

Research on the Legalization of Living Will Systems

Zhencheng Lin¹, Xinyi Li²

¹ Law School, Southwest Petroleum University, Chengdu, China

² Law School, Southwest Medical University, Luzhou, China

Abstract

The living will system, which safeguards patients' dignity and medical freedom, has received increasing attention from the public. Many people are calling for the protection of their medical freedom and right to die under the regulation of legal systems. The first part of this article introduces the connotation of the advance directive system and traces its origin and development; the second part discusses the legislative basis of the advance directive system in our country; the third part provides a detailed overview of the current situation of the advance directive system in our country; the fourth part examines the potential issues that may arise from implementing the advance directive system in our country; and the final part summarizes the suggested improvements to address these issues. This article aims to provide recommendations for the implementation of the advance directive system in our country to better protect patients' autonomy in medical decisions and their dignity.

Keywords

Living Will; Patient Autonomy; Legislation.

1. The Connotation of the Living Will System

The living will system first emerged in the United States during the latter half of the 20th century. In the 1960s, advancements in medical technology, particularly the widespread application of life-sustaining equipment such as ventilators and dialysis machines, made it possible to prolong life significantly. However, this also sparked debates about "futile medical treatment" and whether patient autonomy should include the right to refuse life-sustaining interventions, which became a focal point of academic discourse at the time.

In 1967, Luis Kutner, an Illinois-based attorney, introduced the concept of the "living will" for the first time. He advocated for the use of written documents to reject futile medical treatment, triggering extensive discussions among American scholars, especially in the fields of law and medicine. By 1969, the Euthanasia Committee of the United States issued guidelines requiring hospitals to obtain disclaimers from terminally ill patients who voluntarily refused further medical treatment. This measure aimed to shield hospitals from potential ethical, legal, and public relations liabilities and is regarded as the precursor to the living will system in the U.S.

However, until 1970, discussions about living wills remained largely confined to professionals such as scholars, lawyers, and physicians, with limited societal engagement. There had been no legislative or judicial response at either the federal or state level during this period.

The pivotal moment arrived in 1976 with the Quinlan case, which ignited nationwide debates across the United States concerning the "right to die," the necessity of living wills, and the ethics of euthanasia. Following this landmark ruling, numerous U.S. states emulated the precedent set by the New Jersey Supreme Court, extending judicial recognition to living wills.

I contends that the emergence of the Quinlan case stemmed primarily from two contextual factors: One is the ascendancy of law and economics: During the 1970s-a period marked by rapid global economic and trade expansion-the field of law and economics gained prominence.

Courts increasingly rendered decisions grounded in cost-benefit analyses, prioritizing utilitarian considerations. The another one is intensified focus on human rights: In the latter half of the 20th century, human rights protections garnered heightened scholarly and societal attention. Within American society, individual freedom emerged as the paramount human right, propelling issues like medical autonomy and overtreatment to the forefront of public discourse. The pivotal Cruzan case in 1990 catalyzed nationwide deliberation on living wills in the United States, culminating in the federal Patient Self-Determination Act (PSDA) of 1991. This landmark legislation formally established the living will system at the federal level, making the U.S. the first nation to codify such provisions. Subsequently, multiple jurisdictions including Japan, the United Kingdom, Germany, and China's Hong Kong and Taiwan regions introduced similar regulatory frameworks.

Globally, the theoretical foundation of living will systems faces minimal controversy. Variations in implementation arise primarily from differences in national contexts and societal values. The prevailing academic consensus defines a living will as: A declaration made by a mentally competent patient to accept or refuse specific medical interventions when diagnosed with an incurable terminal condition. Chinese scholar Professor Wu Guoping elaborates: "Living wills are legally executed documents through which individuals, while fully conscious, specify their preferences for accepting or refusing medical treatments during terminal illness, including arrangements for postmortem affairs." [1] Aligning with China's legal framework, I posit that a valid living will requires: A fully competent adult (under civil law) acting with clear consciousness Expression of intent regarding life-sustaining treatment during the terminal stage of an incurable disease Compliance with statutory documentation requirements; Adherence to rigorous legal procedures in execution.

