

Current Methods of Dead Fetus Disposal in Germany and Their Implications for Japan

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Abstract

This article surveys procedures for the handling of dead fetuses and their legal status in Germany, to clarify the problems involved in this task and consider how such clarifications can inform current practices in Japan. According to the German Civil Status Act and the Executive Order for the Civil Status Act, parents of a stillborn child, that is, a dead fetus weighing more than 500 grams, may register the child's name in birth records. Though a miscarried child, that is, a dead fetus weighing less than 500 grams, cannot be registered in any records, a certification is issued in which the child's name is entered in accordance with the parents' request. Burial is governed by the law of each state: Most states require parents to bury a fetus when it exceeds a certain weight and permit the burial of a fetus upon the parents' request if the weight is below the threshold. These regulations were introduced as a result of petitions from parents who had experienced a miscarriage or a stillbirth. When considering procedures for the treatment of dead fetuses in Japan, we should take into account both the dignity of the unborn child and the feelings of the bereaved parents.

Keywords: stillbirth, miscarriage, abortion, Civil Status Act, Burial Act

Introduction

This article discusses recent legal regulations with a focus on burial laws in German states in order to describe practices for the dignified management of dead fetuses and regulatory challenges to their burial or disposal. Dead fetuses are those born dead as a result of stillbirth, miscarriage, or abortion. Until recently, few people in Japan were aware of the practice of disposing of dead fetuses as an ethical problem.¹ It was not until 2004 when dead fetuses were found discarded as general waste by an obstetrician who ran a clinic, in Yokohama City, that it was recognized as a major problem.² Around the same time, a committee set up by Japan's Ministry of Health, Labor and Welfare began to discuss the use of dead fetuses for clinical research: While poor management of dead fetuses was reported, deliberations over their clinical use began.

In this article, I will first outline the regulatory situations concerning the disposal of dead fetuses in Japan and the background of the dispute over this issue and clarify the associated challenges. Thereafter, I will compare and contrast the situation in Germany, where burial law reforms, including provisions for the disposal, are underway in several states. In Germany, there is also a current debate over changes to the management of dead fetuses in terms of naming and registering identity, in addition to these burial law reforms. Finally, I will clarify the background of Germany's burial law reforms and identify regulatory challenges in Japan.

1. Situation in Japan and background of the dispute

In Japan, the stillbirth of fetuses that die after four months (12 weeks) of gestation must be recorded according to the “provisions on the notification of stillbirth” (No. 42 of Ordinance of the Ministry of Health and Welfare of 1946). Stillbirth notification must be given to the local government by the father or mother of the stillborn baby by submitting a stillbirth notification form including the names of the parents, sex of the baby, gestational age, and date, time, and place of stillbirth, along with a stillbirth certificate or a fetal postmortem examination certificate issued by a physician or midwife. No space is given in the form for the name of the stillborn baby, and unlike a baby born alive, it will not be registered in the family register.

Article 2 (1) of the Cemetery and Burial Act states that a corpse “includes a dead fetus in the fourth month of gestation or later” and stillborn babies in the fourth month of gestation or later may be buried or cremated. Both the provisions on the notification of stillbirth and the Cemetery and Burial Act apply to dead fetuses in the fourth month of gestation or later, and the permission for burial or cremation will be granted upon stillbirth notification.

But what of dead fetuses before the fourth month of gestation? In this case, there is no obligation for the father or mother to notify authorities of their child’s death. Further, the Cemetery and Burial Act does not apply, and the corpse will generally be collected and incinerated as infectious waste, in a manner similar to that of isolated or resected organs or tissues. The director of the obstetrics and gynecology clinic in Yokohama City was charged and convicted of violating the Waste Management Act, after he was found to have discarded dead fetuses as general waste. This event prompted the Ministry of Health, Labor and Welfare and the Ministry of the Environment to carry out a national questionnaire survey on the management of “aborted fetuses” before the fourth month of gestation among prefectural governments and those city governments with a public health center. According to this survey, some local governments have systems that

grant permission for the incineration of aborted fetuses in crematories, while others do not but will accept a request from the father or mother, if one is made. A detailed account of the survey results is not provided here; however, based on these results, the Ministry of Health, Labor and Welfare announced in 2004 that “it is necessary to treat aborted fetuses before the fourth month of gestation (12 weeks) adequately to preserve the dignity of their lives” and recommended that all prefectural governments and city governments with a public healthcare center refer to the following three criteria.³

1. The local government shall establish an ordinance pertaining to dead fetuses and maternity waste. A collection and disposal agent licensed under this ordinance shall collect an aborted fetus before the fourth month (12 weeks) of gestation from a medical institution separately from other waste and incinerate it at a licensed disposal site.
2. The local government shall establish an ordinance pertaining to dead fetuses and maternity waste. A collection and disposal agent licensed under this ordinance shall collect an aborted fetus before the fourth month (12 weeks) of gestation and incinerate it at a crematorium. Alternatively, a medical institution shall incinerate it in a crematory, according to this ordinance.
3. According to the instructions of the municipality, medical institutions shall incinerate aborted fetuses before the fourth month (12 weeks) of gestation in a crematory.

