁵⁵ The outbreak involved ten countries on three continents, infected over 28,000 people, and resulted in more than 11,300 deaths.⁵⁶ Although countries outside of the African conti-

48. See WORLD BANK, PROJECT PERFORMANCE ASSESSMENT REPORT: FEDERAL REPUBLIC OF NIGERIA AVIAN INFLUENZA CONTROL AND HUMAN PANDEMIC PREPAREDNESS AND RESPONSE PROJECT 4 (2013), http://ieg.worldbankgroup.org//default/files/Data/reports/NIGERIA_AvianInfluenza.pdf [<https://perma.cc/95DL-CZAH>].

49. See Isabella Monne et al., *Highly Pathogenic Avian Influenza A (H5N1) Virus in Poultry, Nigeria, 2015*, 21 EMERGING INFECTIOUS DISEASES 1275, 1275 (2015).

50. Justin R. Ortiz et al., *Lack of Evidence of Avian-to-Human Transmission of Avian Influenza A (H5N1) Virus Among Poultry Workers, Kano, Nigeria, 2006*, 196 J. INFECTIOUS DISEASES 1685, 1685 (2007).

51. See, e.g., Amy Maxmen, *Deadly Outbreak Tests Nigerian Health Agency*, 555 NATURE 421, 422 (2018).

52. *Ebola Virus Disease*, WORLD HEALTH ORGANIZATION (Feb. 12, 2018), <http://www.who.int/mediacentre/factsheets/fs103/ejn/>.

53. *Id.*

54. *Id.*

55. See Akaninyene Otu et al., *An Account of the Ebola Virus Disease Outbreak in Nigeria: Implications and Lessons Learnt* 1 (18 BMC PUB. HEALTH, Article No. 3, 2018), <https://bmcpublikealth.biomedcentral.com/track/pdf/10.1186/s12889-017-4535-x> [<https://perma.cc/SS9J-P358>].

56. *Id.*

ment were not as severely affected, the threat of transmission via international travel made it a global concern.

a. Japan

Japan's response to the Ebola outbreak was inward-facing, mostly focusing on the Japanese people. It only shifted to an outward-facing approach, looking to contribute to the global effort, after there were no confirmed outbreaks in Japan.⁵⁷ Japan's approach was outward-facing because it supplied financial aid and emergency relief goods, and has since been a key player in the international effort fighting the Ebola virus.⁵⁸ Working closely with WHO, Japan has dispatched health experts and commissioned pharmaceutical companies to work towards solutions for eradicating Ebola.⁵⁹

b. Nigeria

The first case of Ebola was confirmed in Lagos, Nigeria on July 23, 2014, and eventually spread to nineteen laboratory-confirmed cases.⁶⁰ The index case (the first documented patient) in Nigeria was from a Liberian diplomat who arrived at Murtala Mohammed Airport in Lagos on July 20, 2014.⁶¹ He was identified as ill at the airport and was admitted into a hospital in Lagos, where the diagnosis was made.⁶² After the first case was confirmed, the Federal Ministry of Health and the Nigeria Centre for Disease Control made an official declaration of an Ebola emergency in Nigeria.⁶³

As the most populous country on the African continent and home to Lagos, the commercial center of West Africa, Nigeria was at significant risk. With two domestic airports, an international airport, and two seaports, Lagos experiences heavy human traffic and

57. See generally Gaimushō [Ministry of Foreign Affairs of Japan], *Japan's Response to the Ebola Outbreak* (July 17, 2015), <http://www.mofa.go.jp/files/000093832.pdf> [<https://perma.cc/G96V-N6MN>] (summarizing Japan's response to the outbreak as it provided aid).

58. See *Fighting Against Ebola*, WE ARE TOMODACHI, Winter 2015, https://www.japan.go.jp/tomodachi/2015/winter2015/fighting_against_ebola.html [<https://perma.cc/8A68-BZNA>].

59. See *id.*; see also Press Release, FUJIFILM Corp., The Anti-Influenza Drug "Avigan Tablet" Selected As One of the Supplies to be Procured with the Japanese Government's Emergency Grant Aid for Countering the Ebola Virus Disease in Guinea (June 14, 2016), <http://www.fujifilm.com/news/n160614.html> [<https://perma.cc/G6C9-9DRD>].

60. See Otu, *supra* note 55, at 1.

61. See European Centre for Disease Prevention and Control, *Outbreak of Ebola Virus Disease in West Africa*, at 6 (Aug. 1, 2014).

62. *Id.*

63. See Otu, *supra* note 55, at 2.

is particularly susceptible to the spread of such pathogenic diseases.⁶⁴ However, against these odds, the Nigerian government took quick action in addressing the outbreak, which resulted in only seven deaths.⁶⁵ There were nineteen laboratory-confirmed cases, and eight of the confirmed cases were ultimately fatal.⁶⁶ The 2014 Ebola outbreak in Nigeria ended with WHO declaring Nigeria Ebola-free on October 20, 2014.⁶⁷

C. *International Guidance on Public Health Emergency Management: WHO and IHR Guidelines*

The World Health Organization (WHO) is the international group charged with directing and coordinating health within the United Nations.⁶⁸ WHO established the International Health Regulations (IHR), which are legally binding for members and aim to facilitate collaboration between countries to fight against the spread of disease, while avoiding unnecessary interference with trade and travel.⁶⁹ Although there are no explicit enforcement mechanisms, “the potential consequences of non-compliance are themselves a powerful compliance tool.”⁷⁰ Peer pressure and public knowledge are the available compliance tools, as well as the consequences of a tarnished international image and unilateral trade and travel restrictions.⁷¹

In addition to overseeing the implementation of the IHR, WHO keeps countries informed about public health management and helps member countries build capacities to detect, report, and respond to public health events.⁷² WHO also publishes disease-specific guidance documents aimed at providing affected countries

64. *Id.*

65. See Press Release, World Health Organization, WHO Declares End of Ebola Outbreak in Nigeria (Oct. 20, 2014), <http://www.who.int/mediacentre/news/statements/2014/nigeria-ends-ebola/en/> [<https://perma.cc/82TW-Y7EH>].

