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Criminal Liability of Third Parties with Regard to Free-Responsible Suicide:

New Developments in the German Jurisdiction[*1]

1. Introduction

'There is no doubt that the sentence administered justice in the concrete case, but at the same time it opened the way for many future wrong decisions in this area.'[*2] These were the words with which former law professor Rudolf Schmitt reviewed the judgement of the Federal Court of Justice as to the criminal liability of third parties in the context of free-responsible suicide in the *Wittig* case. His pessimistic prediction did not remain valid for long. Quite to the contrary, it seemed that the judgement remained without supporters until 2016. In that year, the regional courts of appeal of Hamburg and Berlin decided to open a trial based on it.[*3] The district court of Hamburg and of Berlin delivered judgements in the first instance in late 2017 and early 2018, respectively. This paper is about these new developments within German jurisdiction. After a brief overview of the basics of suicide and German criminal law (in Section 2., the *Wittig* case (in Section 3.) and the two recent cases (in sections 4. and 5.) are presented. The paper ends with a conclusion and thoughts on the future (6.).

2. Basics of suicide and German criminal law

'Whoever kills a human being without being a murderer, shall be punished for manslaughter with imprisonment for not less than five years' states Section 212 of the German Criminal Code[*4]. At first glance, this is irritating. Someone who commits suicide kills a human being – namely, himself. If we strictly refer to

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1 This paper is an extended version of a lecture given on 30.10.2018 at the University of Tartu in the context of the doctoral seminar titled 'Common Problems of Medical Law and Criminal Law'. Special thanks go to Prof. Sootak and Ants Nõmper for their kind invitation to the seminar and to Estonia.

2 R. Schmitt, Der Arzt und sein lebensmüder Patient ['The Doctor and His Tired-of-Life Patient']. – *Juristenzeitung* 1984/19, pp. 866–869, on p. 868.

3 Hanseatisches Oberlandesgericht (Hanseatic Regional Appeal Court), decision from 8.6.2016 – 1 Ws 13/16 = *Zeitschrift für Medizinstrafrecht* 2017/1, pp. 45–54; Kammergericht Berlin (Court of Appeal for Berlin), decision from 12.12.2016 – 3 Ws 637/16 – 161 AR 160/16 = *Zeitschrift für Medizinstrafrecht* 2017/3, pp. 180–182.

4 The sections referred to below are from the German Criminal Code when no other law is mentioned.

the text of the section, suicide would be a crime. This seems to be a misleading assumption, and it is with good reason that no-one in more modern German jurisprudence pleads for this.[*5] One who 'successfully' commits suicide cannot be punished, since he is dead. In the event of failure, it would be possible to exact punishment for attempted suicide; however, if actual suicide cannot be punished under any imaginable circumstances, it is hard to believe that the legislator nevertheless **intentionally** formulated Section 212 so as to encompass suicide. It is more convincing that it seemed unnecessary to explicitly place the term 'another' in front of the object 'human being'.[*6] Through a systematic lens, this result is confirmed. In Section 216 of the German Criminal Code, the killing at the request of the victim is punishable with imprisonment of six months to five years and, thereby, privileged over manslaughter. The position which declares the single-handed suicide by the 'victim' included by Section 212 has to explain the reason for the privilege of the not single-handed, but requested killing of the victim by a third party. No-one has succeeded this challenge yet.[*7]

Therefore, suicide is not an unlawful act by the person committing it.[*8] This position has consequences for the criminal liability of third persons who participate in the act. The German Criminal Code differentiates between perpetration and incitement or accessoryship. For the latter, an intentional, unlawful act of another person is necessary as a link for punishability (under Sections 26 and 27). For that reason, in German criminal law the principle of **impunity for incitement and accessoryship to suicide** exists.[*9] Accordingly, it is essential to consider whether the relevant participant acts as a perpetrator or, on the other hand, an inciter or accessory. The qualification for perpetration is control of the final killing act, so it is significant which of the two persons controls that final act.[*10] If it is the person who is tired of life, the behaviour of the participant is not punishable as killing at the request of the victim. This could be in case of reaching the deadly medication which is ultimately taken by the person him- or herself. It is, when the further conditions are fulfilled, just **an unpunished accessoryship**. *Vice versa*, when the other person infuses the deadly medication and the further conditions are fulfilled as well, the act is **punishable** as killing at the request of the victim, per Section 216.

