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Topics: Recent topics in public health in Japan 2023

＜ Review ＞

Issues in end-of-life care and organizing and prospecting ethical and legal issues of Voluntary Stopping of Eating and Drinking (VSED) in Japan

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Abstract

With the world's aging population and the advent of a "super-aged, multi-death society" in which approximately 1.3 million people die each year, interest in end-of-life care is growing. Many academic societies have developed guidelines on how end-of-life care should be provided. In 2018, the Ministry of Health, Labour and Welfare revised its guidelines on end-of-life care for the first time in 11 years. The public has become increasingly interested in how to end one's own life, as in "end-of-life" activities, and there is a growing discussion about "desirable ways to die" and the corresponding medical treatment. Considerations regarding the kind of end-of-life care required and how medical and welfare professionals should approach patients and their families have emerged. Advances in medical technology have made it possible to prolong patients' lives; however, it is necessary to determine how we should respond when patients do not wish to prolong their lives. In such cases, options such as "euthanasia," "death with dignity," and "physician-assisted suicide" are available. However, there is conflict between the patient's preferred choice of dying (patient decision-making) and the medical professionals required to treat the patient.

Therefore, this paper summarizes the decisions made by medical professionals in cases in which ventilators and life-prolonging treatments were withheld or discontinued to respect the decisions of terminally ill patients and considers them in the context of legal arguments.

Japan is less advanced than other countries with regard to Voluntary Stopping of Eating and Drinking (VSED) at the end-of-life. Therefore, we will analyze these issues according to ethics, medical practice, and legislation and discuss how to advance knowledge about VSED in Japan, develop laws and guidelines, and formulate a code of ethics.

keywords: terminal medical treatment, law, ethics, voluntary stopping of eating and drinking, withdrawing life-sustaining treatment

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I. Introduction: Issues in End-of-Life Care

Interest in end-of-life care is growing, and various organizations and academic societies have begun to address the state of end-of-life care in their recommendations and guidelines [1-5]. In March 2018, the Ministry of Health, Labour and Welfare revised its guidelines for the first time in 11 years [6]. The public is becoming increasingly interested in "end-of-life" options, and there is a growing debate about "desirable ways to die" and the corresponding medical care. In recent years, medical professionals have taken the initiative in developing "advance care planning)." It involves discussions with the patient and family members on the policies of medical treatment and care for the end-of-life stage, as well as how the patient would like to live; Japan has begun to adopt this approach. Advances in medical technology

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have made it possible to prolong patients' lives; however, it is important to determine how we respond when patients do not wish to prolong their lives. End-of-life care involves various issues for patients and their families and medical professionals [7,8].

This paper reviews end-of-life care and analyzes the laws and guidelines in other countries to use the associated ethical issues as a basis for developing a code of ethics for Voluntary Stopping of Eating and Drinking (VSED) in Japan. Additionally, we present a system aimed at eliminating VSED-related issues among people in home, palliative, and terminal care.

II. End-of-Life Care and Criminal Law

1. Judicial precedents on euthanasia, death with dignity, and end-of-life care

We describe a case in which a patient insists on exercising his or her right to informed refusal and a physician respects their wishes and takes steps to shorten the patient's life. It is important to examine which requirements must be met to prevent illegality and medical professionals from being held criminally liable, even if the constitutive elements of murder or consensual homicide crimes are applicable. Table 1 displays a selection of notable events. In Japan, the Special Committee on Death and Medical Care of the Science Council of Japan published a report in May 1994 ("Report of the Special Committee on Death and Medical Care – On Death with Dignity"), in which (1) the significance of discontinuation of life-prolonging medical care, (2) conditions for discontinuation of life-prolonging medical care, and (3) contents and scope of life-prolonging medical care subject to refusal were established. The following year, in the "Tokai University Euthanasia Case" decision, the court expressed its opinion on the requirements for permissible active euthanasia and discontinuation of medical treatment for terminally ill patients [9]. However, cases in which physicians were charged with murder occurred, including the Haboro Hospital, Imizu Municipal Hospital, and Kawasaki Kyodo Hospital cases [10,11], and in all cases in which they were indicted, the convictions were confirmed.