66. See Otu, *supra* note 55, at 2.

67. See WHO Declares End of Ebola Outbreak in Nigeria, *supra* note 65.

68. See About WHO, WORLD HEALTH ORGANIZATION, <http://www.who.int/about/en/> [<https://perma.cc/327M-7KKS>] (last visited June 29, 2019).

69. See *Nigeria Moves to Improve Implementation of International Health Regulations*, NIGERIA CTR. FOR DISEASE CONTROL (Oct. 10, 2016), <http://www.ncdc.gov.ng/news/59/nigeria-moves-to-improve-implementation-of-international-health-regulations> [<https://perma.cc/AA9F-K6EP>].

70. World Health Organization, *Frequently Asked Questions About the International Health Regulations (2005)*, <http://www.who.int/ihr/about/FAQ2009.pdf> [<https://perma.cc/MG4T-JZ5G>] (question 7).

71. *Id.*

72. See About WHO, *supra* note 68.

with helpful information and strategies to detect and control infectious diseases such as Ebola and H5N1.⁷³

1. IHR Guidelines

The purpose of the IHR is to prevent and manage public health issues arising from global spread of disease while avoiding “unnecessary interference with international traffic and trade.”⁷⁴ The IHR requires states to develop “core capacities to detect, assess, report, and respond to potential public health emergencies of international concern.”⁷⁵ The IHR also “require[s] countries to exercise their health powers in a transparent and non-discriminatory manner, with full respect for the dignity, human rights and fundamental freedoms of persons.”⁷⁶ General adherence to the WHO’s guidance and a demonstrated willingness to cooperate with the international standards are indications that a country is likely to incorporate individual rights protections in addressing public health emergencies.

While WHO does not go into detail about the protection of individual rights during public health emergencies, it does provide that the boundaries of government emergency power should be clearly defined.⁷⁷ The current IHR includes important obligations for countries, recommending that countries explicitly define their powers to take action required to deal with public health risks and provide individuals the opportunity to seek “independent review of decisions that restrict their fundamental rights.”⁷⁸ This balance between swift government action in screening and stopping infectious disease and upholding individual rights is left to the member countries to determine.⁷⁹ While WHO provides suggestions and recommendations, it does not require or enforce measures specifically aimed at protection of individual rights amidst government action.

73. See What Are the International Health Regulations and Emergency Committees?, WORLD HEALTH ORGANIZATION (June 20, 2016), <http://www.who.int/features/qa/39/en/> [<https://perma.cc/3Q8A-GDXK>].

74. WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (2005) 10 (2nd ed. 2008), <http://www.who.int/ihr/publications/9789241596664/en/> [<https://perma.cc/B6PL-8N5R>].

75. Lawrence O. Gostin & Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Scrutiny*, 94 MILBANK Q. 264, 269 (2016).

76. WORLD HEALTH ORGANIZATION, ADVANCING THE RIGHT TO HEALTH: THE VITAL ROLE OF LAW 165 (2017).

77. *Id.*

78. *Id.* at 166.

79. *Id.*

2. IHR Application to Avian Influenza and Ebola

a. Avian Influenza (H5N1)

WHO continuously monitors avian influenza through the Global Influenza Surveillance and Response System (GISRS).⁸⁰ The increasing outbreaks of the H5N1 avian influenza strain prompted WHO to release a series of guidance, including guidelines for global surveillance and monitoring.⁸¹ As H5N1 avian influenza has particular potential to cause a pandemic, WHO recommends enhanced surveillance for all A/H5 influenzas and has continued to provide updated guidance for member countries.⁸²

b. Ebola

During the Ebola outbreak in 2014, WHO issued continuing recommendations for countries with Ebola transmission, which could also be used as reference and planning tools for other countries.⁸³ Specifically addressing the spread of the Ebola virus, WHO issued several guidance documents on screening practices for entry and exit of persons and live animals.⁸⁴ In detailed checklists and examples, WHO provided its recommendations on medical testing of travelers and travel restrictions.⁸⁵ However, lost in this information was any substantive discussion of limits on the restriction of individual liberties after the risk of infection has been sufficiently established. The relatively weak suggestions merely stated that “legal mechanisms for restricting travel . . . and for lifting the restriction

80. See Global Influenza Surveillance and Response System, WORLD HEALTH ORGANIZATION, http://www.who.int/influenza/gisrs_laboratory/en/ [<https://perma.cc/7ZKJ-WPC5>] (last visited June 29, 2019).

81. See WHO *Guidelines for Global Surveillance of Influenza A/H5*, WORLD HEALTH ORGANIZATION (Feb. 6, 2004), <http://www.who.int/influenza/resources/documents/.pdf?ua=1> [<https://perma.cc/UG29-WVF9>].

82. See *id.*; see also *Influenza (Avian and Other Zoonotic)*, *supra* note 41. A/H5 refers to highly pathogenic avian influenza.

83. See WORLD HEALTH ORGANIZATION, WHO INTERIM GUIDANCE FOR EBOLA VIRUS DISEASE: EXIT SCREENING AT AIRPORTS, PORTS AND LAND CROSSINGS 3 (2014), https://apps.who.int/iris/bitstream/handle/10665/139691/WHO_EVD_Guidance_PoE_14.2_eng.pdf [<https://perma.cc/PW28-Y5SZ>]; WHO, *Interim Guidance: Ebola Event Management at Points of Entry* (Sept. 2014), http://apps.who.int/iris/bitstream/10665/131827/1/_EVD_Guidance_PoE_14.1_eng.pdf?ua=1&ua=1 [<https://perma.cc/6UPC-5V4P>].