It should be noted that these recommendations from the Ministry of Health, Labor and Welfare apply only to artificially aborted fetuses before the fourth month of gestation. This limitation may be attributable not only to the fact that the event that triggered these responses was related to the disposal of such fetuses, but also to the fact that there are many circumstances in which the aforementioned recommendations are inadequate for aborted fetuses in general. This is because the number of natural miscarriages is unknown and very early-stage natural miscarriages are not necessarily treated in a medical institution, in

contrast to the number of induced abortions, the reasons for which the doctor must report to the authorities to keep a record of demographics.

Of all dead fetuses, those in the fourth month of gestation or later are treated as corpses by law, and fetuses that are artificially aborted before the fourth month of gestation are required “to be treated appropriately as pertaining to the dignity of their lives” by the Ministry of Health, Labor and Welfare; however, a discussion on how the nation should treat miscarried fetuses before the fourth month of gestation has been lacking. Moreover, further discussion is required regarding whether the abovementioned three criteria are adequate for the treatment of artificially aborted fetuses before the fourth month of gestation. For example, the recommendations require “collection and disposal agents,” “collection agents,” and “medical institutions” to incinerate these fetuses at a disposal site or crematorium. However, they do not grant the parents the right to bury or cremate them, unlike in the case of fetuses in the fourth month of gestation or later. Furthermore, some local governments permit burial or cremation, but do not require the medical institution to explain to the parents of the deceased fetus that burial or cremation is possible. Thus, to examine the validity of these points, let us consider the situation in Germany, where burial law reforms are underway.

Before doing so, let us consider the regulations regarding the use of dead fetuses for research purposes in Japan. In principle, similar to the provisions on the notification of stillbirth and the Cemetery and Burial Act, dead fetuses at the fourth month of gestation or later may be dissected and preserved for educational and research purposes with the consent of the bereaved family, based on the Postmortem Examination and Corpse Preservation Act. Although there are no clearly stated laws or national guidelines for dead fetuses before the fourth month of gestation, the Japan Society of Obstetrics and Gynecology released guidelines for the use of deceased fetal or newborn organs for research purposes in 1987.⁴

In 2002, the Ministry of Health, Labor and Welfare’s expert committee on human stem cell-based clinical research began to discuss, more positively, in some cases, whether to allow

the use of dead fetuses for this type of clinical research. However, after the 2004 event at the obstetrics and gynecology clinic in Yokohama City, the poor management of artificially aborted fetuses came to be viewed as a social problem, which led to the determination not to use dead fetuses for clinical research. The final guidelines formulated in 2006 clearly state that clinical research using stem cells derived from dead fetuses is outside the acceptable scope.⁵

2. Management of dead fetuses in Germany

In Germany, the notification of dead corpses is stipulated by federal regulations in the Civil Status Act⁶ and the Executive Order for the Civil Status Act⁷ (hereinafter, Executive Order). Dead fetuses that weigh 500 grams or more or those that weigh less than 500 grams but had reached 24 weeks of gestation are classified as stillborn babies (Totgeburt), while those that weigh less than 500 grams and had not reached 24 weeks of gestation are classified as miscarried fetuses (Fehlgeburt). The former involves an obligation to notify the government under the Civil Status Act. There is no such obligation for the latter, and civil status cannot be registered for miscarried fetuses, although a formal certificate can be issued at the parents’ request. There are provisions for the burial of dead fetuses in all the state burial laws in Germany; however, the criteria (weight and gestational period) for burial obligation, regulations differ from state to state on the use of dead fetuses for research purposes, and the required disposal method for unburied dead fetuses. Under the Civil Status Act, there is no such category as “aborted babies” since aborted fetuses are classified as either stillborn or miscarried fetuses. Nonetheless, many state burial laws have specific provisions for “aborted babies.”

As for the use of dead fetuses for transplantation, the Transplantation Act of 1997 did not initially cover the procurement of organs and tissues from dead embryos and fetuses; however, provisions for this type of organ and tissue procurement were added in the Amendment of 2007.⁸ In addition, the German Medical Association released guidelines in 1991 on their use for research purposes (Guidelines for

the Use of Fetal Cells and Tissues).⁹

In what follows, let us closely examine the treatment of dead fetuses under German Civil Status Act and the burial law provisions in each state. Let us discuss, albeit briefly, the use of dead fetuses for research purposes under these burial laws.

2-1. Regulations related to the Civil Status Act

In Germany, the standards for stillborn babies and miscarried fetuses are set out in Article 31 (2) of the current Executive Order. The Executive Order has been amended several times in the past, and the standards have been changed. The Executive Order of 1957 defined “stillborn babies” as those with a height of 35 cm or above, while “miscarried fetuses” were classified as those with a height of below 35 cm.¹⁰ Thereafter, weight became the measure for stillborn or miscarried fetuses, and the amendment of 1979 defined the former as those weighing 1000 grams or more, and the latter as those weighing less than 1000 grams.¹¹ In 1994, a new amendment defined stillborn fetuses as those weighing 500 grams or more, and miscarried fetuses as those weighing less than 500 grams.¹² The amendment of 2018, which is the current standard, classifies dead fetuses that weigh 500 grams or more or those that weigh less than 500 grams but have reached 24 weeks of gestation as stillborn babies, and all other dead fetuses as miscarried fetuses.¹³ The reason for changes in these standards was primarily to be consistent with the fetal viability outside of the mother’s body (The reason for the amendment of 2018, in particular, was to extend pregnant or postpartum women’s eligibility to receive benefits by including those at 24 weeks of gestation or later). Note that standards other than weight, including babies without a heartbeat, umbilical cord pulsation, or voluntary breathing after separation from the mother’s body, are common to the definitions of both stillborn babies and miscarried fetuses.