2. Patient's right to self-determination

The Constitution of Japan stipulates "fundamental human rights" in Article 97, and Article 13 states that "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs. " and stipulates the right to self-determination and the right to the pursuit of happiness. The right to respect for the individual and the pursuit of happiness is considered to include "the freedom to decide the disposition of one's own life (refusal of medical treatment, death with dignity, etc.)" [12]. Regarding the patient's right to self-determination, the "Jehovah's Witnesses" nonconsensual blood transfusion case in 1992 recognized the "right to refuse transfusion" based on the right to self-determination. This is a precedent of the "right to refuse treatment," which allows a patient to refuse even medically effective treatment in the absence of his or her consent. In the field of medical care, there is disagreement between "self-determination" when a patient does not wish to undergo life-prolonging treatment and medical personnel who recognize their duty to treat the patient. Although advance instructions or a living will would be helpful regarding the patient's true decisions, it is necessary to confirm this decision and the opinions of family members, caregivers, and others who are familiar with the patient's values.

3. Laws on medical practitioners

Article 19 of the Medical Practitioners Law stipulates that "No medical practitioner who engages in medical practice may refuse any request for medical examination or treatment without legitimate grounds." The Medical Service Law also stipulates the duty to attend to patients. Furthermore, the Medical Care act stipulates the basic principles of medical care in Article 1-2 and provides informed consent guidelines for medical personnel in Article 1-4-2. When discontinuing medical treatment, it is necessary to consider the relationship with criminal law [13].

Article 1-2 "Medical care is to be provided in accordance with the physical and mental state of the medical care recipient, based on a relationship of trust between the physician, dentist, pharmacist, nurse, or other medical care professional and the medical care recipient, in a way which respects life and ensures the dignity of the individual, and not only the medical treatment, but including measures to prevent illness and rehabilitation measures must also be of high quality and well-suited. "

Article 1-4-2 states "In providing medical care, a physician, dentist, pharmacist, nurse or other medical care professional must give proper explanations and endeavor to foster understanding in medical care recipients."

4. The process by which a crime is committed under the criminal law in Japan

The general process by which a crime is or is not committed under the criminal law is as follows (Figure 1 and Appendix).

The requirements for crimes that are the object of punishment are stipulated in the text of the law (the principles of criminal law) [14]. For example, the act that constitutes

Table 1 Important judicial precedents for euthanasia, death with dignity, and end-of-life care

Case	Type	Time	Summary	Judicial disposition
Tokai University Hospital (Kanagawa)	Treatment discontinuation **Active euthanasia**[a)]	1991.4.	The eldest son of a patient hospitalized for multiple myeloma., requested that the therapeutic action be discontinued. The doctor discontinued intravenous infusion and other treatments. Furthermore, the patient's family requested, "Please make the patient comfortable." The doctor injected potassium chloride and other drugs into the patient and caused his death.	Yokohama District Court, Mar. 28, 1995 (Doctor/Murder, 2 years imprisonment, 2 years suspended sentence).
National Health Insurance Keihoku Hospital (Kyoto)	**Active euthanasia**	1996.4.	A 48-year-old comatose patient hospitalized for terminal cancer was administered a muscle relaxant at the doctor's discretion. Approximately 10 minutes later, the patient died. The hospital director was prosecuted for murder the following year.	The case was dropped because the actual administered dose was less than the lethal dose.
Kawasaki Kyodo Hospital (Kanagawa)	Discontinuation of treatment **Active euthanasia** (focus was on the former)	1998.11.	An attending physician extubated a patient who became unconscious due to a bronchial asthma attack. However, when the patient was having difficulty breathing, the attending physician ordered an assistant nurse to inject a muscle relaxant intravenously to the patient, which caused the patient's death.	Yokohama District Court 2005.3.25. Medical doctor/killer, 3 years of imprisonment, 5 years of execution → Tokyo High Court 2007.2.28. 1 year and 6 months of imprisonment, 3 years of execution → Third Petty Benchmarking Decision 2009.12.7.
Hokkaido Haboro Hospital (Hokkaido)	Treatment discontinued	2004.2.	A patient (90 years old) who had cardiopulmonary arrest due to aspiration of food was put on a ventilator. The attending physician explained to the family that the patient was in a brain dead state and was not expected to recover and then removed the ventilator, causing the patient's death.	Sent to prosecutors for murder. May 2004 → not prosecuted. August 2006 (causal relationship difficult to determine).
Imizu Municipal Hospital (Toyama)	Treatment discontinued	2000.9 ~2005.10.	Since 2000, the chief of surgery removed ventilators from seven terminally ill patients (54–90 years old, four men and three women) at the request of their families and allowed them to die.	Former head of the Department of Surgery and former second head of the Department of Surgery were prosecuted on suspicion of murder (without seeking strict disciplinary measures) H2008.7. Indictment not filed; 2009.12.
Wakayama Prefectural Medical University Hospital Kihoku Branch (Wakayama)	Treatment discontinued	2006.2.	An 88-year-old woman was put on a ventilator after emergency surgery for an intracerebral hemorrhage. When the woman became brain dead, the doctor removed the ventilator leading to her death (cardiac arrest).	Sent to court on suspicion of murder (did not seek criminal punishment) 2007.1. → No prosecution 2007.12.
Tajimi Hospital (Gifu)	Treatment was stopped	2006.10.	A patient choked on his food and was placed on a ventilator after being resuscitated via emergency medical treatment, but his recovery was not expected. The Ethics Committee decided to discontinue life-prolonging treatment, including ventilators, at the request of the patient's family and in response to the patient's written request, "If I cannot be revived, do not prolong my life." However, the treatment was not discontinued because the prefectural government opined that 'there were no national guidelines and it was too early to do so,' but the patient died without discontinuing his treatment."	
Kameda General Hospital (Chiba)	Treatment discontinued	2008.4.	A patient with amyotrophic lateral sclerosis submitted a request to be taken off the ventilator when he could no longer communicate due to the progression of his disease. The Ethics Committee recommended that the hospital director respect the patient's wishes. However, the hospital director showed reluctance to remove the ventilator, saying, "Under the current law, there is a risk of arrest (for murder, etc.) if the ventilator is removed."	
Kyoto ALS patient commissioned murder (Kyoto)	—	2019.11.	Two doctors who were asked to euthanize a female patient with ALS (amyotrophic lateral sclerosis) killed the patient by injecting drugs into the patient's body through the gastric fistula. After doctors left the patient's home, the patient stopped breathing and was pronounced dead at the hospital.	Two doctors were arrested in July 2020 on suspicion of commissioned murder and charged in August. As of the end of 2022, it is still at the stage of collecting evidence, and court proceedings will be held in the future.