84. See, e.g., WHO, *Interim Guidance: Ebola Event Management at Points of Entry*, *supra* note 83, at 3.

85. See Consolidated Ebola Virus Disease Preparedness Checklist, WORLD HEALTH ORGANIZATION (Jan. 15, 2015), https://apps.who.int/iris/bitstream/handle//137096/WHO_EVD_Preparedness_14_eng.pdf?sequence=1 [<https://perma.cc/79LQ-T48F>].

when a person is no longer considered at risk of infecting others, should be considered.”⁸⁶

In the aftermath of the Ebola epidemic in Africa, the IHR faced scrutiny for being insufficiently flexible to respond to new infectious diseases, with WHO, the United Nations, and the U.S. National Academy of Medicine all urging for major reform.⁸⁷ The IHR attempts to balance the interests of public health, commerce, and human rights during outbreaks.⁸⁸ This balancing “informs the health measures a State may take,” and States must “have sufficient scientific evidence of the risk posed and of whether the measure adopted is likely to ameliorate that risk before taking restrictive travel or trade measures or impinging on human rights.”⁸⁹

3. Japan and Nigeria’s Compliance with IHR

Japan generally adheres to WHO recommendations on the protection of individual rights, following reporting requirements and including protections of individual rights in its statutes for public health emergencies.⁹⁰ Specifically, Japan incorporates the recommended measures for individual appeals and time limits on government-imposed isolation.⁹¹ Nigeria, on the other hand, trails Japan in terms of adopting WHO recommendations and guidance.⁹² While Nigeria does abide by the required reporting standards, the protection of individual rights is not as emphasized as in Japan.⁹³ The relevant statute includes general mentions of protection for individual rights, but is not as thorough or specific as the provisions in Japanese legislation on public health emergencies.⁹⁴ These discrepancies may be attributed to differences in govern-

86. WHO, *Interim Guidance: Ebola Event Management at Points of Entry*, *supra* note 83, at 11.

87. See Gostin & Katz, *supra* note 75, at 265.

88. *Id.* at 267.

89. *Id.* at 267–69.

90. See Ken’ekihō [Quarantine Act], Act No. 201 of 1951, art. 16-2, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/detail/?ft=5&re=2&dn=1&gn=3&sy=26&ht=A&no=201&x=0&y=0&ia=03&ky=&page=1> [<https://perma.cc/CQ27-CS5T>] (Japan).

91. *Id.* at art. 16-2, paras. 1–2.

92. See World Health Organization, *Joint External Evaluation of IHR Core Capacities of the Federal Republic of Nigeria*, at 3 (June 2017) (recommending that Nigeria “fast track the legislation, regulatory and policy frameworks to support IHR implementation”).

93. *Id.* While Japan specifically includes measures for protecting individuals, Nigeria does not address individual rights with the same level of specificity as recommended by the WHO recommendations.

94. See *generally* Quarantine Act (2004) Cap. (Q2) (Nigeria) (outlining regulations for dealing with instances of infectious diseases arriving via maritime vessels).

ment structure and culture, as well as a substantial disparity in terms of resources and capacity to incorporate such safeguards in the face of a pandemic disease such as Ebola.

D. *Statutes: Japan and Nigeria*

Examination of specific provisions in the quarantine and public health statutes illustrates the extent to which Japan and Nigeria prioritize the protection of individual rights in times of public health emergencies.

1. Japan

a. Quarantine Laws

Responsibility for quarantine in Japan is divided between two ministries: the Ministry of Health, Labor and Welfare is responsible for human and food quarantine, while the Ministry of Agriculture, Forestry and Fishery handles plant and animal quarantine.⁹⁵ The Quarantine Act's stated purpose is "to prevent pathogens of infectious diseases that are not endemic in Japan from entering the country via [marine] vessels or aircrafts, as well as to take other necessary measures . . . to prevent infectious diseases."⁹⁶ The Act authorizes surveillance, examination, and tracking of any disease-carrying vessels, and is one of the primary sources of government power during infectious disease outbreaks.⁹⁷

b. Other Relevant Statutes

Japan also has specific statutes addressing that address pandemic influenza. In the case of avian influenza, the virus was initially only thought to affect birds and was considered an agricultural problem. However, with the newly developed capacity for animal to human transmission, the H5N1 strain in particular became very problematic.⁹⁸

The Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases provides the legislative framework for Japan's management of infectious disease

95. See Umeda, *supra* note 35, at 132.

96. See Ken'ekihō [Quarantine Act], Act No. 201 of 1951, art. 1, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?ft=5&re=2&dn=1&gn=3&sy=26&ht=A&no=201&x=0&y=0&ia=03&ky=&page=1> [<https://perma.cc/NCN8-YTJH>] (Japan).

97. See Ken'ekihō [Quarantine Act], Act No. 201 of 1951, ch. II.

98. See Rezza, *supra* note 5, at 807.

response.⁹⁹ This Act categorizes infectious diseases based on severity and organizes a structured plan for reporting and monitoring outbreaks of infectious disease.¹⁰⁰ Japan has pre-designated hospitals with special facilities to deal with infectious patients, and prefectural governors are given relatively broad authority to address public health threats in their respective jurisdictions.¹⁰¹ Although governors have the power to act independently, the Act provides specific guidelines for the hospitalization and isolation of individuals.¹⁰²

2. Nigeria

a. Quarantine Laws

In Nigeria, the Quarantine Act is the primary law governing prevention and response to infectious diseases.¹⁰³ The Act's purpose is to "regulate the imposition of quarantine and to make other provisions for preventing the introduction into and spread in Nigeria, and the transmission from Nigeria, of dangerous infectious diseases."¹⁰⁴ Furthermore, the Quarantine Act empowers the president to declare an infectious disease as "dangerous," and to "issue regulations for the purpose of preventing or suppressing a dangerous infectious disease."¹⁰⁵ These broad provisions do not provide sufficient guidance as to what extent government measures may be appropriate.

b. Other Relevant Statutes

Nigeria does not have statutes specifically addressing infectious disease management or prevention, and the Quarantine Act of 1926 remains the primary law governing infectious disease con-

99. See generally Kansenshō no yobō oyobi kansenshō no kanja taisuru iryō ni kansuru hōritsu [Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases], Act No. 114 of 1998, translated in (Japanese Law Translation [JLTD]), <http://www.japaneselawtranslation.go.jp/law/detail/?ft=5&re=2&dn=1&gn=4&sy=10&ht=A&no=114&x=65&y=13&ia=03&ky=&page=1> [<https://perma.cc/TX7M-4GKH>] (Japan) [hereinafter Act on the Prevention of Infectious Diseases].

100. *Id.* art. 17–26. The Act addresses medical examinations, restrictions on work, hospitalization, procedures for discharge from hospitalization, and requirements for written notice to the individual to be hospitalized. The Act also outlines the procedures for individual complaints and administrative review. *Id.*

101. *Id.* at art. 38.