How, then, do stillborn babies (weighing 500 grams or more or at 24 weeks of gestation) and miscarried fetuses (weighing less than 500 grams or before 24 weeks of gestation) differ in terms of their treatment in Germany? Stillborn babies are registered in the “register of births”, along

with the place, date and time of birth, sex, and names of parents, as well as a remark that “it was stillborn”. In addition, the name of the stillborn baby can be registered at the time of the request¹⁴ (Article 21 (2) of the Civil Status Act). In other words, if a stillborn baby is named at the request of the parents, it is treated in the same way as babies born alive on the civil status register, except for the added remark that it was stillborn. This treatment is due to the amendment of 1998 to the Civil Status Act, before which stillborn babies were registered in the “registry of deaths,” and name registration was not permitted. There are also trends in other countries, allowing the naming of stillborn babies. The Amendment of 1995 to the Civil Status Registry Ordinance in Switzerland¹⁵ and the amendment of 1999 to the Civil Status Registry Act in Austria both allow parents to name their stillborn babies.¹⁶

The treatment of miscarried fetuses is governed by the Executive Order. Article 31 (3) of the Executive Order, as amended in 2013, allows parents to notify the Civil Status Registration Office of their miscarried baby, if they wish to receive an official certificate, even if they are not allowed to register the civil status of their deceased child.¹⁷ This certificate includes entries for the child’s name, along with the date, time, and place of birth, and its sex (although parents’ notification of miscarried fetuses is voluntary, and the certificate does not have legal force). Before the amendment of 2013, miscarried fetuses simply “[could] not be registered for civil status” without a proviso, and except for changes in the criteria based on weight for the stillbirth/miscarriage classification, no major revisions were made in the treatment of miscarried fetuses on the Civil Status Register.¹⁸

2-2. Burial law provisions

In Germany, burial is governed by state law,¹⁹ which mainly includes the following provisions:

- Obligation and parental right to bury the dead fetus
- The manner of disposal of any dead fetus whose parents decline to bury it
- Obligation of medical institutions to explain the burial of dead fetuses
- Treatment of artificially aborted fetuses

Not every state employs these provisions, and burial laws vary considerably among them. However, almost all states have defined a standard in terms of weight or gestation period. If the dead fetus meets the standard, “burial obligation” is imposed upon the parents, and, if it does not, “the right of burial” is granted to them, if they wish. In what follows, the expressions “the obligation and the right of parents to bury the dead fetus,” “the manner of disposal of the dead fetus whose parents decline to bury it,” and “treatment of artificially aborted fetuses” are explained. In so doing, let us examine the obligation of medical institutions to explain the options for the burial of dead fetuses to parents.

Parents’ obligation and right to bury their dead fetus

In Japan, fetuses that die at the fourth month of gestation or later are treated in the same manner as other corpses in terms of burial, according to the Cemetery and Burial Act. However, most German states use the weight of the fetus rather than the gestation period as the standard for deciding the required burial treatment. Presently, 9 out of the 16 states in Germany²⁰ impose an obligation for parents to bury a dead fetus if it weighs 500 grams or more, and if a dead fetus weighs less than 500 grams, parents have the right to bury their dead fetus if they so wish. To illustrate this, let us consider provisions included in the Baden-Württemberg State Burial Act²¹ as one of the states with the most comprehensive regulations:

Article 30. Burial Obligation of the Baden-Württemberg State Burial Act

1. Corpses shall be buried. This includes babies born dead weighing 500 grams or more and fetuses dead at birth (i.e., stillborn fetuses).
2. Miscarried fetuses are babies born dead, weighing less than 500 grams, and fetuses born dead at birth. Miscarried fetuses can be buried at the expense and request of the parents. Article 46 (4) and Article 47 apply to this case. If delivery is conducted in a medical institution, the manager of the institution shall ensure an explanation regarding the availability of burial is given to at least one of the parents.

3. All artificially aborted fetuses (aborted fetuses) shall be regarded as miscarried fetuses and shall be treated according to the provisions stipulated in the second and third sentences of Paragraph 2. If at least one of the parents does not express their will as per the second sentence of Paragraph 2, miscarried fetuses and aborted fetuses shall be collected and buried by a medical institution under dignified conditions. The manager of the institution shall bear this cost.
4. Miscarried and aborted fetuses that are unburied can be used only for academic purposes. To use a dead fetus for academic purposes, prior consent shall be obtained from the parents. If miscarried and aborted fetuses are no longer to be used for academic purposes, the academic institution shall take care of miscarried and aborted fetuses.