a) Active euthanasia is shown in bold to distinguish it from Treatment discontinued.

the crime of murder is "killing a person." However, a crime is not committed immediately after the act constitutes the act of killing a person but only once the act has been deemed illegal. A doctor's surgical act also falls under the requirements for the crime of injury; however, because it is a legitimate medical act, it is not considered illegal. Next, even if the act meets the requirements for constituting a crime of injury and is illegal, a crime is not committed if liability cannot be established. For example, if a person is mentally ill or insane and cannot be held responsible, murder is not committed.

Thus, a crime is committed when an act that meets the constitutive requirements is present, the act is illegal, and the person is found to be responsible" .

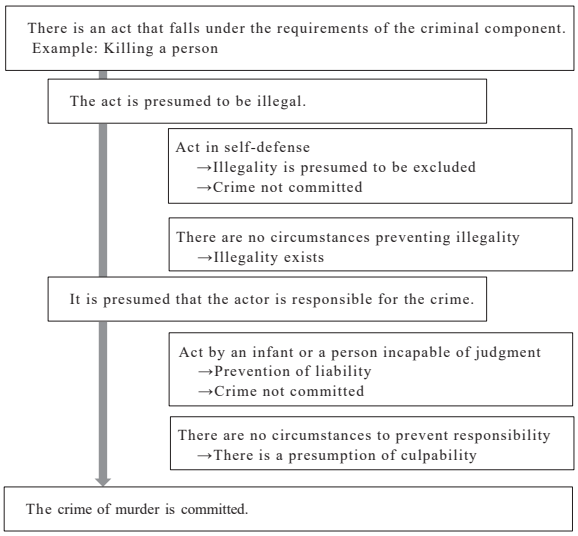

Figure 1 The process by which a crime is committed under the Criminal Law

5. Euthanasia under the criminal law

Under criminal law, when a physician is involved in euthanasia, such as removing a patient's ventilator or not providing necessary life-prolonging treatment, it constitutes murder and the legality of the act is an issue. From a criminal law perspective, euthanasia can be divided into the following four categories [15].