102. See *id.* at art 19.

103. See Goitom, *supra* note 35, at 165–66.

104. *Id.*

105. Goitom, *supra* note 35, at 166.

trol.¹⁰⁶ There have been efforts to repeal the Quarantine Act and replace it with a statute that addresses the realities of the current infectious disease climate and incorporates the recommendations of WHO with regard to protection of individual rights.¹⁰⁷ For example, the Public Health Bill SB 210 aims to provide protections for individuals subject to isolation or quarantine, while streamlining infectious disease response.¹⁰⁸ But the Bill has appeared before the Nigerian legislature before and not yet passed, making it uncertain whether it will become law.¹⁰⁹

III. ANALYSIS

Using four factors, identified below, analysis of each country's constitution and statutes indicates the level of protection for individual rights each country provides in times of public health emergencies.

A. *Four Factors for Evaluating Protection of Individual Rights*

The following four factors can be used to measure a state's protection of individual rights in times of public health emergencies, by looking at the constitution, quarantine laws, and any particularly relevant statutes. In evaluating the protections a country's constitution, statutes and regulations provide, the measures may be characterized as direct or indirect. Direct measures are explicit language demonstrating a commitment to protection of individual rights in times of public emergency, while indirect measures are ways in which the use of government power is curtailed to ensure it is not abused during emergencies.

1. Language Indicating a Dedication to Upholding Individual Rights

First, there must be limiting language in the constitution and statutes to prevent the abuse of government power. The power to act and potentially override normal individual liberties is undoubtedly necessary in order to effectively address public health emergencies. But there must be specific, enumerated limits on the exercise of this power and the contexts in which it is appropriate. Language in a state's constitution and relevant statutes specifically stating the need to protect individual rights and only override

106. *Id.* at 165.

107. *Id.* at 171.

108. *See id.* at 172–73.

109. *See id.* at 163.

those liberties when absolutely necessary shows a certain level of dedication to the protection of individual rights.

2. Specific Timeframes for When Emergency Precautionary Measures May Override Individual Rights

According to WHO guidelines, laws addressing government measures in public health emergencies should specify clear time limits on the application of emergency powers.¹¹⁰ Establishing clear triggers for the use of such emergency power and boundaries on how long the government may usurp the fundamental rights of the individual provides a necessary layer of protection for people in such times of uncertainty.

3. Availability of an Appeal Process and Adequate Review Procedures to Contest Government Action

An appeal process to contest the government's action protects individuals when their individual rights have been curtailed during public health emergencies. Particularly in circumstances such as quarantine of persons for extended periods of time—limiting the right to mobility—an individual's ability to seek independent review of decisions that limit fundamental rights provides a key protective tool against governmental abuse.¹¹¹

4. Required Consultation with Select Councils or Experts

Requiring government officials to consult a third-party expert before exercising emergency powers is an additional layer of protection for individual rights. For example, requiring the governor to consult with the Minister of Health, Labor and Welfare before ordering mandatory medical examination or house arrest ensures that government actions encroaching on individual rights are not made without deliberation.¹¹² Requiring a system of multi-layered approval before these kinds of measures may be enacted helps to ensure that decisions are not made without thorough examination of potential alternatives in evaluating the balance of benefits and harms.

Of the four factors, two and three are the most important predictors of a country's protection of individual rights during public health emergencies because they are *explicitly referenced* in

110. See ADVANCING THE RIGHT TO HEALTH, *supra* note 76, at 165.

111. *Id.* at 165–66.

112. See Act on the Prevention of Infectious Diseases, *supra* note 98, at art. 51, para. 1 (Japan).

the IHR Guidelines.¹¹³ Explicit language in constitutional or statutory provisions is helpful for identifying a government's desire to incorporate protective aspects but it is not a particularly strong indicator without real means for enforcement. Required consultation before deciding on individual appeals and other decisions affecting individual rights indicates a high level of dedication to protection of individual rights.

B. *Application of Four Factors*

Comparing Japan and Nigeria against each of these four factors provides a structured method of analysis of each country's available protections for individual rights in times of public health emergencies. With particular emphasis on the second and third factors, the comparison reveals a more thorough and systematic application of each factor in Japan's approach than in Nigeria's.

1. Language Expressing Dedication to Protection of Individual Rights

a. Japan

The individual rights to mobility and property are specified in the Japanese Constitution.¹¹⁴ However, the relevant statutory provisions intertwine these rights with a continuous emphasis on the general public good. The right of a person to "choose and change his residence" is limited to the extent that it "does not interfere with the public welfare."¹¹⁵ Similarly, the right to "own or to hold property" must be defined by law "in conformity with the public welfare."¹¹⁶

In the enumeration of the rights and duties in the Japanese Constitution, there is an explicit requirement that these rights be exercised only to the extent that they do not "interfere with the public welfare."¹¹⁷ The phrase "public welfare" is used *many times* throughout, making clear the requirement that the public good is to be at the center of any derogation of rights.¹¹⁸ Explicit use of the words "public welfare" throughout the Constitution provides a continuous reminder of the importance of balancing individual interests with those of the community as a whole.

113. See ADVANCING THE RIGHT TO HEALTH, *supra* note 76, at 165–66.

114. JAPAN CONST. arts. 22, 29.

115. *Id.* art. 22.

116. *Id.* art. 29.

117. *Id.* art. 13.

118. See, e.g., *id.* arts. 12, 22.

In addition to the discussion of particular rights, the general duty to obey the Constitution specifies that the people “shall always be responsible for utilizing [the freedoms and rights] for the public welfare.”¹¹⁹ This collective focus in the Japanese Constitution, defining and applying individual rights within the context of the general public good, may be indicative of a more collective culture which prioritizes the community above the individual. However, there seems to be a countervailing emphasis on individual rights, specifically protections for individuals in the relevant statutory provisions.¹²⁰ Japan’s constitutional provisions expressing consideration of individual rights within the context of the general public good illustrates an explicit commitment to protecting these rights while highlighting the country’s general collective approach. This strikes a good balance between the two potentially conflicting interests, guarding individual rights in the context of government exercise of power during national emergency.

b. Nigeria

Like Japan, the Nigerian Constitution enumerates specific fundamental rights of the individual. The Nigerian Constitution explicitly enumerates a public health exception to protections for individual rights, stating “[e]very person shall be entitled to his personal liberty and no person shall be deprived of such liberty,”¹²¹ with an exception “in the case of persons suffering from infectious or contagious disease . . . for the purpose of their care or treatment or the protection of the community.”¹²² The rights to property and mobility are also specified in the Nigerian Constitution.¹²³ These rights are also accompanied by lists of circumstances when their restriction is warranted.¹²⁴

The Nigerian Constitution contains broad, overarching provisions for designation of individual rights in the context of the public good. While not mentioned throughout the Constitution in relation to each enumerated right, section 45 provides that the granting of rights such as property and mobility does not invalidate provisions of law that are reasonably justified in the interest of public safety and public health.¹²⁵ Furthermore, section 45 provides

119. *Id.* art. 12.

