Headnote

to the Judgment of the First Senate of 3 April 2001

1 BvR 1629/94

It is not compatible with Article 3.1 in conjunction with Article 6.1 of the Basic Law (*Grundgesetz* – GG) that members of social long-term care insurance who care for and raise children, and thereby in addition to the monetary contribution make a generative contribution to the functioning of a contributory social insurance system, are burdened with an equally high long-term care insurance contribution as members without children.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1629/94 –

Pronounced
on 3 April 2001
Kehrwecker
Amtsinspektor
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

**In the proceedings
on the constitutional complaint**

of Mr M(…)

– authorised representatives:

Rechtsanwälte Heinrich W. Moritz und Koll., Konstantinstraße 4-10, 54290 Trier

against Article 1 §§ 54, 55, 57, 58 and 60 of the Act on Social Security against the Risk of Need of Long-term Care (*Gesetz zur sozialen Absicherung des Risikos der Pflegebedürftigkeit,* Long-term Care Insurance Act, Pflege-Versicherungsgesetz – PflegeVG) of 26 May 1994 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 1014)

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice President Papier,

Kühling,

Jaeger,

Haas,

Hömig,

Steiner,

Hohmann-Dennhardt,

Hoffmann-Riem

held on the basis of the oral hearing of 4 July 2000:

JUDGMENT:

1. **§ 54.1 and 54.2, § 55.1 sentence 1 and § 55.2, as well as § 57, of the Eleventh Book of the Code of Social Law (*Elftes Buches Sozialgesetzbuch* – SGB XI) of 26 May 1994 (Federal Law Gazette I page 1014) are not compatible with Article 3.1 in conjunction with Article 6.1 of the Basic Law insofar as members of social long-term care insurance who care for and raise children are burdened with an equally high long-term care insurance contribution as members without children.**
2. **The provisions of the Eleventh Book of the Code of Social Law quoted at 1. may continue to be applied until a new provision [comes into force], at most until 31 December 2004.**
3. **The Federal Republic of Germany is ordered to reimburse the complainant his necessary expenses.**

REASONS:

A.

The constitutional complaint impugns the non-consideration of care for and raising of children in the assessment of the contribution to social long-term care insurance. 1

I.

The funding of social long-term care insurance is governed by §§ 54 to 68 of the Eleventh Book of the Code of Social Law, which was added to the Code of Social Law by Article 1 of the Act on Social Security against the Risk of Need of Long-term Care (Long-term Care Insurance Act) of 26 May 1994 (Federal Law Gazette I p. 1014). It is operated above all by means of contributions (§ 54.1 of the Eleventh Book of the Code of Social Law). Details of the law on contributions are contained in the provisions of §§ 54 to 61 of the Eleventh Book of the Code of Social Law. 2

1. The contributions are collected from the members of social long-term care insurance (§ 54.2 of the Eleventh Book of the Code of Social Law). Family members are insured free of contributions for the duration of family insurance in accordance with § 25 of the Eleventh Book of the Code of Social Law (§ 56.1 of the Eleventh Book of the Code of Social Law). As is the case with statutory health insurance, the contributions are levied not in accordance with the insured risk, in particular not in accordance with state of health, age and gender, but in accordance with a percentage (contribution rate) of the income of the members on which contributions are levied, up to an assessment limit (§ 54.2 sentence 1, §§ 55 and 57 of the Eleventh Book of the Code of Social Law). As in statutory health insurance, the assessment limit is 75 % of the assessment limit of statutory pensions insurance (§ 55.2 of the Eleventh Book of the Code of Social Law), and on 1 January 2000 was 6,450 DM per month in the old *Länder* (states) and 5,325 DM per month in the new *Länder*. 3

2. The contribution to social long-term care insurance in the period from 1 January 1995 to 30 June 1996 was nationally 1 % of the income of the members on which contributions are levied. Since 1 July 1996, the time when the benefit law provisions on in-patient long-term care entered into force, the contribution has been 1.7 %. Wage-earners and salaried employees and those employed in their vocational training on a remunerational basis – individuals who are also subject to obligatory statutory health insurance –, who are subject to obligatory [social long-term care] insurance in accordance with § 20.1 no. 1 of the Eleventh Book of the Code of Social Law, as well as their employers, each pay half the contributions, which are to be assessed in accordance with remuneration (§ 58.1 sentence 1 of the Eleventh Book of the Code of Social Law). Employees covered by voluntary statutory health insurance, who are subject to obligatory social long-term care insurance in accordance with § 20.3 of the Eleventh Book of the Code of Social Law, receive a subsidy from their employer which corresponds to the employer's share for the parties insured in accordance with § 20.1 no. 1 of the Eleventh Book of the Code of Social Law (§ 61.1 sentence 1 of the 4

Eleventh Book of the Code of Social Law). In the Free State of Saxony, in which no statutory *Land* (state) holiday was abolished, the employees bore the full contribution until 30 June 1996 (see § 58.3 of the Eleventh Book of the Code of Social Law). § 58.3 of the Eleventh Book of the Code of Social Law was ultimately amended by Article 2 no. 1 of the Act to Implement the Second Phase of Long-term Care Insurance (*Gesetz zum Inkraftsetzen der 2. Stufe der Pflegeversicherung*) of 31 May 1996 (Federal Law Gazette I p. 718), such that in Saxony from 1 July 1996 employees pay 1.35 % and employers pay 0.35 % of remunerations as a contribution burden. In all other *Länder*, the contribution burden continued to be shared in equal halves by employees and employers after 30 June 1996.