Although the living will system has been recognized around the world, some scholars still believe that the living will system cannot have a legislative basis. Most people who support the legislation of living will believe that the living will is established on the basis of fully respecting the freedom, dignity and independent choice of the patient, but the definition of whether a person is in an untreatable state needs to be confirmed by the doctor or hospital, but this obviously violates the foundation of the establishment of the system - the compulsory participation of the doctor or hospital and its dominant position in the field of medical knowledge. If the patient is free to judge his or her physical condition solely, there is a possibility of assisted suicide. This is an unavoidable problem of the living will system. In addition, the living will system has also been opposed by some groups, and Japan's disability groups oppose the living will system, believing that life-sustaining medical measures such as ventilators will not make people lose their dignity, and that the living will is a humiliation for those who are clear but need medical measures or others to maintain their lives, and believe that the living will system fundamentally lacks a legislative basis.

2. The Legitimacy of Legalizing Living Wills in China

2.1. Aligns with China's Ethical and Moral Values

In traditional Chinese ethics, the five virtues of benevolence, righteousness, propriety, wisdom, and faith are regarded as the cornerstone, among which "benevolence" is regarded by Confucianism as the place of "full virtue", advocating that benevolent people should have the qualities of sympathy, care, love, respect and help others, push themselves and others, and put themselves in the shoes of others. [2] The living will system requires others to respect the choice and wishes of the testator, not to force the patient to accept or not accept medical assistance, and to think about the patient from the patient's point of view, which reflects the idea of "benevolence". Our country society has a traditional moral concept of "good death", for death, most people hope that they can have a perfect ending, do not want to die painfully, and at the

same time there is also the concept of "avoiding death", and the patient's relatives are afraid of bearing the "crime" of unfilial piety for giving up treatment. The living will is determined by the patient himself, and there can be no coercion by others, and while dying with dignity, his relatives can know his or her own wishes to alleviate his relatives' guilt. In the preface to the book "Who Calls My Death" written by Luo Diandian and others, it is written: "This method of choosing which medical care you want or not at the end of your life by signing a 'living will' based on the patient's informed consent and self-determination is a gift of civilization." [3]

2.2. Embodies the Values of Chinese Law

Under today's legal system, the values of law mainly include freedom, order, justice, etc., and freedom requires that under the rule system, the subject's behavior can be arbitrary; Order requires that within the rule system, the subject can carry out activities in an orderly and unchaotic manner; Justice emphasizes equality and justice among all subjects in society. In addition, freedom, democracy and the rule of law are also the core values of the current society. The value basis of the living will is freedom, the freedom to decide how to end the end of one's life, the defense of the dignity of one's own life, the full embodiment of freedom and human rights, and the embodiment of democratic society. It is foreseeable that the living will system can greatly improve the dilemma of the continuous occurrence of "medical trouble" and meet the requirements of order and the rule of law for the subject's behavior. A living will allows people to choose whether they die decently, to choose their own way of death, and to control their own right to life, rather than accepting some unnecessary life-sustaining assistance measures due to the compulsory requirements of the state, which is also a manifestation of fairness and justice for patients.

2.3. Meeting the Urgent Needs of Contemporary Chinese Society

By the end of 2024, China's population aged 60 and above reached 310.31 million, accounting for 22.0% of the total population, while those aged 65 and above numbered 220.23 million, making up 15.6% of the population. [4] According to the standards set by the United Nations in its 1956 report "The Aging of Populations and Its Economic and Social Implications," a country or region is considered aging when 7% or more of its population is aged 65 or above. Clearly, China has long entered an aging society. Given the enormous elderly population, the question of whether one can die with dignity has become an urgent issue, making "a dignified death" a common topic in daily life.