120. *See id.*

121. CONSTITUTION OF NIGERIA (1999), § 35(1).

122. *Id.* § 35(1)(e).

123. *Id.* §§ 41(1) (mobility), 44(1) (property).

124. *See, e.g., id.* § 44(1)(a).

125. *Id.* § 45(1)(a).

that legislation which calls for takings or suspension of personal liberty during times of emergency “shall not be invalidated” on that basis alone.¹²⁶ However, the measures taken in response to such emergencies must only be to a reasonably justifiable extent.¹²⁷ Where Japan specifies the controlling concern of public welfare in each enumeration of individual rights and throughout the Constitution as a whole, the Nigerian Constitution expresses this concern more indirectly by describing it in relation to existing law. The Nigerian Constitution takes a more circuitous approach by stating that constitutionally-enumerated individual rights do not always overcome existing laws.¹²⁸

While constitutional provisions may suggest the importance of individual rights, the reality may oftentimes be far from the constitutional ideals. Both Japan and Nigeria have sections in their respective constitutions and statutes explicitly enumerating fundamental individual rights with certain limited exceptions when necessary for the public good. But in the case of Nigeria, the constitutional language lacks the directness and clarity of the Japanese Constitution in expressing the importance of individual rights and acknowledging the potential conflict between public welfare and individual interests. While Nigeria’s enumeration of rights adds value to the Constitution, there is room for clarity and further articulation of the balance between protection of individual rights and public welfare in times of emergency.

2. Specific Designation of Time for Which Emergency Situations or Precautionary Measures May Warrant Overriding Individual Rights

a. Japan

Despite WHO’s rather vague, surface-level recommendations on time limits for derogation of individual rights, Japan’s Quarantine Act specifies the duration of time for which an individual’s activities may be restricted.¹²⁹ The duration of restriction must not exceed 504 hours for diseases other than plague, and must consider “the incubation period of each respective infectious dis-

126. *Id.* § 45(2).

127. *Id.*

128. *Id.* § 45(1)(a).

129. Ken’ekihō [Quarantine Act], Act No. 201 of 1951, art. 16, para. 1, translated in [Japanese Law Translation [JLT DS]], <http://www.japaneselawtranslation.go.jp/law/?ft=5&re=2&dn=1&gn=3&sy=26&ht=A&no=201&x=0&y=0&ia=03&ky=&page=1> [https://perma.cc/Q9E9-2ER4] (Japan).

ease.”¹³⁰ In addition, a patient in isolation may seek review after thirty days.¹³¹ The Health, Labor and Welfare Minister is then required to “make a determination . . . within five days of the date of the request for administrative review.”¹³²

The Act on the Prevention of Infectious Diseases also provides time limits for hospitalization of potentially infected persons. For persons hospitalized per the recommendation of a prefectural governor, hospitalization “shall not exceed 72 hours.”¹³³ If the governor further deems it necessary to extend hospitalization, they may require hospitalization for “not more than ten days.”¹³⁴ This period of hospitalization may be extended for an additional period not exceeding ten days if the governor deems it necessary for the person to stay in the hospital.¹³⁵ Like the provisions in the Quarantine Act, the Act on the Prevention of Infectious Diseases contains the same designated deadlines for appeal of isolation and minister review of the application.¹³⁶

This method of legally mandated hospitalization has been criticized as too slow for highly pathogenic diseases such as typhoid, while others support the more cautious and deliberate approach that the restricted time frame affords.¹³⁷ Effective implementation of this system will likely be refined in the future based on “actual circumstances.”¹³⁸ The categorization of various pathogenic diseases into classes based on infectiousness and severity of symptoms allows the government to clearly determine when measures like quarantine and mandated treatment are required. Under Japan’s Quarantine Act, Ebola is a “quarantinable disease.”¹³⁹ The Quar-

130. *Id.* at art. 16, para. 2.

131. *Id.* at art. 16-2, para. 1.

132. *Id.* at art. 16-2, para. 2.

133. *See* Act on the Prevention of Infectious Diseases, *supra* note 98, at art. 19, paras. 3–4 (Japan).

134. *Id.* at art. 20, para. 1.

135. *Id.* at art. 20, para. 4.

136. *See id.* at art. 25, paras. 1–4.

137. Takashi Nomura, *Changes in Measures Against Infectious Diseases in Japan and Proposals for the Future* 46 JAPAN MED. ASS’N J. 390, 397 (2003).

138. *Id.*

139. *See* Ken’ekihō [Quarantine Act], Act No. 201 of 1951, art. 2, para. 1(iii), translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/?ft=5&re=2&dn=1&gn=3&sy=26&ht=A&no=201&x=0&y=0&ia=03&ky=&page=1> [<https://perma.cc/P82Q-N43J>] (Japan) (allowing quarantine for “diseases specified by Cabinet Order”). In 2014, Japan’s health minister applied provisions of the Quarantine Act to travelers from countries with Ebola outbreaks. *See Japan Orders Travelers from Ebola Nations to Report Twice Daily*, JAPAN TIMES (Oct. 21, 2014), <https://www.japantimes.co.jp/news/10/21/national/japan-orders-travelers-from-ebola-nations-to-report-twice-daily/#.XXksPflKiUn> [<https://perma.cc/TMN8-37XD>].

antine Act applies directly to the handling of Ebola cases, as individuals may need to be isolated for extended periods of time to prevent spread of disease. While Japan did not experience any human infection during the 2014 Ebola outbreak, these establish a clear set of standards that may be applied if and when human transmission does occur in Japan.