The monthly maximum contribution (including the employer's share) has gradually increased in the old *Länder* since 1 January 1995 from 58.50 DM to 109.66 DM in 2000, and in the new *Länder* from 48 DM to 90.52 DM per month. 5

3. Long-term care insurance does not constitute complete insurance in the sense that all and any need of the person in need of long-term care would be comprehensively covered by benefits in every case. Depending on the long-term care rate, these are not sufficient in the in-patient sector, in some cases in Categories I and II, and very largely in Category III, to cover the cost of long-term care, plus not inconsiderable expenditure on accommodation and food […] As an average per inhabitant in need of long-term care, 4,261 DM needed to be paid per month in the old *Länder* in 1998, while in the new *Länder* it was an average of 3,307 DM (information acc. to Schneekloth/Müller, *Wirkungen der Pflegeversicherung*, Vol. 127 of the series of the Federal Ministry of Health, 2000, pp. 175-176 […] see also *Bundestag* printed paper (*Bundestagsdrucksache* – BTDrucks.) 14/3592, pp. 10-11). This was opposed by the following benefits from statutory long-term care insurance: 6

	§ 41 of the Eleventh Book of the Code of Social Law	§ 42 of the Eleventh Book of the Code of Social Law	Article 49a § 1 of the Long-term Care Insurance Act, § 43.5 of the Eleventh Book of the Code of Social Law from 1 July 1996 to 31 December 2001	§ 43a of the Eleventh Book of the Code of Social Law Long-term care in full in-patient fa-cilities of disabled assistance from 25 June 1996
Category	monthly up to	for four weeks per year up to	monthly flat-rate	monthly up to

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I	750 DM	2,800 DM	2,000 DM	10% of the home charge agreed in accordance with § 93.2 of the Federal Social Assistance Act (*Bundessozialhilfegesetz – BSHG*), up to a maximum of 500 DM per month
II	1,500 DM from 1 August 1999: 1,800 DM	2,800 DM	2,500 DM	
III	2,100 DM from 1 August 1999: 2,800 DM	2,800 DM	2,800 DM	
Hardship Cases	------	------	3,300 DM	

Also in the out-patient sector, the benefits of long-term care insurance do not cover the total cost of care in many cases. In 1998, persons in need of long-term care living in private households on average had regular additional costs which they had to pay themselves in Category I amounting to 210 DM/month, in Category II amounting to 264 DM/month and in Category III amounting to 384 DM/month […] Here, the additional cost of out-patient care of the persons most seriously in need of long-term care may be much higher than the average values given above. The benefits of long-term care insurance in the case of domestic care have been as follows since the Act entered into force: 8

Category	Benefits in kind § 36 of the Elev-enth Book of the Code of Social Law per month	Nursing care allowance § 37 of the Eleventh Book of the Code of Social Law per month	Combination benefit § 38 of the Eleventh Book of the Code of Social Law (e.g.: 50/50) per month
I	750 DM	400 DM	575 DM
II	1,800 DM	800 DM	1,300 DM
III	2,800 DM	1,300 DM	2,050 DM

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Hardship Cases	3,750 DM	------	2,525 DM

Both for domestic and for in-patient care it is the case that the social assistance organisations must provide benefits for insured persons in need of long-term care if – assuming financial neediness – either the first Category is not yet reached, or the benefits of long-term care insurance are not sufficient to cover the costs. 10

4. The risk of needing long-term care is determined to a great degree by the age of the insured party. The data available in the legislative procedure (see *Bundestag* printed paper 12/5262, p. 62) and the information provided by the First Report on Trends in Long-term Care Insurance (*Bundestag* printed paper 13/9528, Annex 2) show that the share of persons in need of long-term care in the age group to 60 is lower than 1 % – of whom 0.5 % are in the age group under 15 and in domestic care (see *Bundestag* printed paper 13/11460, p. 244), from 60 to 80 years, this increases to 5 %, and among the over 80s it is 20 %. Among persons in need of long-term care themselves, 17.5 % are under 60; 30.3 % are aged between 60 and 80, and finally, 52.3 % are 80 and older. 11

II.

The complainant is the father of ten children born between 1982 and 1995. He is in dependent employment, and is a voluntary member of statutory health and social long-term care insurance. His wife is not in gainful employment. She takes care of the children, and like them is covered by family insurance. 12

The complainant objects to the contribution law provisions of §§ 54, 55, 57, 58 and 60 of the Eleventh Book of the Code of Social Law concerning him. They are alleged to violate Article 2, 3 and 6 of the Basic Law, as well as the principle of the rule of law and of the social welfare state. Also, the legislature is said to have violated the duties imposed on it by the judgment of the Federal Constitutional Court (*Bundesverfassungsgericht*) of 7 July 1992 (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 87, 1). 13

[…] 14-17

III.