The Baden-Württemberg State Act provides for the burial of dead fetuses in Article 30 from paragraphs (1) to (4). Paragraph 1 provides for the obligation to bury stillborn babies (weighing 500 grams or more), while the second sentence of Paragraph 2 provides for the right to bury miscarried fetuses (weighing less than 500 grams). Paragraph 3 stipulates that aborted fetuses shall be treated in the same way as miscarried fetuses. The yardstick of 500 grams in weight is based on the measure for the stillbirth/miscarriage distinction prescribed in the Executive Order for the Civil Status Act prior to the amendment of 2018.

Of the remaining seven states, four²² require the burial of fetuses weighing 1000 grams or more, while recognizing parents’ right to bury fetuses weighing less than 1000 grams.²³ Three states (Hesse, North Rhine-Westphalia, and Bavaria) use uniquely different measures. Hesse requires the burial of fetuses weighing 500 grams or more or at 24 weeks of gestation or more while recognizing parents’ right to bury fetuses that meet neither of these conditions. North Rhine-Westphalia, meanwhile, does not impose a burial obligation on parents but recognizes parents’ right to bury their dead fetuses, whether miscarried or stillborn.

Bavaria has the most stringent regulations for the burial of dead fetuses. The Bavarian State

Burial Act²⁴ defines stillborn babies as those weighing 500 grams or more and miscarried fetuses as those weighing less than 500 grams, with parents having the same obligation to bury their fetus as other corpses if it is stillborn, and the same right to bury their fetus, if it is miscarried. These regulations are common to those of Baden-Württemberg and the other states mentioned above. However, the Bavarian State Burial Act further dictates that parents “must put their miscarried fetus to rest in a cemetery” if they cannot bury it. If, however, parents are unable to “put it to rest in a cemetery,” the medical institution is obliged to do so. Thus, Bavaria requires that all parents perform some form of burial for their dead fetuses. The distinction between “burial” and “putting a dead fetus to rest in a cemetery” can be explained in the following way: “burial” refers to the burial of the dead body or ashes in an individual burial plot in the same way as other corpses. In contrast, “putting a dead fetus to rest in a cemetery” does not refer to burial in an individual burial plot; rather, the fetus is buried in a common grave, together with the corpses and ashes of several other dead fetuses.²⁵

In relation to parents’ right to burial of a fetus, some states obligate medical institutions to explain to the bereaved parents that they are allowed to bury their dead fetus. This is laid out in the third sentence of Paragraph 2 of Article 30 of the Baden-Württemberg State Burial Act (“If delivery is conducted in a medical institution, the manager of the institution shall ensure an explanation for the availability of burial is given to at least one of the parents”). Presently, 9 out of the 16 German states require that such an explanation be provided by the relevant medical institution.²⁶

Disposal methods for dead fetuses unburied by their parents

Let us review the treatment cases where the parents do not wish to bury their deceased fetus or exercise the right to bury it. Presently, 9 out of the 16 states in Germany impose an obligation on medical institutions to bury such fetuses.²⁷ Five states impose an obligation on medical institutions to dispose of or incinerate these fetuses, instead of requiring that they be buried by these institutions.²⁸ For example, Paragraph

2 of Article 15 of the Berlin State Burial Act²⁹ states that “if stillborn babies weighing less than 1000 grams or miscarried fetuses are not buried, they must be disposed of by the institution in which they are born or the custodian thereof in a sanitary and morally appropriate manner, as long as they are not used for academic purposes.” Hesse and Schleswig-Holstein have no legal provisions for dead fetuses that are not buried.

Some states provide regulations in their burial laws for the use of dead fetuses for research purposes. Needless to say, they do not provide concrete guidelines regarding specific research uses, but do stipulate regulations concerning burial. These are exemplified by the required consent for the research use of dead fetuses and their burial after the research in Paragraph 3 of Article 30 of the aforementioned Baden-Württemberg State Burial Act. Eleven states have provisions that limit (this may be better phrased as “only give reference to”) the use of unburied dead fetuses for academic purposes,³⁰ of which Baden-Württemberg and Bavaria are two states that specifically require the consent of parents or a person entitled to dispose of dead fetuses and their burial after research use.

Provisions for aborted fetuses

In Germany, abortion is allowed at up to 12 weeks of gestation, for example, after a legally required consultation. Abortion after 12 weeks of gestation may also be allowed if there is a medical indication that continued pregnancy may endanger the woman’s life; thus, in the case of a late-term abortion following such a medical indication, the baby may weigh more than 500 grams. As mentioned above, there is no such category as “aborted fetuses” under the Executive Order for the Civil Status Act, and an aborted fetus is included in either the stillborn fetuses or miscarried fetuses category, depending on whether it weighs 500 grams or more.