Avian influenza, on the other hand, is not necessarily a quarantinable disease. However, the definition of “quarantinable infectious disease” includes “diseases specified by a Cabinet Order.”¹⁴⁰ Depending on the particular outbreak and strain of avian influenza, the government may require quarantine for diseases other than those named in the Act. This is key, especially considering the fact that new strains of avian influenza are evolving and increasingly capable of human to human transmission.¹⁴¹ The H5N1 strain of avian influenza was particularly dangerous because of its newly developed capability to transmit from animals to humans, and the resulting fatal nature of the disease in humans.

b. Nigeria

Nigeria’s quarantine statutes do not have specific designations of time for isolation or specifically stated limits on how long a period of public emergency may last. The power of the president in declaring “any place whether within or without Nigeria to be an infected local area” is discretionary.¹⁴² In making regulations to prevent the spread of dangerous infectious diseases, the president is not governed by any standard of how long that designation can be in effect.¹⁴³ This has the potential to leave individuals unable to contest forced quarantine where the president unilaterally determines an area or individual to be infected and requiring isolation. The Quarantine Act is long overdue for amendment to more accurately reflect the state of the Nigerian government and fill in the substantial gaps in detail of governance.

The Public Health Bill would provide time restrictions on the presidential declaration of public health emergency, designating an initial thirty-day period, which the president may renew indefinitely in thirty day increments.¹⁴⁴ In addition, the legislature may

140. *Id.* at art. 2, para. 1(ii).

141. See Shuo Su et al., *Epidemiology, Evolution, and Recent Outbreaks of Avian Influenza Virus in China*, 89 AM. SOC’Y FOR MICROBIOLOGY J. VIROLOGY 8671, 8673 (2015).

142. Quarantine Act (2004) Cap. (Q2), § 3 (Nigeria).

143. *Id.* § 4.

144. See Nigeria Public Health Act, S.B. 210 § 14(b) (2018) (Nigeria).

terminate the declaration with a simple majority vote if convinced that the underlying threat to public health no longer exists.¹⁴⁵ While this does not directly address situations in which an individual is held in isolation for questionably long periods of time, checks on the president's power to declare a state of public health emergency are important, as the declaration grants the president and his administration significant discretionary power. However, this Bill has yet to be enacted, despite calls for updates to the existing quarantine laws, and the likelihood of passage remains uncertain.

3. Availability of an Appeal Process for Individuals to Contest Government Action that Infringes on Individual Liberties

a. Japan

Japan's Quarantine Act contains special provisions for an individual to appeal the government's order for quarantine.¹⁴⁶ In providing this opportunity for appeal, and specifying the time in which the individual may apply as well as a deadline for the government in responding to the request, the statute provides for the protection of individual rights. Not only does this provision convey government dedication to upholding individual rights, it also insulates individuals during times of public health emergencies from being deprived of the chance to contest the loss of a fundamental right.

Similarly, the Act on the Prevention of Infectious Diseases provides a process for appeal. Article 25 allows for a person who has been hospitalized under order for a period exceeding thirty days to petition the Minister of Health, Labor and Welfare, orally or in writing, for review of their hospitalization.¹⁴⁷ Like the provision in the Quarantine Act, Article 25 also specifies when appeals may be made and when the Minister of Health, Labor and Welfare is required to make a judgment.¹⁴⁸ Inclusion of specific rules and boundaries for the appeals process shows Japan's dedication to addressing these difficult situations in a cautious and deliberate manner.

145. *Id.* § 14(c).

146. *See* Ken'ekihō [Quarantine Act], Act No. 201 of 1951, art. 16-2, para. 1, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/?ft=5&re=2&dn=1&gn=3&sy=26&ht=A&no=201&x=0&y=0&ia=03&ky=&page=1> [<https://perma.cc/94GZ-M5RU>] (Japan).

147. Act on the Prevention of Infectious Diseases, *supra* note 98, at art. 25, para. 1 (Japan).

148. *See id.* at art. 25, paras. 1-2.

b. Nigeria

On the other hand, the Nigerian Quarantine Act does not provide an appeal process for individuals to contest government actions that impede individual rights, such as quarantine.¹⁴⁹ This poses many issues in terms of individual rights, as individuals may be forced to remain in isolation for extended periods of time during a public health emergency without any statutorily-identified way to contest government action. Currently, there is no remedy for this lack of individual protection. Legislative reform may be a possibility with the Public Health Bill SB 210, which would provide judicial oversight for extended isolation or quarantine.¹⁵⁰ However, since its introduction, there has been little certainty about when the Public Health Bill will pass and become law.

During the 2014 Ebola outbreak in Nigeria, authorities in Lagos opened an observation unit for five quarantined, asymptomatic individuals.¹⁵¹ Protocols for the five quarantined individuals required evaluation for clinical symptoms of Ebola three times a day and restriction of visitors and interactions with each other.¹⁵² The individuals were permitted to bring personal items into the unit but “with the understanding that if they developed symptoms of Ebola, their personal items would not be allowed to leave the facility.”¹⁵³ The minimum required observation period was twenty-one days, however, if any person in the observation unit were to become symptomatic, the twenty-one day observation period would start “anew for each of the others based on their exposure to the newly symptomatic person.”¹⁵⁴ Because of the inevitable exposure to each other in a group housing unit, one individual showing symptoms would restart the twenty-one day observation period for all the quarantined people. This statutory construction makes it possible that an asymptomatic individual would be forced to remain in quarantine for an extended period of time resulting from continuous renewals of twenty-one day periods, with no ability to appeal. Without avenues of contesting continued containment, individual rights may be compromised more than necessary.

149. See generally Quarantine Act (2004) Cap. (Q2) (Nigeria) (lacking a process for appealing a quarantine order).

150. See Nigeria Public Health Act, S.B. 210 § 26(c) (2018) (Nigeria).

151. Cheri Grigg et al., *Use of Group Quarantine in Ebola Control – Nigeria, 2014*, 64 MORBIDITY & MORTALITY WKLY. REP. 124, 124 (2015).