In both cases, however, an additional aspect is important. Even though the participant controls the final killing act, the range of his punishability depends on the mental status of the person which is tired of life. The request to kill herself has to be **expressed** and **earnest** (see Section 216). Especially the second condition can cause problems. It is necessary that the decision process is faultless.[*11] But the will can be deficient for example as a consequence of drug abuse, depression, an age-related lack of ability to judge or when the request is evoked through fraudulent actions.[*12] In these cases, the punishability of the participant depends on whether he acts **intentionally** with regard to the condition of being earnest. If he **assumes** that it is

5 Earlier voices for the opposite: G. Stratenwerth et al. (eds). *Festschrift für Hans Welzel zum 70. Geburtstag* ['*Festschrift* for Hans Welzel for the 70th Birthday']. Berlin, 1974 (in German). – DOI: https://doi.org/10.1515/9783110909197; *Selbstmord und Beteiligung am Selbstmord in strafrechtlicher Sicht*, pp. 801–822, on pp. 810–817 (E. Schmidhäuser). – DOI: https://doi.org/10.1515/9783110909197-043; H. Klinkenberg. Die Rechtspflicht zum Weiterleben und ihre Grenzen ['The Legal Duty to Live On and Its Limitations']. – *Juristische Rundschau* 1978/11, pp. 441–445 (in German), on pp. 443–444. – DOI: https://doi.org/10.1515/juru.1978.1978.11.441.

6 U. Kindhäuser et al. (eds). Strafgesetzbuch. Nomos Kommentar ['Nomos Commentary on the Penal Code'], Vol. 2, 5th ed. Baden-Baden, Germany, 2017 (in German), before Section 211, Comment 38 (U. Neumann); T. Fischer. Strafgesetzbuch. Kommentar. 65. Aufl. ['Penal Code: 65th, Commented Edition']. Munich, Germany, 2018 (in German), before sections 211–217, Comment 29.

7 U. Kindhäuser et al. (see note 6), before Section 211, Comment 39 (U. Neumann).

8 W. Joecks, K. Miebach (eds). Strafgesetzbuch. Münchener Kommentar ['Munich Commentary on the Penal Code'], Vol. 4, 3rd ed. Munich, Germany, 2017 (in German), before Section 211, Comment 32 (H. Schneider); U. Kindhäuser et al. (see note 6), before Section 211, Comment 41 (U. Neumann).

9 C. Roxin. Tötung auf Verlangen und Suizidteilnahme – Geltendes Recht und Reformdiskussion ['Killing on Request and Suicide Participation – Applicable Law and Reform Discussion']. – *Goltdammers Archiv* 2013, pp. 313–327; Bundesgerichtshof (Federal Court of Justice), sentence from 12.2.1952 – 1 StR 59/50 = BGHSt 2, pp. 150–157, on p. 152; Bundesgerichtshof (Federal Court of Justice), sentence from 15.5.1959 – 4 StR 475/58 = BGHSt 16, pp. 162–169, on p. 167; Bundesgerichtshof (Federal Court of Justice), sentence from 16.5.1972 – 5 StR 56/72 = BGHSt 24, pp. 342–345, on p. 343; Bundesgerichtshof (Federal Court of Justice), sentence from 4.7.1984 – 3 StR 96/84 = BGHSt 32, pp. 367–381, on p. 371.

10 W. Joecks, K. Miebach (see note 8), Section 216, Comment 37-43 (H. Schneider).

11 T. Fischer (see note 6), Section 216, Comment 9. There is an additional requirement in the jurisdiction and parts of the jurisprudence. The Federal Court of Justice requests 'deep reflection' by the victim and an 'inner consistency' of the request to be killed – see T. Fischer (see note 6), Section 216, Comment 9a; U. Kindhäuser et al. (see note 6), Section 216, Comment 14-15 (U. Neumann / F. Saliger).