Four types of euthanasia under criminal law

(1) Passive euthanasia

This refers to cases in which death is hastened by not taking active life-prolonging measures to avoid extending the suffering of the dying person. In other words, this is the case when a patient in a persistent vegetative state is permitted to die early without active life-prolonging treatment to avoid extending the patient's dying process.

(2) Active euthanasia

This refers to cases in which life is directly shortened using an artifice for eliminating physical suffering. In other words, it is a case in which the suffering of the dying person ends with actively ending life.

(3) Pure euthanasia

This refers to cases in which the purpose is to alleviate physical pain and suffering but not to shorten life. Pure euthanasia is not considered an act that falls under the requirements of the Penal Code but is considered a type of therapeutic act and is therefore not a problem under the Penal Code.

(4) Indirect euthanasia

This refers to cases in which a procedure intended to alleviate physical pain results in shortening of life as a side effect that is not directly intended. According to criminal law, pure euthanasia is legal as a purely therapeutic act because it does not hasten the patient's death but rather alleviates or eliminates the patient's physical suffering. The common view is that indirect euthanasia is considered justified as a therapeutic act, as long as it fulfills the requirements of a therapeutic act.

Additionally, if negative euthanasia falls under the requirements for murder, commissioned or consensual murder, or assisted suicide as a crime of omission, it is necessary to recognize the duty to perform the act. However, if life-prolonging measures merely prolong the suffering of the dying person, there is no legal obligation for the physician to prolong life. Finally, the legality of active euthanasia has been the focus of debate in criminal law and has been challenged in court cases in Japan. According to current common law and judicial precedents, the illegality of active euthanasia may be prevented if certain requirements are fulfilled. However, because of the strict criteria for active euthanasia, there are few cases in which active euthanasia is approved.

III. VSED

1. VSED

Thus, the legal issues related to the life-or-death actions of terminally ill people are complex. In recent years, a trend has made these legal challenges even more difficult. In situations where people who wish to hasten their own death and to be euthanized but are not permitted by the laws of their nations, it has been confirmed in countries around the world that they try hastening their death by stopping eating and drinking.

In other countries, the term VSED is used to describe the Voluntary Stopping of Eating and Drinking by terminally ill people. In recent years, studies on VSED have accumulated in these countries, and issues in ethics, medical practice, and legal development have begun to be identified [16]. Shibasaki analyzed specific cases of VSED since the 2000s and highlighted the issues in each case [17]. In Jain-

ism, "Sarekkana" (originally meaning "to wear down properly") is generallyknown as a cultural custom to stop eating and drinking at the time of death. Sarekkana is considered by some societies a way of approaching death that is still celebrated today. The Indian High Court has decided that Sarekkana should be banned. The court has introduced a ruling that prohibited VSED and argued for the need to examine the ethics of VSED from multiple perspectives.

In Japan, palliative and home care physicians have reportedly experienced patients wishing VSED. Shinjo et al. surveyed 219 home medicine specialists and 695 palliative medicine specialists and found that 52% and 32% of physicians knew about VSED and had patients who had attempted it, respectively [18]. They also noted that 15% of the physicians responded that palliative sedation was indicated for fatigue, hunger, and dry mouth associated with VSED. It is not easy for patients to complete VSED on their own. In cases overseas, support is often provided by medical and nursing care workers. There are ethical challenges involved in, as palliative sedation is often deemed necessary by physicians to complete VSED.

The Netherlands enacted the "Act on the Termination of Life on Request and Assisted Suicide" in 2002 [19]. The criminal law in the Netherlands was also amended, and an amendment was added to Article 293 of the criminal law, which previously prohibited euthanasia and assisted suicide. The revised article states that liability is not imposed if the following conditions are met: (1) clear intent, (2) unbearable suffering with no hope of cure, (3) no treatment, (4) a third-party physician's decision and written agreement, and (5) a report to the coroner in accordance with burial law. This was the first national move to legalize active euthanasia and assist suicide [20].

In the U.S. state of California, the Natural Death act (1994) was enacted, which states that not only terminally ill patients but also patients in a "vegetative state" are not subject to criminal prosecution, civil liability, or punishment or sanctions for violation of professional ethics for the acts of medical personnel who do not prolong life in accordance with the declaration of the patient. A physician who fails to comply with the declaration committsa misdemeanor.