152. *Id.*

153. *Id.*

154. *Id.*

4. Checks on Use of Authoritative Power: Required Consultation with Selected Councils or Experts

a. Japan

The fourth factor considers whether the government agent issuing the order for quarantine or decision to confiscate property is required to consult with another source before finalizing the decision. Rather than allowing a single individual to impose restrictions, requiring ministers to wait for review by experts adds further checks on government authority. Japan's Quarantine Act requires that the Minister of Health, Labor and Welfare "hear the opinions of a Council . . . in advance when the Minister makes a determination."¹⁵⁵ This applies to the isolation and restriction of individuals because of existing as well as new infectious diseases.¹⁵⁶ In addition, when dealing with a new infectious disease in an emergency, individuals may be isolated in a hospital not specifically designated for quarantine.¹⁵⁷ When determining whether isolation of an individual may be lifted, the hospital administrator "may state an opinion to the quarantine station chief that there is no risk of the new infectious disease . . . spreading."¹⁵⁸

Similarly, the Act on the Prevention of Infectious Diseases provides for the consultation of the Minister of Health, Labor and Welfare with advisers when addressing the individual petition for examination of an isolation order.¹⁵⁹ Prior to issuing the recommendation for hospitalization or the extension of hospitalization, the Act on the Prevention of Infectious Diseases requires the prefectural governor to "hear opinions of the committee . . . established in the public health center who [sic] has jurisdiction over the location of the hospital or clinic where the . . . patient is hospitalized."¹⁶⁰ By requiring that prefectural governors consult with the appointed council and other relevant authorities before issuing orders for isolation and hospitalization, Japan's statutes provide a

155. Ken'ekihō [Quarantine Act], Act No. 201 of 1951, art. 16-2, para. 6, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/?ft=5&re=2&dn=1&gn=3&sy=26&ht=A&no=201&x=0&y=0&ia=03&ky=&page=1> [https://perma.cc/3AZ9-93LZ] (Japan).

156. *Id.* at art. 34-3, para. 6 (requiring that the Minister of Health, Labor and Welfare hear the views of the Health Science Council prior to giving instructions to the quarantine station chief).

157. *Id.* at art. 34-3, para. 1.

158. *Id.* at art. 34-3, para. 3.

159. *See* Act on the Prevention of Infectious Diseases, *supra* note 98, at art. 25, para. 6 (Japan).

160. *Id.* at art. 20, para. 5.

layer of protection for the individual and reassurance that decisions involving suspension of individual liberties are not made arbitrarily by a single person.

b. Nigeria

Nigeria's existing quarantine statute does not provide for mandatory consultation with councils or experts. In assigning the president the power to make regulations for quarantine and take action to prevent the transmission and spread of infectious disease, Nigeria's Quarantine Act does not require the president to consult with other agency officials beforehand.

The Public Health Bill would provide that the president "shall consult with the public health authority" when declaring a state of public health emergency and "may consult with any additional public health or other experts as needed."¹⁶¹ However, the Bill also specifies that when a situation calls for prompt action, the president may act without consulting with the public health authority and other experts.¹⁶² This creates a loophole through which the president may overexert his power and unnecessarily impede on individual rights in the name of public welfare. It seems, therefore, that the Public Health Bill addresses many of these concerns and attempts to implement the broad IHR recommendations. However, unless it becomes law, there will not be sufficient protection for the individual during public health emergencies.

C. *Proposed Solutions*

Based on these four factors, Nigeria should adopt elements of Japan's quarantine and infectious disease statutes, particularly the specific inclusion of measures to protect individual rights during times of public health emergencies. While there may be difficulties in implementing the practices of Japan in the Nigerian system, the differences in economic and social status will not likely pose an insurmountable hurdle in terms of incorporating more individual protections. Referencing the four factors discussed in the prior sections, adoption of digestible yet meaningful measures will enable Nigeria to provide increased protections for individual rights during public health emergencies while maintaining effective and efficient public health operations.

161. Nigeria Public Health Act, S.B. 210 § 10 (2018) (Nigeria).

162. *Id.*

1. Adoption of the Japanese Focus on Local Governments and Granting Autonomy to Local Leadership in Times of Public Emergency

Japan's emphasis on local officials and prefectural governors to implement national standards addresses the first and fourth factors. Shifting Nigeria's focus to emphasize and encourage autonomy at the local level will provide increased opportunities to place checks on authoritative power and hold the government accountable.

While Japan's allocation of power to local governments and heavy dependence on prefectural governors in decision-making may be a result of unique cultural qualities, encouraging autonomy of local leadership is key in responding to public health emergencies. Federal government dependence on local leadership and cooperation with local leadership allows for a quick and efficient response in public health emergencies, and by giving decision-making power to those with a nuanced understanding of the particular community, Japan allows for greater flexibility.

In the case of avian influenza, Japan's focus on local government puts it in a better position to identify infected poultry and quickly address any threats to the poultry population. Upon identification of an avian influenza threat, local governments have organized protocols to test for and confirm the disease, and contain the spread.¹⁶³ In addition, if culling is required, there is an established compensation structure for poultry farmers.¹⁶⁴ By charging local governments with these procedures, Japan ensures that any losses of property due to infections of avian influenza are compensated adequately and thus do not violate individual rights to property.

In contrast, Nigeria does not have the best structure for early detection and eradication of potentially infected poultry. Furthermore, much of the poultry in Nigeria is bred in backyards, making it more difficult to track unusual outbreaks of disease.¹⁶⁵ Countries with outbreaks largely confined to commercial farms faced the best

163. See Tokuaki Shobayashi, *Japan's Actions to Combat Pandemic Influenza (A/H1N1)*, 54 JAPAN MED. ASS'N J. 284, 287 (2011).

164. See Sayako Kanamori & Masamine Jimba, *Compensation for Avian Influenza Cleanup*, 13 EMERGING INFECTIOUS DISEASES 341, 341 (2007); *Poorest Forgotten in Bird Flu Compensation Pay-Outs*, NEW HUMANITARIAN (Mar. 9, 2006), <http://www.thenewhumanitarian.org/report/78/nigeria-poorest-forgotten-bird-flu-compensation-pay-outs> [<https://perma.cc/7BXM-TB6D>].