12 W. Joecks, K. Miebach (see note 8), Section 216, Comment 19-23 (H. Schneider).

about an **earnest request**, section 216 will be taken into consideration (per Section 16, Subsection 2).[*13] Otherwise, when he is aware of the circumstances of the deficient will, he gets punished for manslaughter (per Section 212) or murder (per Section 211).[*14]

Furthermore, this aspect is important also in the case of the final killing act being under full control of the suicidal person. The mentioned example, the reaching for the medication, is just **unpunished accessoryship** when this person commits suicide with **free responsibility**.[*15] Therefore, the element of free responsibility is central. Insofar it is no surprise that the scale for it is disputed. The Federal Court of Justice has no clear position regarding this question.[*16] The jurisprudence is essentially divided in two camps. The 'exculpation theory' denies the free responsibility when the conditions laid down in Section 19, 20, or 35 or in Section 3 of the German Youth Courts Law, which deal with absence of responsibility in case of a lack of guilt, are fulfilled.[*17] More convincing is the 'consent theory', which claims the requirements of a valid consent[*18] and is sometimes combined with the more specific requirements of Section 216[*19]. The situation of suicide is characterised by a **damaging behaviour against oneself** as well as a consent to a damaging behaviour from another person. The 'exculpation' theory meanwhile reverts to sections which concern the responsibility for **damaging behaviour against someone else**. Anyway, there are three possible results, if there is no free responsibility: When the participant acts with negligence with regard to this circumstance, then he is punishable for negligent manslaughter (dealt with in Section 222).[*20] If he intentionally causes the lack of free responsibility – for example, through fraud – or just wilfully exploits this from a position of superior knowledge, he is punishable as a perpetrator who has committed the crime, manslaughter or murder, through another person (under alternative 2 in Section 25's Subsection 1): the victim.[*21] Otherwise (that is, when unknowing and not negligent with regard to this circumstance), the participant is not liable for the death by suicide.[*22]

Until today, there are various discussions about the dogmatic basics and certain details of the above-mentioned aspects of criminal liability related to suicide. In the following pages, this paper will explore another angle. In the cases discussed below, a person with free responsibility committed suicide. A third party either render aid to the final killing act, for example the intake of medication, or they do not. Afterwards, the suicidal person gets unconscious. In the following phase, the present person omits the possible and required rescue to save the life of the dying person.[*23] Having a look at the rules already mentioned, the third person is unpunishable. Even if one renders aid, this solely constitutes **unpunished accessoryship**. At least, this was the legal status until the coming into effect of section 217, the prohibition of the commercial supplying of suicide, on 10.12.2015. When the requirements of this sections are fulfilled a person who renders aid is punishable. This dubious prohibition[*24] and its meaning for the legal questions of the reviewed cases in this paper shall not be discussed here[*25], since they were settled **before** its coming into effect[*26]. Nevertheless, in 1984 the Federal Court of Justice declared omitting life-saving acts to

13 W. Joecks, K. Miebach (see note 8), Section 216, Comment 55 (H. Schneider); T. Fischer (see note 6), Section 216, Comment 11.

14 W. Joecks, K. Miebach (see note 8), Section 216, Comment 54 (H. Schneider).

15 W. Joecks, K. Miebach (see note 8), before Section 211, Comment 37 (H. Schneider); T. Fischer (see note 6), before sections 211–217, Comment 26.

16 To this and with more references: W. Joecks, K. Miebach (see note 8), before Section 211, Comment 37 (H. Schneider).

17 U. Kindhäuser et al. (see note 6), before Section 211, Comment 64 (U. Neumann).

18 U. Kindhäuser et al. (see note 6), before Section 211, Comment 65 (U. Neumann).

19 T. Fischer (see note 6), before sections 211–217, Comment 28.

20 W. Joecks, K. Miebach (see note 8), before Section 211, Comment 64 (H. Schneider).

21 T. Fischer (see note 6), before sections 211–217, Comment 20; U. Kindhäuser et al. (see note 6), before Section 211, Comment 62-63 (U. Neumann).