However, many states’ burial laws provide for the treatment of aborted fetuses separately from stillborn or miscarried fetuses. Hesse is the only state that does not have a clear state law on the treatment of aborted fetuses. In this case, it is reasonable to think that aborted fetuses are treated in the same way as dead fetuses in general, according to Hesse’s stipulation of either weighing 500 grams or being at 24 weeks

Table 1. Provisions for the disposal of dead fetuses in the burial laws of each German state

	State	Weight or gestational age of the fetus at which the parents' obligation for burial arises	Medical institution's obligation to explain parents' right to burial	Treatment of unburied dead fetuses*	Provisions for research use **
1	Baden-Württemberg	500g	○	○	○
2	Bavaria	500g (Fetuses weighing less than 500g are put to rest in a cemetery)	○	○	○
3	Berlin	1000g	○	△	△
4	Brandenburg	500g	○	△	△
5	Bremen	1000g	○	○	△
6	Hamburg	1000g	—	○	△
7	Hesse	500g or 24 weeks of gestation	—	—	—
8	Lower Saxony	500g	○	△	△
9	Mecklenburg-West Pomerania	1000g	○	○	△
10	North Rhine-Westphalia	(Right to burial only)	○	○	—
11	Rhineland-Palatinate	500g	○	○	—
12	Saarland	500g	—	△	△
13	Saxony	500g	—	○	△
14	Saxony-Anhalt	500g	—	△	△
15	Schleswig-Holstein	500g	○	—	—
16	Thuringia	500g	—	○	△

* ○: Burial by medical institution △: Disposal and incineration by medical institution —: No provisions

** ○: Consent provisions in burial law △: Reference to research use only —: No provisions

of gestation.

Five of the remaining 15 states, excluding Hesse, impose an obligation on parents and medical institutions for complete burial—that is, that all aborted fetuses must be buried in some way.³¹ Of these, Bavaria, as in the case of miscarried fetuses weighing less than 500 grams, grants burial rights to parents and requires them to put their aborted fetus to rest in a cemetery, even if they do not bury it. If parents cannot place the fetus in a cemetery, the medical institution is obliged to do so. Baden-Württemberg, Rhineland-Palatinate, and Saxony are the three states that recognize parents' burial rights for all aborted children, and, if the child is not buried by the parents, the medical institution is obliged to do so. Hamburg does not specify parents' burial obligation or rights, but Hamburg does impose a burial obligation on medical institutions.

Four states impose an obligation on parents or medical institutions for partial burial: If the

aborted fetus meets certain criteria, the parents or medical institution are required to bury it; if it does not, the fetus is either incinerated or discarded.³² In Lower Saxony, parents are obliged to bury their aborted fetus if it weighs 500 grams or more, and the parents have the right to bury it if it weighs less than 500 grams; the fetus is incinerated if it is not buried by the parents. Bremen, Mecklenburg-West Pomerania, and Thuringia have adopted similar standards. Bremen and Mecklenburg-West Pomerania recognize parents' right to bury their fetuses after 12 weeks of gestation and impose a burial obligation on the medical institution if a fetus is not buried by the parents. Further, neither state recognizes parents' right to bury any fetus aborted before it had reached the 12th week of gestation. While Bremen recognizes the medical institution's burial right, Mecklenburg-West Pomerania requires that the fetus be incinerated. Finally, Thuringia acknowledges parents' burial

right, regardless of the gestational age of the fetus, and if it is not buried by the parents, the state requires the medical institution to bury it if it is over 12 weeks of gestation and to dispose of it if it has not reached this point.

Four states recognize parents' burial rights only and do not specify a burial obligation.³³ North Rhine-Westphalia, Saxony-Anhalt, and Schleswig-Holstein recognize parents' right to bury their aborted fetus, regardless of weight and gestational age, and, if the fetus is not buried, it is discarded. Saarland specifies that the burial of an aborted fetus weighing less than 1,000 grams may be waived at the express wish of one parent if the other parent does not object it. If the fetus is not buried, it is discarded.

Neither Berlin and Brandenburg specify either burial rights or burial obligation and, instead, provide for disposal. Both states require that aborted fetuses be disposed of by the medical institution in the same manner as miscarried and stillborn fetuses are disposed of when they are not buried.

3. Meaning of burying dead fetuses

Up to this point, we have seen the practices for handling dead fetuses in Japan and Germany. Here, let us consider the meaning of burying dead fetuses by reviewing Germany's burial law reforms. Until the early 1990s, Hamburg and Bremen were the only two German states that specified parents' right to bury their dead fetus when there were no burial obligations. Both states amended the burial law to enshrine the burial right in response to strong requests by parents who had experienced a stillbirth or miscarriage to bury their dead fetuses.³⁴ In other states, it was common practice to discard dead fetuses that did not meet the criteria. Article 30 of the earlier cited Baden-Württemberg State Burial Act included the following proviso before its amendment in 2009³⁵ —here, there is no provision for the right to bury miscarried or aborted fetuses:

Former Article 30: Burial Obligation in the Baden-Württemberg State Burial Act

1. All corpses must be buried.
2. Miscarried fetuses and excised body parts that are not buried shall be disposed of in a

sanitary and morally appropriate manner, as long as they are not used for academic purposes.