165. See Olatunde Babatunde Akanbi & Victor Olusegun Taiwo, *Backyard Poultry Mortality Associated with Highly Pathogenic Avian Influenza (HPAI) H5N1 Outbreaks in Nigeria*, 7 IOSR J. AGRIC. & VETERINARY SCI. 23, 23–24 (2014).

prospects for successful control in the case of avian influenza.¹⁶⁶ In the event of a recognized outbreak when culling is required, adequate compensation becomes an issue. Without sufficient compensation, poultry farmers are not motivated to cull their poultry, and farmers have often opted to sell potentially infected poultry instead of culling them.¹⁶⁷ Nigeria's lack of resources and heavy dependence on small-scale farming, particularly in more rural areas, makes it difficult to enforce lofty constitutional standards when there are emergent issues requiring government action.¹⁶⁸ For example, it is difficult to reach rural areas and police individual small-scale poultry farmers.¹⁶⁹ When there is a need to eradicate and prevent sale of infected poultry, consideration of each individual farmer's right to property is not reasonable for the federal government.

Nigeria should adopt Japan's focus on local government autonomy and deference to local authority when dealing with public health emergencies. However, it is necessary to recognize the organizational and financial challenges Nigeria and other developing countries face, with large impoverished populations lacking adequate resources for containing and fighting pathogenic diseases.¹⁷⁰ Nigeria remains largely disjointed in terms of federal and local government interaction, as many smaller, rural communities are isolated both geographically and in terms of communication.¹⁷¹ Collaboration between the national government and these local towns may be difficult, reinforcing the importance of local governance.

Limitations on surveillance and epidemiological testing, as well as tensions between other disease concerns raise questions of priority and resource allocation that are difficult to answer.¹⁷² For

166. See AVIAN INFLUENZA, *supra* note 36, at 13.

167. See Kanamori, *supra* note 164, at 341.

168. See Hassan Ishaq Ibrahim et al., *Avian Influenza and Employment Decisions of Poultry Farmers in the Federal Capital Territory of Nigeria*, 2 J. AGRIC. SCI. 138, 138–39 (2010).

169. See T.M. Joannis et al., *Serologic and Virologic Surveillance of Avian Influenza in Nigeria, 2006-7*, EURO SURVEILLANCE, Oct. 16, 2008, at 11. Backyard poultry production is widespread in Nigeria, and “contributes significantly to family income, especially in peri-urban and poor rural communities.” *Id.* This kind of direct human-animal interaction contributes to the spread of potentially pandemic avian influenza, making a case-by-case consideration of the right to property is unreasonable approach. See *id.*

170. See *id.*

171. See Ogunsola Grace Oluwatofunmi et al., *Effect of Telecommunication on Poverty Status of Rural Households in Nigeria*, 15 GLOBAL J. HUM. SOC. SCI. ECON., no. 3, 2015, at 50 (describing low density of telecommunications technology in large parts of rural Nigeria).

172. See Robert F. Breiman et al., *Preparedness for Highly Pathogenic Avian Influenza Pandemic in Africa*, 13 EMERGING INFECTIOUS DISEASES 1453, 1454–55 (2007).

example, while Ebola continues to pose a substantial threat on the African continent, other diseases like yellow fever and cholera are much more rampant and currently affect many more people than Ebola. However, when it comes to highly infectious diseases, prioritized allocation of resources is not the only way to address concerns regarding the spread of infection and individual rights. While a government order to cull infected poultry should not be contestable, due to risk of further transmission, individuals could be allowed to appeal the government's compensation decision if they feel the amount is insufficient.

2. Emphasis on Monitoring of Human and Commercial Traffic, While Providing Clear Limits on Duration of Isolation and Ability to Contest Undue Quarantine

This proposed solution addresses the implementation of an appeal process and specified time designations. As the most important factors in determining the level of protection available for individual rights, this proposal should take priority. Explicitly placing clear limits on the duration of isolation and providing the ability to contest objectionable quarantine will allow Nigeria to better protect individual rights in public health emergencies.

As hubs of industrial commerce on their respective continents, both Japan and Nigeria understand the importance of monitoring human and commercial traffic that enters the country, especially during a threat of pandemic disease. The existence of explicit quarantine statutes in both Japan and Nigeria to govern the screening and quarantine of goods and people during a time of public health emergency reflects an understanding of the importance of protecting the country and its population from disease-bearing vessels. Because the rate of potential exposure to infected individuals increases exponentially the longer infection is left undetected, the importance of finding and testing exposed individuals may provide strong justification for wielding governmental power at the expense of individual rights. For instance, the centralized and coordinated system created to address the Ebola outbreak in Nigeria "is largely credited with helping contain the Nigerian outbreak early."¹⁷³ In situations like this, the focus becomes whether provisions exist to determine when exercise of governmental power should expire and how that will be enforced. At what point does the level of emergency subside so that it becomes appropriate to

173. Faisal Shuaib et al., *Ebola Virus Disease Outbreak—Nigeria, July–September 2014*, 63 MORBIDITY & MORTALITY WKLY. REP. 867, 867 (2014).

enforce checks on governmental power by the legislature or allow individuals to appeal quarantine or isolation orders?

Japan's statutes incorporate the suggestions in the IHR for measures for individual appeal of quarantine orders and specific time limits and provide some security for individual rights in the country's approach to public health emergencies. Nigeria should adopt Japan's approach and allow individuals to appeal and contest quarantine orders after a specified length of time. Solidifying specific procedures and limits on isolation will not only ensure the protection of individual liberties, it will also ensure efficiency in identifying and treating infected persons and property. The caveat is that quarantine should be upheld until the people or items can be cleared as safe, but that requires quick and efficient laboratory testing, to which countries like Nigeria may have limited access.¹⁷⁴

IV. CONCLUSION

During public health emergencies, such as pandemic infectious diseases, individual rights may be overridden for the greater public welfare. Although undoubtedly necessary in certain circumstances, governments must establish mechanisms to ensure that government action does not unnecessarily impede on individual rights. Comparing the statutory systems of Japan and Nigeria, alongside the recommendations of the World Health Organization, Japan appears better equipped to maintain and protect individual rights in times of public health emergencies. By adopting elements of Japan's system and revising the existing statutes to reflect the realities of the modern day, Nigeria may be able to ensure adequate protection for individuals in public health emergencies such as avian influenza and Ebola.

174. See Maxmen, *supra* note 51, at 422 (2018) ("Many Nigerian states lack facilities to quickly diagnose diseases such as . . . Ebola.").