22 W. Joecks, K. Miebach (see note 8), before Section 211, Comment 64 (H. Schneider).

23 On the real similarities of the cases: H. Lorenz / C. Dorneck, Die Strafbarkeit des Arztes bei freiverantwortlichem Suizid ['The Criminal Liability of the Doctor with Regard to Free-Responsible Suicide']. – *Zeitschrift für Lebensrecht* 2018/4, pp. 146–159 (in German), on p. 147.

24 More than one hundred forty German professors and private lecturers in criminal law issued pleas against Section 217: E. Hilgendorf / H. Rosenau. Stellungnahme deutscher Strafrechtslehrerinnen und Strafrechtslehrer zur geplanten Ausweitung der Strafbarkeit der Sterbehilfe ['Statement of German Professors and Private Lecturers in Criminal Law on the Planned Extension of the Punishability of Euthanasia']. – *Zeitschrift für Medizinstrafrecht* 2015/3, pp. 129–131.

25 To this point: H. Lorenz / C. Dorneck (see note 23), pp. 146–159 (in German), on pp. 149–151.

26 The District Court of Berlin also discussed the (non-existent) importance of Section 217 in the case.

be **basically** punishable as killing at the request of the victim by omission (per Section 216 in conjunction with Section 13) when the omitting person is a **guarantor** for the life of the suicidal person.[*27] Additionally, and for the case of a non-guarantor, it is **basically** punishable as a failure to render assistance (section 323c).[*28] This more than 30-year-old jurisdiction of the Federal Court of Justice was established by the already mentioned *case Wittig*.

3. The Wittig case (1984)

a) The facts of the case

In the *Wittig* case, Wittig' a 76-year-old widow free responsibly decided to commit suicide by taking medication.[*29] The defendant, a family doctor named Wittig, found her unconscious during a home visit. Previously, she told him about her suicidal intention and the reasons for those. When Wittig found her, she was holding a signed sheet of paper in her hands with the words (in translation) 'Salvation! 28.11.81'. Another note in the flat stated: 'I want to go to my Peterle' – her deceased husband. In recognition of her decision, the doctor decided not to try to rescue his patient from death. Nevertheless, he did adjudge rescue to be possible, though not without irreversible cerebral damage.

b) Legal evaluation by the court

Because the survival of the woman in case of an intervention by Wittig was unverifiable with the necessary utmost probability, a completed killing at the request of the victim by omission (again, per Section 216 in conjunction with Section 13) was not suitable for real reasons.[*30] Furthermore, the district court abandoned a conviction for an attempt and a completed failure to render assistance (see Section 323c), for legal reasons.[*31] The prosecution appealed to court. Finally, the Federal Court of Justice delivered a judgement.

The court confirmed the acquittal as the result of the trial. Nevertheless, it explained the omission of rescue **basically** to a forbidden behaviour. A guarantor (in this example, family doctor Wittig) is not allowed to give in to the desires of a suicidal person.[*32] Only in extreme situations is the omitting person's behaviour unpunishable, because the rescue is **unconscionable**.[*33] The reason and requirement for this exception is rooted in the conflict between the obligation to protect life and respect for self-determination.[*34] This conflict can be resolved via a *de jure* not unjustifiable, medical question of conscience.[*35] In the opinion of the Federal Court of Justice, an example of this was manifested in the *Wittig* case, because of the expressed will not to receive medical treatment and the threat of irreversible cerebral damage. Therefore, the doctors's behaviour was unpunishable. Referring to the failure to render assistance (see Section 323c), the court explained free-responsible suicide as an **accident** in terms of the law.[*36] But it still held that, in extreme situations such as the case at hand, rescue cannot be expected, precisely for the reasons mentioned above.[*37] This jurisdiction has remained unrevised by the Federal Court of Justice to this day.