Similarly, until recently, the Rhineland-Palatinate State Burial Act³⁶ had no provisions for the treatment of dead (miscarried or aborted) fetuses unburied by their parents; however, an amendment at the end of 2014 obligated medical institutions to bury such fetuses and required the place of burial to be recorded if the medical institution buried them (Paragraph 2 of Article 8 of the Rhineland-Palatinate State Burial Act). The significance of recording the place of burial is that it aims not only to ensure strict control over the treatment of dead fetuses but also to allow parents who did not initially wish to bury their child to visit the place of burial if they should later ask for a place to grieve. The emotions of those who have experienced stillbirth, miscarriage, or abortion are very complex and could be expressed as “unauthorized grief”³⁷ or “loss covered by taboos.”³⁸ To acknowledge the right to name not only stillborn but also miscarried fetuses and the right to bury dead fetuses that do not meet the stipulated criteria is to socially acknowledge the existence of children who died before birth. Amendments to the German Civil Status Act and Enforcement Order and reforms to the state burial laws with regard to the treatment of dead fetuses have been made primarily in light of the need to care for families who have experienced the loss of such a child. In Japan, the Cemetery and Burial Act treats a dead fetus as a corpse if it dies in the fourth month of gestation or later. Compared to Germany, where half of the states impose the same burial obligations as those for corpses if the dead fetus weighs 500 grams or more (around 24 weeks of gestation), the Japanese criteria are stricter. However, the criteria of being in the fourth month of gestation or later have been in place since the beginning of modern state policy for cemeteries in the Meiji era³⁹ and did not originate from the perspective of parental and familial care. Furthermore, it is generally impossible for parents to name their dead fetuses and officially register their names in any way. As mentioned above, recommendations made by the Ministry of Health, Labor and Welfare in 2004 did not deal with the treatment of dead

fetuses before the fourth month of gestation in general, but only with artificially aborted fetuses before the fourth month of gestation, nor did they recognize parents' right to bury fetuses that are artificially aborted before the fourth month of gestation or miscarried fetuses. The phrase "pertaining to the dignity of life" in the recommendations must also be noted.

There is a risk that imposing an obligation to bury aborted fetuses on their parents as "pertaining to the dignity of life" may serve, in effect, to tighten abortion regulations. It is important to adopt the perspective of burial as parents' right and that disposal should be according to the parents' wishes.

Conclusion

We have examined regulations regarding the disposal and burial of dead fetuses in Japan and Germany. In Germany, reforms to the Civil Status Act and the Executive Order have been undertaken from the 1990s to the present, triggered by movements led by parents who had experienced miscarriages or stillbirths and self-help groups. These reforms enabled registration of stillborn babies on the register of births, as well as the naming of stillborn babies and miscarried fetuses. Burial laws in each state have also been amended since the late 1990s to enable the recognition of parents' right to bury their dead fetuses that do not meet the burial criteria.

In Japan, medical practice and research related to care for parents who have experienced miscarriage or stillbirth are also underway. However, there has not yet been a strong call for institutional changes, for example, to keep the names of children born dead in official documents or to oblige medical institutions to explain the options for their disposal. However, despite the silence concerning institutional changes, the grief of bereaved parents is of course serious. We must also reflect on the fact that the practice of disposing of dead fetuses in Japan has not been seen as a bioethical problem, despite the fact that embryo use and abortion are considered bioethical issues.

Some have argued that abortion should be banned because fetuses have dignity equal to that of fully developed humans. However, the claim that the fetus should be disposed of in the same

manner as those who were born alive and died is not necessarily popular. Conversely, even if we endorse the claim that fetuses do not have equal dignity to humans, there should be a debate as to whether dead fetuses may be treated as waste. The review of institutional reforms in Germany from the 1990s to the present day and the general absence of equivalent institutional reforms in Japan seems to show that the question of how dead fetuses should be disposed of has long been forgotten in Japan.

Endnotes

- 1 For recent research on the treatment of dead fetuses including the issue of research use, see M. Kokado. *Shibou taiji no houteki na toriatsukai ni tsuite: itai toshite no songen to kansensei haikibutsu to no aida de* [Legal treatment of dead fetuses: Between dignity as a corpse and infectious waste], *Josan Zasshi*, Vol.60, No.2, 2006, pp.172-175; and M. Tamai and S. Hiratsuka (Editors), *Suterareru inochi, riyō sareru inochi: taiji soshiki no kenkyū riyō to seimei rinri* [Life abandoned, life utilized: Research use of fetal tissue and bioethics], Tokyo: Seikatsu Shoin, 2009. The following book is particularly informative regarding the situation in France: Y. Yamamoto, *Shizanji ni naru: france kara yomitoku "shiniyuku taiji" to seimei rinri* [Having a stillbirth: Understanding "Dying Fetuses" from Cases in France and Bioethics], Tokyo: Seikatsu Shoin, 2015.
- 2 An obstetrician at the (now defunct) Isesaki Clinic in Yokohama City disposed of fetuses and placentas after abortion as general waste, rather than as infectious waste, as stipulated by law. This event was widely reported in newspapers and on television because abortion itself was treated as an ethical taboo in Japan at that time. The doctor was convicted of violating the Waste Disposal Act in 2005.
- 3 *Ninshin 4 kagetsu (12 shu) miman no chuzetsu taiji no toriatsukai ni kansuru chosa kekka nado ni tsuite* [Survey results on the treatment of aborted fetuses in less than 4 months of gestation] (Kojibohatsu No. 1012002, October 12, 2004). Refer to the following website for survey results: <http://www.mhlw.go.jp/houdou/2004/09/dl/h0924-3a.pdf> (Last accessed July 16, 2020)
- 4 The Japan Society of Obstetrics and Gynecology.