In 2013, a German documentary film depicting Marion M., a woman who chose VSED with the help of a doctor, was released and became a hot topic [21]. Many patients try to perform VSED on their own. In France, Alain Koch, who had a degenerative disease of the arterial wall, abstained from eating and drinking under the law prohibiting euthanasia [22]. Compared with other countries, Japan is far behind in terms of acquiring knowledge about VSED, developing laws and guidelines, and formulating codes of ethics. The Japan Geriatrics Society states the following in its "Guidelines for the Decision-Making Process of Care for the Elderly: Focusing on the Introduction of Artificial Hydration and Nutritional Supplementation" [1]. The lack of shared understanding of whether it is unconditionally better to live longer causes confusion among advocates of introducing artificial hydration and nutrition.

In modern society, views on life and death are becoming increasingly diversified, and the will of patients regarding medical care is becoming increasingly respected. Therefore, it is important to have an appropriate method to confirm decisions and practice evidence-based care. As a preliminary step, it is necessary to organize and systematize ethical issues and establish a code of ethics to eliminate conflicts among the individuals involved.

2. Categorizing four types of "VSED"

Next, to systematically conduct future studies on various issues, we independently developed a basic typology of VSEDs. Table 2 presents four types of VSEDs, from Type 1 to Type 4, according to the "legality issue" and "presence or absence of assistants" to stop eating and drinking.

Type 1–4 VSED are categorized" to the four types formed by the horizontal axes of "legal" and "illegal" and the vertical axes of "with assistance of others" and "unassisted by others," and the accompanying central issues are shown in the lower row for each of them.

First, in Type 1 VSED, which is performed under "legal" and "unassisted" situations, there are no illegality and no caregiver, but it is important to give due consideration to the possibility of conflict and psychological distress in those who somehow know the person's intention to perform

Table 2 Basic types of VSED and main issues

		Execution of food and beverage stops	
		With assistance from others	Unassisted by others
Legality	Legal	**Type 2 VSED** Developing a code of ethics for assistants	**Type 1 VSED** Consideration of the psychological distress in those who know the person's intention Assistance and confirmation of intent
	Illegal	**Type 4 VSED** Criminal response to so-called assisted suicide	**Type 3 VSED** Respect for will vs. legal issues

VSED. Additionally, it is necessary to consider communication that continuously confirms the intention of the person.

In a situation where the legality of the support of VSED has already been established, those that involve the assistance of others are designated as Type 2 VSEDs. Here, although legal issues are exempted, it is necessary to develop a code of ethics to reduce the pain and conflict between the parties concerned and their assistants. In an illegal and unsubsidized situation, Type 3 VSED involves judicial intervention. Here, it is processed as "illegal" and itis imagined that various arguments will be raised in domestic society. In addition to the long-standing conflict between the right to self-determination at death and the law, this may involve the issue of how certain the person's "will" is. In Type 4 VSED, which is illegal and assisted by others, criminal action against "assisted suicide" occurs. In Japan, Article 202 of the Penal Code provides for the crime of assisting suicide. In this case, the act of assisting VSED is regarded as "assisted suicide," that is, assistance to facilitate the act of suicide. In this context, broader social debates about what constitutes "suicide" should also be assumed to occur in these illegal situations.

IV. Conclusions

With the advent of a "super-aged, multi-level death society" and the growing interest in end-of-life care and "life at the end-of-life," it is necessary to reexamine the self-determination of patients regarding end-of-life decisions and how healthcare professionals should respond. Advances in medical technology have made it possible to prolong life, but when patients do not wish to prolong their lives, options such as "euthanasia," "death with dignity," and "physician-assisted suicide" have been taken, resulting in problems for medical professionals in relation to bioethics and criminal law and justice.

It is desirable to organize issues according to ethics, medical practice, and legislation regarding VSED; disseminate knowledge about VSED in Japan; develop laws and guidelines; and establish a code of ethics to ensure legal stability and remove psychological conflicts for healthcare professionals.

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Appendix　The process by which a crime is committed under the Criminal Law in Japan

Requirements for an act to be punished as a crime

1【Constitutive elements】 An act must fulfill the constitutive elements of a crime.

2【Illegality】 The act must be illegal (i.e., the act must be contrary to law and order and must infringe upon legal interests).

3【Culpability】 The actor must be responsible for the act (the act must be capable of making the actor liable).

2* [Illegality] The illegality of the act is not denied.

3* [Responsibility] The actor's responsibility for the act is not denied.