With regard to the constitutional complaint, a joint statement has been made on behalf of the Federal Government by the Federal Ministry of Labour and Social Affairs and the Federal Ministry of Health, as well as by the Federal Association of Local Health Insurance Funds (*AOK-Bundesverband*), the Association of Salaried Employees' Health Insurance Funds (Verband *der Angestellten-Krankenkassen*) and the Association of Workers' Substitute Health Insurance Funds (*Arbeiter-Ersatzkassen-Verband*) – both also for the Federal Association of Company Health Insurance Funds (*Bundesverband der Betriebskrankenkassen*) and the Federal Association of Guild Health Insurance Funds (*IKK-Bundesverband*) – while the German Women 18

Lawyers Association (*Deutscher Juristinnenbund*) has also submitted a statement. The German Families Association (*Deutscher Familienverband*), the Family Federation of German Catholics (*Familienbund der Deutschen Katholiken*) and the Association of Single Mothers and Fathers (*Verband Alleinstehender Mütter und Väter*) have made a joint statement. Over and above this, the German Families Association has submitted a statement of its own in preparation of the oral hearing.

1. The Federal Ministries consider the non-allowance of child-raising in the assessment of contributions for social long-term care insurance to be constitutional. 19

a) The Long-term Care Insurance Act is said not to violate Article 3.1 in conjunction with Article 6.1 of the Basic Law. Families with children are said to be particularly accommodated in social long-term care insurance. It is said to provide families with children with considerable advantages in comparison with childless insured parties, both on the contributions and on the benefit side. The member's children were co-insured in social long-term care insurance free of contributions. The same applied to the spouse if his or her income did not exceed the threshold for insignificant employment. Hence, although paying only one contribution, families enjoyed multiple insurance protection in line with the number of children, in comparison to childless couples, which started on the birth of the children. Moreover, maternity and child-raising allowance were contribution free. Family members who were co-insured free of contributions received the same benefits as contribution-paying members in an insured event. What is more, caring family members had social insurance by virtue of the contribution payments made to pensions insurance by the long-term care insurance funds. They were also included in statutory accident insurance. 20

Further benefits for families in the shape of a contribution discount, either standardised or phased in accordance with the number of children, or indeed complete exemption from contributions, were said not to be possible. The financing of long-term care insurance was said to be based on contributions which in principle were to be paid by each insured party. Because of social and family policy considerations, it was possible to justify breaking with this principle. This was however said to be contingent on re-distribution in favour of families falling within the remit of long-term care insurance. However, reducing the financial burden – by whatever form of "family discount" – would not bring about a tangible, expedient improvement in families' economic situations. Even complete exemption from contributions to long-term care insurance could not achieve the goal of an effective burden reduction to which the complainant aspired. The contributions were said to be too low for this. 21

When comparing the contribution burden incumbent on families against that incurred by the childless, it should, according to the Federal Ministries, also be taken into account that childless people in gainful employment paid with their contributions not only for their own insurance protection, but that they also effected transfer payments for the spouses and children who are co-insured in long-term care insurance free of contributions. 22

b) Long-term care insurance was said not to be able to compensate in a general manner for the cost of child-raising. This is said rather to be a task for society as a whole within the framework of the equalisation of family burdens, which preferably is to be carried out through fiscal law and child benefit. The Federal Constitutional Court had already confirmed this in its judgment of 7 July 1992 (BVerfGE 87, 1). Insofar as the complainant derived from this ruling a mandate for the legislature to form the contribution regulations in an even more family-friendly manner, it was said to disregard the fact that disadvantages could not accrue in long-term care insurance – in contrast to pensions insurance – if, as a result of child-raising, gainful employment could only be taken up to a limited degree, or was given up altogether. In the event of a need of long-term care, all insured parties were said to receive the same benefits regardless of whether the insurance existed because of membership or on the basis of contribution-free co-insurance as a family member. In particular, interrupting gainful employment because of child-raising was said not to have an impact on the scope of benefits in an insured event. Long-term care insurance was said to be risk insurance independent of the amount of the contributions made. Its benefits were said not to act as a wage replacement, and not to constitute an additional pension. They were said to be intended, rather, to relieve persons in need of long-term care of the burden of expenditure on long-term care. Hence, the system was said to distinguish long-term care insurance fundamentally from the system of pensions insurance; there was said to be no need of an additional improvement of the situation of families in the law on contributions under long-term care insurance. 23

c) Long-term care insurance was said not to violate the principle of the social welfare state. Neither its out-patient nor its in-patient benefits were said to bring about the occasionally claimed “re-distribution from the bottom to the top”. Long-term care insurance was said to carry out social compensation both with socially balanced contributions, and with benefits tailored to the need for long-term care. It was said to cause redistribution benefiting socially weaker individuals. The socially vulnerable, who when in need of long-term care were said otherwise to depend on social assistance benefits, were said to be provided with insurance benefits to the funding of which not only they, but also the financially less vulnerable had contributed. 24

2. In the view of the Federal Association of Local Health Insurance Funds, the considerations of the Federal Constitutional Court’s “rubble women” judgment (BVerfGE 87, 1) are not transferable to social long-term care insurance. 25

a) In contrast to the situation in statutory pensions insurance, the scope of the benefits was said not to depend on the extent of the contributions made by the member. Furthermore, family members devoting themselves to child-raising, and family-insured children themselves, were said not to be subject to any disadvantages. The contributions made by the children to long-term care insurance after reaching working age were said not to reduce their contributory capacity to meet general maintenance obligations towards their parents. Firstly, the contributions payable to social long-term care insurance were said to be much lower than pensions insurance contributions. 26

Secondly, long-term care insurance was also said not to serve the purpose of old-age security, but to cover the maintenance needs which increased as a result of long-term care.