In reality, a vast number of elderly patients suffer both physically and mentally due to illness, while their families endure a double burden. Some patients, with strong self-respect, do not wish to live in a state of "a fate worse than death." Prolonging life meaninglessly may appear to protect the right to life, but in essence, it is a disguised violation of both the right to life and personal dignity. **Advance directives** aim to prevent such situations by improving the quality of both life and death, allowing individuals to choose their end-of-life care and leave this world with dignity in their final moments.

3. The Current Situation of Our Country's Living Will System

our country research on the living will system started late, our country the first to implement the living will system was Luo Diandian and others, who created the "Choice and Dignity" website in 2006 to promote the concept of living will to the society in the form of "five wishes". In 2013, with the approval of the Beijing Civil Affairs Bureau and the participation of a number of medical institutions and units, the Beijing Pre-Life Will Promotion Association was established, aiming to publicize and promote the living will, hoping to die in a natural and dignified way as much as possible according to the patient's own wishes, so that more people can decide their own lives. During the two sessions of the National People's Congress in 2021,

Huang Gairong, a member of the National Committee of the Chinese People's Political Consultative Conference, suggested that the National People's Congress legislate to legalize living wills. During the two sessions of the National People's Congress in 2024, Gan Huatian, a member of the National Committee of the Chinese People's Political Consultative Conference, suggested actively expanding the pilot of "living wills" and actively promoting the formulation of relevant laws and regulations; Yao Weihai, a member of the National Committee of the Chinese People's Political Consultative Conference, put forward a proposal to promote the pre-living will system, calling for speeding up the legislative process nationwide. In the process of drafting the Civil Code in 2017, Article 8 of the Expert Opinion Draft of the "Personality Rights Compilation" drafted by the Civil Law Research Association has appeared for the first time.

After more than ten years of promotion and research, our country's living will system finally issued the relevant official local legal document for the first time in June 2022 - Article 78 of the "Shenzhen Special Economic Zone Medical Regulations" (hereinafter referred to as the "Medical Regulations") promulgated by Shenzhen, the promulgation of the "Medical Regulations" is a milestone in the history of the development of our country's living will system, and from the perspective of our country's development history, Shenzhen has carried out the pilot work of our country's living will. It provides valuable local practical experience and lays a legislative foundation for the popularization of the living will system nationwide.

From the above, it can be seen that our country only has a clear legal provision on the living will system, and the rest are in the suggestion or promotion stage, and from the perspective of foreign legislative practice, this is definitely not enough, and the living will has become a national legal system in our country and needs to conduct more in-depth research from many aspects such as law, morality, and realistic objective conditions, and explore the legislative path suitable for our country's national conditions.

4. The Practical Dilemma of Legalizing a Living Will in Our Country

4.1. Death Education is Not Widespread Enough

Influenced by the traditional cultural concepts of "taboo death" and "filial piety", most of our country have misunderstandings about living wills, believing that they are equivalent to "giving up treatment" or "unfilial piety". Although death education has become popular in recent years, the scope of promotion is still small, and most people do not fully understand its nature as a "tool for medical autonomy". In addition, in our country's medical practice, family members often replace patient decision-making, with the traditional concept of patient autonomy and family joint decision-making, and even doctors tend to follow the wishes of family members rather than the patient's instructions to avoid disputes. For example, in Ba Jin's later years, the patient's own wishes were ignored due to family and medical intervention, highlighting the contradiction between traditional familialism and individual autonomy.

4.2. The Legal Support is Not Perfect

At present, our country has only one legal provision on living wills, and its supporting provisions are not perfect, many boundaries are not clear, and the implementation procedures are not clearly stipulated, and there are many difficulties in the application process. First of all, the lack of procedures, our country's Shenzhen Special Economic Zone refers to our country's will system for living wills, and the will model text is also applicable to the model will provided by the Chinese Will Database, but the living will solves the problem of medical measures taken at the end of life, which requires the intervention of doctors, not the disposal of property and things after death solved by the will. The procedures for initiation, application, and execution are different from the will, and the solidified legal procedures for applying the will will harm the patient's own will.