Constituting elements (bodily injury, destruction of corpse, murder, and homicide with consent)

(Article 204) A person who causes another person to suffer injury is punished by imprisonment for not more than 15 years or a fine of not more than 500, 000 yen.

(Article 190) A person who damages, abandons, or unlawfully possesses a corpse, the ashes or hair of a dead person, or an object placed in a coffin is punished by imprisonment for not more than 3 years.

(Article 199) A person who kills another person is punished by the death penalty or imprisonment for life or for a definite term of not less than 5 years.

(Article 202) A person who induces or aids another person to commit suicide, or kills another person at the other's request or with other's consent is punished by imprisonment or imprisonment without work for not less than 6 months but not more than 7 years.

Reasons why the applicability of the constitutive requirement is required

The principle of criminal law: The law enacted or promulgated prior to the Act must determine what acts are punishable and, if so, what punishment is to be imposed.

If an act meets the requirements for a crime, it is presumed to be illegal and the actor is responsible for the act.

Cases in which illegality is presumed

Criminal Law

*** Article 35（Justifiable Acts）**

An act performed in accordance with laws and regulations or in the pursuit of lawful business is not punishable.

***Article 36 (Justifiable Defense)**

(1) An act a person was compelled to take to protect the rights of oneself or any other person against imminent and unlawful infringement is not punishable. (2) An act exceeding the limits of self-defense may lead to the punishment being reduced or may exculpate the offender in light of the circumstances.

***Article 37(Emergency Evacuation)**

An act a person was compelled to take to avert a present danger to the life, body, liberty or property of oneself or any other person is not punishable only when the harm produced by such act does not exceed the harm to be averted; provided, however, that an act causing excessive harm may lead to the punishment being reduced or may exculpate the offender in light of the circumstances.

Cases in which culpability is excluded

***Penal Code Article 39(Insanity and Insanity of the Insane)**

(1) Actions due to insanity is not subject to punishment. (2) An act of diminished capacity leads to the punishment being reduced.

***Article 41(Age of Responsibility)**

An acts of a person less than 14 years of age is not punishable.

Medical Treatment and Grounds for Inhibition of Illegality

- **Surgery**: Acts in the course of legitimate duties as stipulated in Article 35
- **Removal of organs for transplantation from a living body**: Included in the justifiable acts under Article 35 (or extrajudicially barred from illegality).
- **Removal of organs for transplantation from a corpse**: Legal Act under Article 35 (Organ Transplantation Law)
- **Euthanasia, death with dignity and discontinuation of end-of-life care**: May be included in justifiable acts under Article 35 (or may be extrajudicially barred).

＜総説＞

日本の終末期ケアにおける課題の整理および終末期の自発的飲食中止（Voluntary Stopping of Eating and Drinking: VSED）の倫理的法的課題の整理と展望

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抄録

世界に類を見ない高齢化が進み，年間約130万人が亡くなる「超高齢多死社会」の中で終末期医療への関心が高まっている．さまざまな学会が終末期医療のあり方をガイドラインなどで取り上げ，2018年には厚生労働省も終末期医療に関するガイドラインを11年ぶりに改訂した．国民の間でも「終活」として自らの人生の締めくくりへの関心が高まり，「望ましい死に方」やそれに対応する医療のあり方などが議論されるようになっている．どのような終末期医療が求められるのか，医療福祉関係者はどのように患者や家族に寄り添うべきか，医療技術の進歩で患者の延命は可能になったが患者自身が延命を望まない場合はどのように対応すればよいのかなど，終末期医療は様々な問題をはらむ．患者が延命を望まない場合,「安楽死」「尊厳死」「医師による自殺幇助」といった選択肢もあるが，患者の理想とする死に方の追及（患者の意思決定）と，治療を求められる医療従事者との間の葛藤の場面と言える．

本稿では，これまで終末期にある患者の意思決定が尊重された結果，医療者により人工呼吸器や延命治療の差し控えや中止が行われた事件について医療者にどのような司法判断が下されたのか，法学上の議論も踏まえながら整理を試みる．特に，終末期における自発的飲食中止（VSED）に関する研究や基盤整備は諸外国に比べ，わが国では遅れている．そのため，これに関する倫理・医療実践・法整備の面での課題を整理し，日本におけるVSEDに関する知識の普及，法・ガイドライン等の整備，倫理綱領の策定に向けた議論を行う．

キーワード：終末期医療，法律，倫理，自発的飲食中止，生命維持治療の中止