Insofar as a disadvantage was said nonetheless to remain with regard to the family in that the contributions to social insurance paid by the children were not available to secure the maintenance of the parents, this was said, because of the latitude available to the legislature, not to be objectionable in accordance with Article 3.1 and Article 6.1 of the Basic Law. The introduction of social long-term care insurance was said to have been necessary because of demographic and medical developments. Moreover, the burden on the children of parents in need of long-term care was said to be reduced by long-term care insurance in terms of corresponding maintenance obligations. 27

b) The family component within the law on contributions called for by family associations was said to be constitutionally unnecessary. It too was said to be neither practicable nor transferable to private obligatory long-term care insurance. The design of the contribution system within long-term care insurance was said also not to be in violation of justice of contributions just because the assessment limit led to a situation in which a disproportionately low burden was imposed on higher incomes, whilst the minimum contribution meant that a disproportionately high burden was imposed on low incomes in terms of the cost of solidarity based insurance. The argument was said to ignore the boundaries imposed by the constitutional subsidiarity of social benefit systems, which favoured an assessment limit. Within the boundaries between the minimum contribution and the assessment limit it was possible for the imposition of a greater burden on insured parties on a high income, in favour of those on a low income, to overstrain the system of social insurance. If at all, an additional family burden component should be considered in fiscal law. 28

3. The Association of Salaried Employees' Health Insurance Funds and the Association of Workers' Substitute Health Insurance Funds take the view that the contribution provisions of the Eleventh Book of the Code of Social Law do not violate the Basic Law. Already the approach that it was less probable for parents than for a childless couple to have to claim "public care" was said to give rise to reservations. For a variety of reasons, it was said to be by no means certain that parents finding themselves in need of long-term care in old age would be cared for by their children. Moreover, persons in need of long-term care who were cared for by their children also had a right to claim nursing care allowance. That the nursing care allowance was lower than the benefits in kind was said to be factually reasoned in the "windfall effect" feared by the legislature. The contribution made by parents to funding long-term care insurance in the shape of the child maintenance undertaken was said to be sufficiently rewarded by contribution-free family insurance. That the long-term care risk was much lower for those with children did not undermine this consideration. In the case of need of long-term care, the burden on the parents was said to be much greater as a rule than with an illness. The contribution rate was said also not to have had to be 29

degressive. It was said not to be recognisable that any excessive burden had been imposed on the complainant by virtue of the contributions levied in social long-term care insurance.

4. The German Women Lawyers Association considers the assessment of the contributions in social long-term care insurance to be unjust. Social insurance is said to derive its legitimacy from the social compensation which it seeks to achieve. Contributions may hence not be assessed in accordance with the individual risk, but – comparable to fiscal law – solely in accordance with the economic contributory capacity of the individual. In fiscal law, the burden in accordance with economic contributory capacity was said to lead to progressive taxation and to exemption of the minimum income from tax. Strict binding of long-term care insurance contributions to the contributory capacity principle would have to be designed as a levy expressed as a percentage of the individual's tax burden, similar to the solidarity levy. Only the burdening of income from gainful employment and assets implemented in fiscal law was said to accommodate the contributory capacity of the individual vertically in the context of the income distribution within the overall population, and horizontally in the context of the maintenance burden within the respective income grade. It was said to be necessary for the design of social insurance contributions to create if not a progressive, then at least a smooth – linear – contribution levy on higher and lower incomes; those on higher incomes would have to be subject in proportional terms to burdens at least as high as those on lower incomes. 30

The assessment limit in long-term care insurance was said, by contrast, to have the effect of an allowance for higher incomes; lower incomes were in principle fully assessed. Hence, it was said that the risk of need of long-term care was being differently managed than had been the case prior to the coming into force of the Eleventh Book of the Code of Social Law, no longer by fiscal means on the basis of a tax tariff which imposed a disproportionately high burden on higher incomes, but via contributions on the basis of a social insurance tariff favouring higher incomes. Similar problems were said to emerge with statutory health insurance. Moreover, with long-term care insurance, the lower incomes were not only subject to a disproportionately high burden, but over and above this enjoyed disproportionately low benefits, at least with regard to benefits in the in-patient area. Nothing was said to change as a result of long-term care insurance for the majority of persons in need of long-term care who were accommodated in homes. Because their pensions and assets were too low in comparison to the cost of in-patient care, they were said to continue to depend on drawing social assistance. Beneficiaries of the benefits from the long-term care insurance funds were said to be persons and their heirs who had built up high pension expectancies or other high levels of old-age security during their working lives. Their assets were said to be spared. 31