The second is the blurred boundaries of the subject. The first is the patient himself, our country's civil law divides natural persons into persons without civil capacity, persons with limited civil capacity and persons with full civil capacity, the law does not clarify whether persons without civil capacity and persons with limited civil capacity can make a will, and the living will requires the patient to decide whether to receive medical assistance at the end of his life, which requires the patient himself to clearly understand his or her own physical state. Some scholars argue that the medical ability to express will is different from the civil law capacity, and it is not necessary to divide their ability to express their will by whether they are adults or not. Other scholars advocate that the medical ability to express intentions should be the same as the standards for determining the capacity of conduct in civil law, and believe that only natural persons who are adults and in a normal mental state can apply to the living will. Second, the minor's legal representative can decide whether the minor receives medical assistance. The second is the patient's doctor, who is the key to judging whether the patient is incurable and plays a decisive role. our country's living will legislation does not require doctors, but we need a set of effective judgment standards for "incurable" and strict legal regulations on doctors and the "incurable" scale. It is necessary to build a sound physician training mechanism, make requirements for doctors such as practice certificates, numbers, levels, and years of practice, and issue clear legal normative documents for "incurable" medical standards. The United States clearly requires three doctors to unanimously judge that the patient is in an incurable state before the living will system can be applied, which is worth learning from.

Finally, there is a lack of judicial remedies. When executing a living will, the testator is usually in a state of unconsciousness or cognitive impairment, and he cannot know whether the living will is executed correctly. In this case, our country's law does not stipulate the exact right holder, and when the patient is unable to wake up, does the patient's relatives have the right to hold the hospital accountable? If the patient's relatives violate the living will, how will the hospital bear the responsibility? There is no legal provision on whether a living will can be "reversed", and it can be said that the rights of the testator are currently not guaranteed by law, and there is no way to provide judicial remedies.

4.3. Prevent Abuse Risks

The main content of a living will is to refuse or accept medical assistance, which means that there will be some conflicts of interest. If the patient belongs to a high-welfare group, such as veterans of the Anti-Japanese War and state cadres, with low medical expenses and high welfare benefits, his heirs may want to continue to receive high state benefits to compulsory medical assistance for the patient, just to maintain the patient's life and extend the welfare receipt time. If the patient is a dependent, especially a family "burden", his relatives may not be willing to spend too much money to help him get rid of the "burden" as soon as possible. The living will system requires the testator to have a clear consciousness, mature cognition, and not be threatened or coerced when making a will, and the living will should be a completely true expression of the testator's will, no matter what the reason is, causing the testator to make a will against his will, and the will should be invalid. our country's living will system does not have relevant laws to avoid the risk of coercion, which may cause abuse of the living will system and aggravate the physical and mental harm to patients.

5. The Path to Improve Our Country's Living Will System

The living will system is essentially similar to the will system, which is why the Shenzhen Special Economic Zone of our country mainly refers to the will system to apply the living will system, but due to its particularity, it should be specially stipulated to better protect the basic rights of patients.

5.1. Improve the Accuracy of the Legal System

5.1.1. Clear Institutional Position

The living will system is a people-oriented legal system, the patient's wishes are the core of the system, whether the living will is valid should be determined by whether the patient's intention is true, doctors and relatives must implement medical assistance according to the patient's wishes, and the entire implementation procedure of the will is also the process of realizing the patient's wishes. A feasible living will system should take the patient's wishes as the core starting point, and on the basis of the existing basic principles of civil law, adhere to the basic principles of patient autonomy, doctor-patient equality, and full supervision, so as to effectively protect the interests of patients. The living will not only protects the physical and material interests of the patient, but more importantly, protects the patient's freedom to control his own life and the right to choose a quality death.