27 BGHSt 32, pp. 367–381, on pp. 371–377.

28 BGHSt 32, pp. 367–381, on pp. 375–376.

29 Addressing the facts of the case: BGHSt 32, pp. 367–381, on pp. 368–369.

30 BGHSt 32, pp. 367–381, on pp. 369–370.

31 On the specific legal reasons against basically given punishability: BGHSt 32, pp. 367–381, on pp. 377–381.

32 BGHSt 32, pp. 367–381, on p. 374.

33 Initial thoughts on this probable-seeming predominant interpretation of this sentence: R. Schmitt (see note 1), pp. 866–869, on p. 868. On voting for justification under Section 34 ('Necessity'): R. D. Herzberg. Der Fall Hackethal: Strafbare Tötung auf Verlangen? ['The Case of Hackethal: Punishable Killing by Request?']. – *Neue Juristische Wochenschrift* 1986/27, pp. 1635–1644, on pp. 1639–1641. Underlining the unclear position of the Federal Court of Justice at this point: U. Kindhäuser et al. (see note 6), before Section 211, Comment 81 (U. Neumann).

34 BGHSt 32, pp. 367–381, on p. 377.

35 BGHSt 32, pp. 367–381, on pp. 377–378.

36 BGHSt 32, pp. 367–381, on p. 381.

37 BGHSt 32, pp. 367–381, on p. 381.

4. The Spittler case (2017)

a) The facts of the case

The point of origin for a possible revision of the jurisdiction from *Wittig* came with a case from Hamburg. The circumstances can be summarised in simplified form thus: A doctor of neurology and psychiatry, named Spittler, provided an expert opinion about the free responsibility expressed in the suicide intentions of two women over 80 years of age.*[38] These ladies obtained medication from an association for euthanasia, Sterbehilfe e.V., which was one of the examples stimulating the debate that led to Section 217's introduction in 2015. One day, the ladies free responsibly took the medication in the presence of the doctor. He omitted to attempt their rescue, out of respect for the will of the two women.

b) Legal evaluation by the court

For the same reasons cited in *Wittig*, the unverifiable probability, just an attempted killing at the request of the victim by omission (once again, per Section 216 in conjunction with Section 13) was suitable and additionally a completed failure to render assistance (Section 323c). The District Court of Hamburg abandoned a conviction on 8.11.2017, for legal reasons.*[39] The prosecution appealed to court. A judgement by the Federal Court of Justice will be delivered on 3.7.2019.

At first, the district court discussed the role of the doctor as a guarantor. In this context, it is instructive to compare the *Spittler* case with *Wittig*. In the earlier case, the omitting individual was the family doctor, who **basically** had taken over the treatment of his patient. In contrast, Spittler only provided an expert opinion. On these grounds, the district court rightly negated the position as a guarantor. However, this question was not actually answered.*[40]

In fact, the court ruled out the existence of a concrete duty to avoid the result that came to pass, the death of the two elderly women.*[41] This was in explicit contradiction to the opinion of the Federal Court of Justice in *Wittig*.

The main argument for this change in view hinges on the increased significance of the right of self-determination in **jurisdiction** and **legislation**. The Federal Court of Justice communicated in other cases, wherein no suicide method was intentionally supplied by a third party (drug cases in which the consumer just recognised the hazard of the drugs), that an earnest and free-responsible decision for suicide is essential for the punishability of a participant.*[42] Furthermore, it introduced the jurisdiction related to the *Behandlungsabbruch*, or withdrawal of treatment, in 2010, to which the District Court of Hamburg referred in *Spittler*.*[43] It is based on the case of *Putz*, an attorney in medical law who advised his client, the daughter of an elderly lady who was ill and comatose, to cut off the mother's feeding tube, after which the older woman died.*[44]

According to the traditional rules of euthanasia, the act of the daughter would have been forbidden as an active killing. In the *Putz* case, the Federal Court of Justice now admitted that there could be situations in which euthanasia by an active doing might be necessary and admissible. Prior to that, this possibility was only accepted for indirect euthanasia but not for the passive form.*[45] Today, omission, limiting, and also

38 To the facts of the case: Landgericht Hamburg (District Court of Hamburg), sentence from 8.11.2017 – 619 KLs 7/16 = *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on pp. 81–85.

39 Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 85.

40 Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 87.

41 Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on pp. 87–89.

42 Bundesgerichtshof (Federal Court of Justice), sentence from 21.12.2011 – 2 StR 295/11 = *Neue Zeitschrift für Strafrecht* 2012/6, pp. 319–320, on p. 320; Bundesgerichtshof (Federal Court of Justice), decision from 5.8.2015 – 1 StR 328/15 = *Neue Zeitschrift für Strafrecht* 2016/7, pp. 406–407, on p. 407.