5. In their joint statement, the German Families Association, the Family Federation of German Catholics and the Association of Single Mothers and Fathers object to the nature of the funding of social long-term care insurance. 32

a) The legislature is said to have opted for a contributory solution. By these means, it was said that families were again subject to a two-fold burden in that they paid contributions and at the same time also ensured future long-term care by raising children. The childless were said not to make any contributions to the future long-term care generation, and were said even in future to be more dependent on more costly inpatient care. The concept of social long-term care insurance was said to be all the more dependent on families than was already the case in statutory pensions insurance. In both systems, families were said to raise the stock-ensuring future contributors; in the case of long-term care insurance, today's children furthermore were said to have to take over the function of carer. Since the funding procedure of social long-term care insurance did not recognise the activities of families for this social insurance system, this too was said to lead once more to a provision that was highly questionable in constitutional terms. At the same time, the insurance of carers in statutory pensions insurance was welcome in principle. However, the expectancies that could be achieved were said to be too low if one took as a basis the fact that carers were prevented by their care work from accruing their own old-age pensions. It was proposed in order to equalise the burden on families to introduce a tax allowance of DM 900 per child per month. The allowance was to be granted for each child insured in accordance with § 25 of the Eleventh Book of the Code of Social Law. 33

b) There were said also to be constitutional reservations insofar as, whilst a spouse who was not in gainful employment and who had no children was insured free of contributions, this was not the case for a divorced mother of several children who was not in gainful employment. The divorced mother was said to contribute to the preservation of the social insurance systems by raising children and to be able to expect to a disproportionately higher degree to be cared for by her children domestically on occurrence of a need of long-term care. If the single mother received maintenance from her divorced husband, the contribution for her was said in fact to have already been made. Maintenance was said to be paid from the income of the party obliged to pay, which had been subject to contributions. With a single parent who was unable to engage in gainful employment because of child-raising, for a solution to be constitutional, his or her activities for the children would have to be valued as a contribution in their own right for as long as the obstacle to gainful employment typically lasted. 34

6. In its additional statement, the German Families Association submits further reasons in support of its view that long-term care insurance results in exploitation of families by virtue of the fact that benefits are transferred away from them. 35

a) Long-term care insurance was said to have been introduced with the declared goal of preventing a fall in social status in old age and of protecting the assets of this age group. The childless in particular were said to be able to garner assets, however, as a result of saved maintenance expenditure and a lack of child-related obstacles to earning an income. Poverty was said today to be a problem of families. Despite increases in direct state family benefits, the relationship between the net income of childless young married couples, on the one hand, and of young families, on the oth- 36

er, was said to have remained virtually unchanged in recent years to the disadvantage of families.

Insofar as the income and assets of the current pensioners' generation was said to be protected by long-term care insurance, the whole working-age generation would have to provide the benefits for this pensioners' generation through their contributions. Also here, there was said to be a transfer because a not inconsiderable number of today's pensioners were childless (roughly 10 %) or had only brought up one child (20 %). This re-distribution from young to old was said to largely equate to a re-distribution from the bottom to the top. Today's pensioners' generation was said to be relatively prosperous on average. 37

b) The funding of social long-term care insurance via contributions was said to be inimical to families. Higher incomes above the assessment limit were said to be spared. In contrast to tax, with its allowances and progressive tariffs, no regard was given when assessing contributions to the size of a family and its ability to pay. With a single person earning a gross annual income of DM 60,000, the employee share imposed a burden on disposable income of 1.5 %. With a four-person family with the same annual income, however, there was said to be a burden of 7 %. The contribution system under social insurance law was said to come from a time in which both lifecycles and birth rates had been much more homogeneous than was the case today. The legislature was said to have missed the opportunity to effect an adjustment to the changed conditions. 38

c) In an overall view of all reservations existing against long-term care insurance, the conclusion was drawn that the contribution provisions contained in the Eleventh Book of the Code of Social Law were unconstitutional. They were already said to violate the mandate to improve the financial situation of families imposed on the legislature by the Federal Constitutional Court in its judgment of 7 July 1992 (BVerfGE 87, 1). Article 3.1 in conjunction with Article 6.1 of the Basic Law was said to be materially violated by the previously indicated "construction error" in long-term care insurance, namely the non-allowance of the financial burdens ensuing from child-raising activities. Contribution payment and child-raising were said to be equivalent. The Federal Constitutional Court had not adopted this point of view in its judgment of 7 July 1992. It had however allegedly failed to sufficiently take into account that the comparability of economic circumstances related to in both cases could only take place on the basis of economic criteria. Contribution payment was said to signify forgoing past-orientated consumption in order to maintain one's own parent generation, whilst child-raising signified forgoing future-orientated consumption in favour of the young generation. Also, the Federal Constitutional Court is said not to have sufficiently taken into account that, at macroeconomic level, funding could only be provided via a contribution. The proposal put forward by the German Women Lawyers Association to levy the contribution to social long-term care insurance as a levy on income tax according to the model of the "solidarity levy" was supported explicitly. 39

IV.

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B.

[…] 41

C.

§ 54.1 and 54.2, § 55.1 sentences 1 and 2, as well as § 57, of the Eleventh Book of the Code of Social Law are incompatible with Article 3.1 in conjunction with Article 6.1 of the Basic Law insofar as members of social long-term care insurance who care for and raise children, and who have an equally high contributable income, are burdened with an equally high long-term care insurance contribution as childless members. By contrast, an obligation on the part of the legislature to exempt members of social long-term care insurance who care for and raise children from the obligation to contribute cannot be derived from Article 6.1 of the Basic Law. 42

I.