Shibou shita taiji/shinseiji no zouki nado wo kenkyu ni mochiiru koto no zehi ya kyoyou hanni ni tsuite no kenkai [Pros and cons for using organs from dead fetuses and newborns for research and a view on their permissible use]. *Journal of Obstetrics and Gynecology Research*, Vol.39, No. 1, 1987, p.10 [in Japanese]. These guidelines stipulate that the Postmortem Examination and Corpse Preservation Act shall be followed, that research shall be conducted by physicians, consent shall be obtained from the parents, and the privacy of the fetus, newborn, and the parents shall be respected. Caveats were added to these guidelines in 2001.

- 5 *Hito kan saibou ni mochiiru rinshou kenkyu ni kansuru shishin* [Guidelines for human stem cell-based clinical research] (Ministry of Health, Labour and Welfare, Notification No. 425, July 3, 2006). These guidelines were reviewed in their entirety in 2010 and 2013. In both renewals, clinical research using fetus-derived stem cells was excluded from the scope of the guidelines. Note that these guidelines expired in 2014 with the enactment of the new Act on the Safety of Regenerative Medicine.
- 6 Gesetz zur Reform des Personenstandsrechts vom 19. Februar 2007 [Act to Reform of the Civil Status Act of 19 February 2007], BGBl. I 2007, p. 122; last amended by Article 88 of Verordnung vom 19. Juni 2020 [the Order of 19 June 2020], BGBl. I 2020, p. 1328. The Civil Status Act corresponds to Japan's Family Register Act. The civil status registration system differs greatly between Germany and Japan; however, we will not discuss these differences here.
- 7 Verordnung zur Ausführung des Personenstandsgesetzes vom 22. November 2008 [Executive Order for the Civil Status Act of 22 November 2008], BGBl. I 2008, p. 2263; last amended by Article 89 of Verordnung vom 19. Juni 2020 [the Order of 19 June 2020], BGBl. I 2020 p. 1328.
- 8 Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben vom 4. September 2007 [Organ and Tissue Donation Act, removal and transplantation of 4 September 2007], BGBl. I 2007, p. 2206; last amended by Article 16 of Gesetzes vom 19. Mai 2020 [the Act of 19 May 2020], BGBl. I 2020 p. 1018. Although several amendments have been made since 2007, the article regulating the procedure for the procurement of organs and tissues from dead embryos and fetuses has not been amended.
- 9 Bundesärztekammer, "Richtlinien zur Verwendung fetaler Zellen und fetaler Gewebe," [German Medical Association, "Guidelines for the Use of Fetal Cells and Tissues"] *Deutsches Ärzteblatt*, 88(48), 1991, p. A4296-A4301. Note that these guidelines from the German Medical Association have now been revoked.
- 10 Verordnung zur Ausführung des Personenstandsgesetzes vom 12. August 1957 [Executive Order for the Civil Status Act of 12 August 1957], BGBl. I 1957, p. 1139.
- 11 Sechste Verordnung zur Änderung der Ausführung des Personenstandsgesetzes vom 23. April 1979 [Sixth Order to Reform of the Executive Order for the Civil Status Act of 23 April 1979], BGBl. I 1979, p. 493.0
- 12 Dreizehnte Verordnung zur Änderung der Ausführung des Personenstandsgesetzes vom 24. März 1994 [Thirteenth Order to Reform of the Executive Order for the Civil Status Act of 24 March 1994], BGBl. I 1994, p. 621.
- 13 Erste Verordnung zur Änderung der Ausführung des Personenstandsgesetzes vom 24. Oktober 2018 [First Order to Reform of the Executive Order for the Civil Status Act of 24 October 2018], BGBl. I 2018, S. 1768.
- 14 More accurately, "at the request of the person who should be granted personal custody (Personensorge), if the child was born." Since, however, the person who takes custody of the child is normally the parent, we use the phrase "at the parents' request" here.
- 15 Zivilstandsverordnung vom 28. April 2004 [Civil Status Registry Ordinance of 28 April 2004], SR 211.112.2. In Switzerland, stillborn fetuses are defined as dead fetuses weighing 500 grams or more or at 22 weeks of gestation or later.
- 16 Bundesgesetz über die Regelung des Personenstandswesens [Civil Status Registry Act], BGBl. Nr.16/2013. In Austria, stillborn fetuses are defined as dead fetuses weighing 500 grams or more.
- 17 Gesetz zur Änderung der personenstandsrechtlicher Vorschriften vom 7. Mai 2013 [Act to the Amendment of the Executive Order for the Civil Status Act of 7 May 2013], BGBl. I 2013, p. 1122. It should be noted that Austria and Switzerland also made amendments to their regulations in 2016 and 2018, respectively, and, in much the same way as in Germany, parents are allowed to register a miscarriage if they so wish