43 Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 88.

44 To the facts of the case: Bundesgerichtshof (Federal Court of Justice), sentence from 25.6.2010 – 2 StR 454/09 = BGHSt 55, pp. 191–207, on pp. 191–194.

45 An overview of the euthanasia questions is given by: J. C. Joerden, K. Schmoller (eds). *Festschrift für Prof. Dr. Dr. h.c. mult. Keiichi Yamanaka zum 70. Geburtstag* ['*Festschrift* for Prof. Dr. Dr. h.c. mult. Keiichi Yamanaka, for the 70th Birthday']. Berlin, Germany, 2017 (in German). – DOI: https://doi.org/10.3790/978-3-428-54629-9; *Wider die Strafbarkeit des assistierten Suizids* ['Against the Punishability of Assisted Suicide'], pp. 325–344, on pp. 326–334 (H. Rosenau). – DOI: https://doi.org/10.3790/978-3-428-54629-9.

(active) ceasing, under the summarising term 'withdrawal of medical treatment', is seen as justified when the specific requirements defined in this case have been met.*[46] The reason for this is the increased significance of the right of self-determination, which became codified in Section 1901a *ff.* of the German Civil Code in 2009.*[47] In the wake of this, the admissibility of life-prolonging treatment depends on the patient's will. The principle of the unity of the legal order argues for non-punishability when the behaviour is necessary and admissible under civil law.*[48]

Moreover, it is inconsistent for accessoryship to go unpunished while the omission that follows is punishable.*[49] In addition, applying the *Wittig* jurisdiction would lead to a curious result in this case: on one hand, Spittler had to rescue the two old ladies, but, on the other hand, they forbade saving treatment, with obligatory effect, so it had to be cancelled.*[50] A final dubious consequence of applying the *Wittig* jurisdiction would be that guarantors such as family doctors or relatives can get punished while non-guarantors cannot.*[51] That means that the person wishing to commit suicide has to forgo the presence of those important persons during his or her process of dying.

Regarding the failure to render assistance (addressed by Section 323c), the district court expressed doubt as to the existence of an **accident** in terms of law. Still, it ruled out rescue assistance being required and could have been expected of Spittler.*[52]

5. The *Turowski* case (2018)

a) The facts of the case

In this case, a family doctor by the name Turowski assisted in the free-responsible suicide of a 44-year-old woman.*[53] She had several non-life-threatening diseases that severely limited her working and private life. The doctor provided his patient with the medication for her suicide. After the woman took this, she wrote him a text message as a farewell. A little later, the doctor visited the woman, who had fallen unconscious in the meantime, and checked her status. Over the following three days, he made repeated visits to her, and in the early morning of the third day, he recorded her death. For the entire span of time, Turowski omitted to render potentially life-saving assistance, out of respect for the will of his patient. Furthermore, he injected the medication Metoclopramid (MCP), which should prevent regurgitation and the associated danger of asphyxiation, and Buscopan, which should prevent pulmonary oedema. In addition, he spoke over the phone with her relatives, and they too omitted to render any rescue assistance. The difficult questions related to this active doing cannot be answered in the present article. A detailed analysis has been published in a paper jointly written by a colleague and me.*[54] In any event, the active doing in the *Turowski* case was **acausal**.*[55] Therefore, it was unpunishable, as the District Court of Berlin indeed confirmed.

b) Legal evaluation by the court

Thus far, only the omission has to be analysed. Again, and for the same reasons as in the two other cases, only attempted killing at the request of the victim by omission, subject to Section 216 in conjunction with Section 13, was suitable, with completed failure to render assistance in addition (under Section 323c). The District Court of Berlin abandoned a conviction on 8.3.2018 for legal reasons.*[56] The prosecution appealed to court, and a decision by the Federal Court of Justice will be delivered on 3.7.2019 too.

46 See BGHSt 55, pp. 191–207, on p. 204.

47 BGHSt 55, pp. 191–207, on pp. 199–200.

48 J. C. Joerden, K. Schmoller (see note 45), pp. 325–344, on p. 333 (H. Rosenau).

49 Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 88.