5.1.2. Clear Subject Boundaries

As mentioned earlier, the subject of the living will involves the patient and the doctor. For patients, the applicable patients of the living will should be persons with full civil capacity who are incurable and already in the terminal stage of the disease. "Incurable" should be a disease that cannot be recovered under the existing medical level, and "terminal disease" should be a situation where death will occur in the near future after leaving medical assistance. Due to their shallow cognition and the lack of independence of their existence, it is difficult for them to judge whether their will is an expression of their own will, and whether they should continue treatment when suffering from an incurable disease should be decided by their guardians, which is obviously inconsistent with the basic position of living wills. Some scholars believe that "medical decision-making ability" should be distinguished from the behavioral capacity in civil law, and believe that minors and mentally ill people still have the "ability" to decide whether to apply the living will or not.[5] However, from the actual point of view of our country, our country currently does not have mature provisions on living wills, nor does it have similar provisions such as "medical decision-making ability", so relying on the existing legal system, the establishment of a new legal system under the current legal framework is more acceptable to the public, and the new legal system itself is easier to follow.

For doctors, on the basis of having corresponding practice qualifications, the length of practice and the number of people should be strictly limited, and the judgment of the living will should be jointly carried out by multiple doctors, and the participating doctors should have a long practice experience to avoid errors in judgment.

5.1.3. Standard Legal Procedures and Determined Legal Consequences

From the formulation and execution of the living will and the assumption of responsibility after execution, there should be such a set of strict procedures to ensure the protection of the rights and interests of the testator. The formulation of living wills should be diverse. Taiwan, our country, stipulates that a living will can only be in writing and requires the presence of two witnesses. This is too stiff. The form of making a living will should be the same as a will, with various forms, but because it involves the right to life, it is also necessary to prevent ethical risks such as coercing the signing of wills, and the strictness of the procedure should be higher than that of the will-making procedure. For different forms of strict requirements, for written and video forms, only witnesses can be used; However, oral and electronic materials should be strictly controlled, and even oral forms should not be allowed in the early stage of the living will. In addition, a living will should be revocable and changeable before it takes effect. Revocation and Change Due to changes in the testator's expression of will, it is impossible to guarantee whether it is the true expression of the testator's intention, and these two procedures need to strengthen the effectiveness of notarization and prevent ethical risks such as coercive wills.

Finally, the whole process of the living will should be legally supervised, and the testator has the right to protect his rights to the relevant departments. When medical institutions and probationary institutions violate the intention of the proctor, they shall stipulate corresponding legal consequences, establish punishment mechanisms, improve legal deterrence, and maximize the normal implementation of the proctor.

5.2. Increase Publicity and Education on Pre-mortem Wills

In the "death-avoiding" environment of the whole society, we should find a suitable death publicity path, so that people at different stages can receive death education in different ways, gradually change the situation of people avoiding death, and let more people understand the pre-mortem system. In particular, the patient's own wishes are the foundation, and the patient's own wishes are more acceptable to his family, so as not to make the family think that the hospital is shirking responsibility.

6. Conclusion

The living will system has many positive impacts on our country's current stage, especially in terms of serious population aging, sharp doctor-patient relationship, and prominent family pension problems. There is already a mature legal system outside the territory for reference, combined with our country's national conditions and the existing legal system, I believe that the living will system can take root in our country.

References

- [1] Wu Guoping, Exploration and Conception of the Practice of our country's living will system, Rule of Law Research, 2023.05.
- [2] Xiang Jinru, Xiang Yuqiao. Journal of Hunan University(Social Sciences),2023,37(05):36-44.DOI:10.16339/j.cnki.hdxbskb.2023.05.006.
- [3] Luo Diandian et al., "Who Calls My Death", Writers Publishing House, 2011, p. 10.
- [4] Wang Pingping. The decline in the total population has narrowed and the quality of the population has continued to improve. https://www.stats.gov.cn/sj/sjjd/202501/t20250117_1958337.html. 2025.
- [5] Xu Yingbiao, Zhou Wanling. Research on the specific application and system improvement of living wills: from Article 78 of the Shenzhen Special Economic Zone Medical Regulations (revised in 2022)[J].Tianfu Xinlun,2022(6):98-108.