As a freedom right, Article 6.1 of the Basic Law constitutes an obligation incumbent on the state to forgo incursions on the family. Over and above this, the provision contains a value-deciding fundamental provision, which entails the duty incumbent on the state to protect and promote marriage and the family (see BVerfGE 87, 1 (35) with further references). Article 3.1 of the Basic Law demands that that which is equal is to be regulated on equally, and to regulate unequally on that which is unequal in accordance with its characteristics (see BVerfGE 71, 255 (271); established case-law). It is in principle a matter for the legislature to decide which characteristics it regards as material in comparing circumstances in order to treat them equally or differently in law (see BVerfGE 50, 57 (77); established case-law). Article 3.1 of the Basic Law however prohibits the legislature from improperly failing to consider the nature and scope of the actual differences. The principle of equality is violated if the legislature has omitted to consider inequalities in the circumstances to be ordered which are so significant that they should have been taken into account in accordance with a view that seeks to find a just solution (see BVerfGE 71, 255 (271)). Within these limits, the legislature has latitude in its decision-making (see BVerfGE 94, 241 (260)). Having said that, a further restriction may emerge from other constitutional provisions. In particular, when examining the constitutionality of contribution regulations which treat equally persons with and without children, the special protection which the state owes to the family is to be adhered to in accordance with Article 6.1 of the Basic Law (see BVerfGE 87, 1 (36)). 43

II.

Article 6.1 of the Basic Law is not violated by virtue of the fact that members of social long-term care insurance are subject to the contribution obligation even if they care 44

for and raise children.

1. Families are as a rule more financially affected by financial burdens which the legislature imposes on citizens in general. This is the result of the special economic burden on families, which emerges from the responsibility of parents for the physical and emotional well-being of their children stipulated in Article 6.2 of the Basic Law and lent concrete form by family law. For instance, parents must firstly provide maintenance for their children, and secondly they may incur loss of income or care expenditure. A spouse is frequently prevented by caring for and raising the children from taking up gainful employment or unrestrictedly continuing previous gainful employment during the first years after the birth of children. If both parents are in gainful employment, considerable costs are not infrequently incurred from child care provided by third parties. Financial burdens incurred by families by virtue of social insurance contributions hence restrict their [financial] scope more than does the obligation to contribute of married or unmarried individuals without children. 45

2. The special protection of the family, which Article 6.1 of the Basic Law obliges the state to provide, does not however constitutionally oblige the legislature to avoid every additional financial burden on the family. The latter is not placed at a disadvantage in an unconstitutional manner by virtue of the fact that contributions are also levied for social insurance from a parent who is in gainful employment which to a considerable degree covers the financial risk of need of long-term care for him or her, his or her children, as well as his or her spouse who is not in gainful employment, and which additionally to a large degree exempts them from contributions (see § 25 of the Eleventh Book of the Code of Social Law). The state is also not obliged to compensate for this contribution burden by virtue of the obligation to promote the family contained in Article 6.1 of the Basic Law (see BVerfGE 23, 258 (264); 82, 60 (81); 87, 1 (35); 97, 332 (349)). State family promotion through financial benefits is subject to what is possible and is to be regarded within the framework of other promotion requirements. In the interest of general welfare, in addition to family promotion, the legislature must also account for other community interests in its budgeting, and in so doing must ensure above all the proper functioning and equilibrium of the system as a whole. Only by weighing up all interests is it possible to ascertain whether family promotion by the state is manifestly unsuitable and no longer complies with the promotion principle of Article 6.1 of the Basic Law. Accordingly, it is possible to derive, from the value decision contained in Article 6.1 of the Basic Law, in conjunction with the principle of the social welfare state, the general duty of the state to provide equalisation of family burdens, but not the decision on the degree to or manner in which such social compensation is to be implemented. No concrete conclusions can be drawn from the constitutional mandate to bring about an effective equalisation of family burdens for the individual legal areas and sub-systems in which the equalisation of family burdens is to be carried out. In this respect, rather, the legislature in principle has latitude (see BVerfGE 87, 1 (35-36) with further references). It operates within this latitude if it also burdens families with contributions to social long-term care insurance. 46

III.

The impugned provisions do not violate Article 3.1 in conjunction with Article 6.1 of the Basic Law by not accommodating the special contribution, which insured parties with children entitled to maintenance make to the system of social long-term care insurance, in this insurance in such a way as to increase benefits. 47

1. Married parents who completely or largely forgo gainful employment because of caring for and raising their children suffer no disadvantages in claiming the benefits granted by social long-term care insurance, in contrast to the situation in statutory pensions insurance, which is characterised by wage and contribution linking (see on this BVerfGE 87, 1 (5, 37-38)), as against childless insured parties who are in gainful employment. The nature and scope of the benefits granted by the latter depend solely on the person in need of long-term care being insured or co-insured in long-term care insurance, and not upon the degree to which they have made contributions. Social long-term care insurance has benefits without contributions. In this way, for instance, a spouse who is insured free of contributions in accordance with § 25 of the Eleventh Book of the Code of Social Law receives in the context of family insurance in the same Category the same benefits as an insured party who has always paid maximum contributions. 48

2. Having said that, the monetary burden on the long-term care insurance system may be less with parents than with childless members because the former may receive long-term care from their children in place of long-term care by third parties. 49

a) Considerable differences in expenditure with in-patient care cannot be demonstrated when comparing parents with the childless. The expert Professor Dr. Schmähl stated that there were currently no representative empirical data as to whether in-patient care was claimed more frequently by the childless than by persons in need of long-term care who had children. There were said to be certain indications that older persons in need of long-term care without children were relatively more frequently in in-patient than in domestic care in comparison to persons in need of long-term care with children, but that the difference did not appear to be significant. 50