50 Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 89.

51 Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 89.

52 Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 88.

53 To the facts of the case: Landgericht Berlin (District Court of Berlin), sentence from 8.3.2018 – (502) KLs 234 Js 339/13 (1/17) = *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185.

54 H. Lorenz / C. Dorneck (see note 23), pp. 146–159 (in German), on pp. 153–159.

55 Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on p. 181.

56 Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on p. 180.

In a strong contrast against the *Spittler* case, the status of Turowski as a guarantor was obvious: He was the patient's family doctor.[*57] In fact, the court simply denied a concrete duty to avoid the death of the dying woman.[*58] This was also in explicit contradiction with the opinion of the Federal Court of Justice in *Wittig*. The reasons were largely the same as those given in *Spittler*; the court merely added some arguments with reference to constitutional law.[*59]

Regarding the failure to render assistance (Section 323c), the District Court of Berlin denied the existence of an **accident** in terms of law.[*60]

6. Conclusions and the outlook

For a long time, no-one followed the path opened by the Federal Court of Justice with *Wittig*. On one hand, it is regrettable that the regional appeal courts of Hamburg and Berlin decided to follow the 30-year-old footprints on the way to paternalistic criminal law. On the other hand, the Federal Court of Justice now has an opportunity to rub out this earlier path and break away from this jurisdiction. That would be pleasing and appropriate:

The omission of any rescue help after a free-responsible suicide is non-punishable in every sense. It is no killing at the request of the victim by omission of the guarantor because there is no concrete duty to avoid the death of a person who self-responsibly commits suicide.[*61] Indeed, more recent jurisprudence – addressing, for example the withdrawal of treatment – but also newer legislation (the creation of Section 1901a *ff*. of the German Civil Code) supports this interpretation.

Otherwise, there would be an insuperable contrariety of judgement: accessoryship to a free-responsible suicide is non-punishable while the following omission is punishable. The consequences of such an opinion for people who have chosen suicide would be unbearable. Their will, which **basically** gets respected in **'normal' medical contexts** (for example, in the withdrawal of treatment), would not be respected. But there is no difference in the right of self-determination between **regular patients** and **suicidal persons**: there is not a second-class right of self-determination. Furthermore, the result of this conclusion would prove unbearable for a person omitting rescue efforts, who would be obligated to medicate against the will of the patient and, thereby, without the necessary (informed) consent. The latter is usually punishable as causing bodily harm (per Section 223) and goes against all medical ethics.

For the same reasons, the requirements for failure to render assistance (see Section 323c) are not fulfilled. Moreover, it would go beyond the text if a free-responsible suicide as a result of self-determination were to be declared an **accident**.[*62]

The Federal Court of Justice now has an opportunity to change the jurisdiction related to criminal liability of third parties with regard to free-responsible suicide. It should follow the district courts of Hamburg and Berlin on the route to greater importance of self-determination in medical and criminal law.

57 Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on pp. 182–183.

58 Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on pp. 183–184.

59 Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on p. 183.

60 Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on pp. 184–185.

61 With a large number of references for this almost indisputable position: H. Rosenau. Anmerkung zu Hanseatisches Oberlandesgericht, Beschluss vom 8.6.2016 – 1 Ws 13/16 ['Comment to the Hanseatic Regional Appeal Court, Decision from 8.6.2016 – 1 Ws 13/16']. – *Zeitschrift für Medizinstrafrecht* 2017/1, pp. 54–56, on p. 55, footnote 16.

62 For more arguments and details on Section 323c and suicide: H. Lorenz. Tötung auf Verlangen durch Unterlassen und unterlassene Hilfeleistung des Arztes bei freiverantwortlichem Suizid ['Killing at Request by Omission and Failure to Render Assistance by a Doctor in Relation to Free-Responsible Suicide']. – *Juris PraxisReport* 2018/11, Comment 1; H. Lorenz / C. Dorneck, Begehungs- und Unterlassungsstrafbarkeit des Hausarztes beim freiverantwortlichen Suizid ['Criminal Liability of a Family Doctor for Active Deeds and Omission Related to Free-Responsible Suicide']. – *Juris PraxisReport* 2018/18, Comment 1.