- and to include the name of the miscarried fetus in the notification form.
- 18 This amendment was based on the petition of one couple who experienced a miscarriage and stillbirth. The petition called on the Federal Parliament to amend the law in order to allow for the registration of the civil status of all born children, regardless of their weight. For a detailed description of the petition, see the following article by the individuals in question: Barbara und Mario Martin, *Fest im Herzen lebt ihr weiter* [Firmly in Our Heart You Live on], Aßlar: adeo Verlag, 2014, pp. 117-118.
 - 19 The term Bestattung (“burial”) in German burial law refers to the burial of a dead body in general, including not only the procedure of placing the body in the coffin and burying it in the ground, but also other procedures such as cremation. Whether ash scattering is allowed or not depends on the burial laws of each state; however, due to space limitations, we will not distinguish between burial methods here.
 - 20 These nine states are Baden-Württemberg, Brandenburg, Lower Saxony, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thuringia.
 - 21 Gesetz über das Friedhofs- und Leichenwesen vom 21. Juli 1970 [Cemeteries and Corpses Act of 21 July 1970], GBl. p. 395; last amended by Gesetz vom 11. Februar 2020 [Act of 11 February 2020], GBl. p. 37.
 - 22 These four states are Berlin, Bremen, Hamburg, and Mecklenburg-West Pomerania.
 - 23 It should be noted, however, that Bremen recognizes parents’ right to bury a fetus if it weighs less than 1000 grams and is over 12 weeks of gestation, although it does not recognize the right to bury the fetus if it is in the 12th week of gestation or earlier.
 - 24 Bestattungsgesetz vom 24. September 1970 [Burial Act of 24 September 1970], GVBl. p. 417; last amended by Verordnung vom 22. Juli 2014 [the Order of 22 July 2014], GVBl. p. 286.
 - 25 Refer to the following website and article: <https://www.stmgp.bayern.de/service/buerger-fragen-wir-antworten-faqs/> (Last accessed July 16, 2020); Cathleen Severin. *Die Rechtsstellung der Eltern und die Rechtslage verstorbener Kinder im Falle von Fehlgeburt und Schwangerschaftsabbruch* [The Legal Status of Parents and the Legal Position of Deceased Children in the Event of Miscarriage and Termination of Pregnancy], Hamburg: Verlag Dr. Kovač, 2010, p. 62.
 - 26 These nine states are Baden-Württemberg, Bavaria, Berlin, Bremen, Mecklenburg-West Pomerania, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, and Schleswig-Holstein.
 - 27 These nine states are Baden-Württemberg, Bavaria, Bremen, Hamburg, Mecklenburg-West Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saxony, and Thuringia. Of these states, North Rhine-Westphalia requires medical institutions to incinerate dead fetuses if their parents refuse for the institution to carry out a burial.
 - 28 These five states are Berlin, Brandenburg, Lower Saxony, Saarland, and Saxony-Anhalt.
 - 29 Gesetz über das Leichen- und Bestattungswesen vom 2. November 1973 [Corpses and Funerals Act of 2 November 1973], GVBl. p. 1830; last amended by Gesetz vom 15. Dezember 2010 [Act of 15 December 2010], GVBl. p. 560.
 - 30 These eleven states are Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Mecklenburg-West Pomerania, Saarland, Saxony, Saxony-Anhalt, and Thuringia.
 - 31 These five states are Baden-Württemberg, Bavaria, Hamburg, Rhineland-Palatinate, and Saxony.
 - 32 These four states are Bremen, Mecklenburg-West Pomerania, Lower Saxony, and Thuringia.
 - 33 These four states are North Rhine-Westphalia, Saarland, Saxony-Anhalt, and Schleswig-Holstein.
 - 34 Cathleen Severin, *op. cit.*, p. 11. Refer also to the following article: Stephen Rixen, “Die Bestattung fehlgeborener Kinder als Rechtsproblem [The burial of miscarried children as a legal problem],” *Zeitschrift für das gesamte Familienrecht* 41, 1994, pp. 417-425.
 - 35 Gesetz über das Friedhofs- und Leichenwesen vom 21. Juli 1970 [Cemeteries and Corpses Act of 21 July 1970], GBl. p. 395. Note that Article 30 of the Baden-Württemberg State Burial Act was also amended in 2014, but it was not until 2009 that parents’ right of burial was put into statutory form.
 - 36 Bestattungsgesetz vom 4. März 1983 [Burial Act of 4 March 1983], GVBl. S. 69; last amended by Gesetz vom 19. Dezember 2014 [Act of 19 December 2014], GVBl. S. 301.
 - 37 Sakaguchi, Y. *Shibetsu no kanashimi ni mukiau: grief care towa nanika* [Facing the grief of bereavement: What is grief care?]. Tokyo: Koudansha, 2012, p.22 [in Japanese]

- 38 Cathleen Severin, *op. cit.*, 249.
- 39 Article 11 of the 1884 “Detailed Standards for the Enforcement of the Cemetery and Burial Control Regulations” (Notified by the Ministry of the Interior on November 18, 1884, Otsu No. 40) sets out the procedures required for the burial of dead fetuses in the fourth month of gestation or later. This was succeeded by the Cemetery and Burial Act, but the requirement of fetuses being in the fourth month of gestation or later has not changed to date.
- * This article is an English version of the following article: Yoshichika MORI, *Doitsu ni okeru shibou taiji no syobun no arikata, Igakutetugaku Igakurinri* [Annals of the Japanese Association for Philosophical and Ethical Researches in Medicine], Vol.33, 2015, pp.1-9.