This picture is not likely to change much for the overall group of persons in need of in-patient long-term care, given that the share of residents of in-patient care facilities who are under 60 is in any case only 7 % […] It can hence not be ascertained for these benefits of long-term care insurance that parents in need of long-term care pose a significantly lower financial burden on long-term care insurance than do childless persons in need of long-term care. What is more – as stated by the expert – having children of one’s own is only one of several factors for opting for domestic or in-patient care, and this factor cannot be weighted at present. 51

b) By contrast, long-term care provided by children exerts an influence on the scope of benefits granted in the out-patient long-term care area. The expert stated convincingly in this respect that the fact of being a parent, although not the number of children, is a decisive element in choosing between the various types of benefit in out- 52

patient long-term care. The evaluation of the data which he collected gives rise to the following picture: A significant difference can be observed in the group of over 60s – accounting for 80 % of persons in need of long-term care who are cared for as out-patients. 75.8 % of parents in need of long-term care draw nursing care allowance, and only 24.2 % draw other, more expensive types of benefit (benefits in kind, combination benefit, day patient benefit). For childless persons in need of long-term care, by contrast, there is a ratio of 66 % to 34 %. If children – these being overwhelmingly daughters and daughters-in-law, who account for roughly 38 % of carers (see Schneekloth/Müller, p. 52 et seq.) – did not care for their parents and parents-in-law, long-term care insurance would have incurred additional costs amounting to DM 3.53 billion in 2000. Even if one were to account for the expense of the pensions insurance contributions payable benefiting carers, the additional costs would still have been DM 2.695 billion. This corresponds to roughly 8 % of the current benefit volume of social long-term care insurance.

This is not opposed by the fact that benefit expenditure in the out-patient area, in particular in Category II, where the data material is most authoritative – related to all age groups – is somewhat higher for persons in need of long-term care with children than that for persons in need of long-term care without children. It is decisive that the total benefit expenditure on persons over 60 in need of long-term care without children is 10 % higher than for persons of the same age in need of long-term care but with children. The age group of persons in need of long-term care under 60 displays different characteristics, in that it can be presumed that children are less relevant for their long-term care. They are frequently still cared for by their parents. Nursing care allowance is selected for such childcare to a much greater extent than in the case of long-term care of parents. In the view of the expert, this also explains why, in relation to all age groups, childless persons in need of long-term care on average cause slightly lower long-term care expenditure than persons in need of long-term care with children. 53

3. It is compatible with the principle of equality in Article 3.1 of the Basic Law, also in conjunction with Article 6.1 of the Basic Law, if the legislature, which has major latitude in designing social security systems, does not accommodate the child-raising activities of parents on the benefit side although the latter have a long-term influence on the amount of expenditure on social long-term care insurance. The additional expenditure of social long-term care insurance occurring with childless persons in need of long-term care is not only moderate in degree. It is also justified as a consequence of the legislative goal pursued by virtue of long-term care insurance in solidarity-based compensation also to see to it that those who otherwise have no one to take care of them can nonetheless receive care. Furthermore, it cannot be concluded in generalisation from the circumstance that parents carry out child-raising activities that they are later cared for by their children as persons in need of long-term care, thus claiming the less costly nursing care allowance. This is all the more so since the long-term care potential of daughters and daughters-in-law is less counted upon (see 54

Rückert, *Die demographische Entwicklung und deren Auswirkungen auf Pflege-, Hilfs- und Versorgungsbedürftigkeit*, in: v. Ferber et al. (eds.), *Die demographische Herausforderung*, 1989, pp. 121-122). Already today, the lack of family members is only one reason among several to opt for benefits in kind. Almost 90 % of private households in which persons in need of long-term care are cared for give as reasons for opting for long-term care benefits in kind the state of health of the person in need of long-term care or corresponding recommendations of the Medical Advisory Service of Social Health Insurance (*Medizinischer Dienst der Krankenversicherung*). 73 % opt for long-term care benefits in kind seeking to avoid imposing excessive burdens on family members […].

IV.

Article 3.1 in conjunction with Article 6.1 of the Basic Law is however violated by virtue of the fact that care for and raising of children is not accommodated in the assessment of contributions by insured parties who must pay contributions. This unconstitutionally places at a disadvantage the group of insured parties with children in comparison with childless members of social long-term care insurance who benefit from their care and child-raising activity in the case of their need of long-term care. 55

1. The child-raising activity of insured parents within a contributory social insurance system, which serves to cover one of the risks which is material to the ageing of the insured parties, specifically favours insured parties without children. It is decisive here that the financial need caused by the occurrence of the insured event occurs disproportionately frequently in the grandparents' generation (60 and older). The probability of needing long-term care increases considerably with age. It initially increases slightly beyond the age of 60, and then beyond 80 becomes a risk which constitutes a material characteristic of the circumstances of the individual (see *Bundestag* printed paper 12/5262, p. 62). If such a general life risk, which as a rule does not occur until old age, is funded by a contribution procedure, the child-raising activity has a constitutive significance for the functioning of this system. On occurrence of the vast majority of insured events, the contribution procedure relies on the contributions of the coming generation. 56

a) The favourable treatment of the childless becomes manifest if one compares the group of those in need of maintenance who have children with the group of working-age insured parties who have no children. Given that social insurance is funded by a contribution procedure, both rely on sufficient numbers of children growing up. In the contribution procedure, today's contributors of the working-age generation trust that sufficient young persons will be available in future to pay contributions. This can only be today's children, on whom a collective obligation to fund is imposed in future, in favour of those who will then be old and in need of long-term care, by means of obligatory membership entailing contribution burdens which is equivalent to a maintenance obligation related to the special needs of long-term care. This obligation however applies, regardless of the existence of family maintenance obligations, towards 57

all old people who are in need of long-term care. For instance, all persons who will be in need of long-term care in 20 or 30 years' time enjoy the same advantage as a result of the current child-raising activity of parents, namely of being insured and receiving long-term care benefits for their own insured event by means of an obligatory insurance system under public law "of parties owing maintenance who are jointly linked", regardless of whether or not they themselves have contributed to conserving the stock of contributors by child-raising.

b) Hence, an advantage accrues in the case of an insured event to insured parties without children by virtue of the child-raising activity of other contributors who because of child-raising forego consumption and asset-formation to their disadvantage. The childless are also called on with their contributions to fund the long-term care risk of spouses and children who are co-insured free of contributions. This however does not outweigh the advantage of childless insured parties against those who take care of the future contributors in order to cover the long-term care risk of all in old age. 58

This advantage accruing to childless persons subject to obligatory contributions is not called into question by the fact that some of today's children, whose parents are currently insured in social long-term care insurance, may in future not be contributors subject to obligatory contributions at all, or only temporarily. This is allowed for by the statutory allocation of those subject to obligatory insurance either to social or to private long-term care insurance in accordance with the amount of income or the nature of the gainful employment and the fluctuation existing in this respect between the two insurance sectors. Taking account of the circumstance that, currently, roughly 87 % of the population are insured in social long-term care insurance (see for more details […] (BVerfGE 103, 197 (198 et seq.)) and that children leave as contributors not only the system of social long-term care insurance, but will also change to it from their parents' private obligatory long-term care insurance, one may certainly presume that child-raising activity in social long-term care insurance will continue to provide sustainable assistance and will benefit childless members of social long-term care insurance. 59

2. The "system-specific" advantage evident from the conception of social long-term care insurance of childless insured parties differs from the benefit which a society receives by virtue of children and their care and child-raising in general. 60

Each state community depends on the value added of young generations. There is a general interest in the care and child-raising activity of families (see BVerfGE 88, 203 (258-259)). This alone does not necessitate accommodating this child-raising activity in favour of families in a certain social benefit system (see BVerfGE 87, 1 (35-36)). If however a social benefit system is to cover a risk which above all affects the old generation, and its funding is designed such that essentially it only works via the existence of younger generations who in turn come of working age as contributors and help to pay the costs associated with the previous generations' insured events, not only the insurance contribution, but also child-raising activity is constitutive for such a 61

system. If this generative contribution is no longer provided as a rule by all insured parties, this leads to a specific burden on child-raising insured parties in the long-term care insurance system, the disadvantageous impact of which is also to be compensated for within this system. Child-raising insured parties ensure the functioning of long-term care insurance, therefore, not only by paying contributions, but also through caring for and raising children.

3. The legislature can disregard the disadvantage incurred by insured parties subject to obligatory contributions who have children as against childless members of social long-term care insurance, who respectively belong to the generation of contributors, as long as a clear majority of insured parties has carried out child-raising activities. Under such circumstances, the legislature can avail itself of its right of generalisation and refrain from making a differentiation in contributions that takes account of the child-raising activity. If the overwhelming majority of insured parties subject to obligatory contributions raises children, a social insurance system built on the contributions system, and social long-term care insurance in particular, is in a generative equilibrium. The insured parties subject to obligatory contribution support persons in need of long-term care through their contributions. At the same time, they have taken care of their children. In return, they may trust that, as insured employees, they cover their long-term care risk in old age by making contributions, and in turn with child-raising activities create the foundation for their own risk coverage. If in this “three-generational contract” the share of childless persons among the number of members of social long-term care insurance remains in a clear minority, in the context of the latitude open to it the legislature can treat them in relation to contributions as if they were child-raising insured parties. The legislature has however overstepped the boundaries of this latitude in that in 1994 it let the Eleventh Book of the Code of Social Law – apart from the provisions of §§ 25 and 56 of the Eleventh Book of the Code of Social Law – enter into force without a child-related component to accommodate the contribution burden of parents. 62

a) If it is regulating complex circumstances, the legislature may take a reasonable period to collect information and gather experience. During this period, it may limit itself to making less precise generalisations. Resulting unfairness only gives rise to a complaint in constitutional terms if the legislature has not reviewed its provisions in the light of newly available information and experience and has failed to attempt to reach a proper solution (see BVerfGE 100, 59 (101) with further references; established case-law). 63

b) It was however recognisable as long ago as 1994 that the number of persons raising children had fallen dramatically in recent decades. The legislature could no longer presume at that time that an overwhelming majority of insured parties subject to obligatory contributions, in addition to making contributions, would also contribute to the sustainable stabilisation and financing of social long-term care insurance benefits by raising children. 64

aa) In accordance with the assessment made by the expert Professor Dr. Birg, the population of Germany will age unavoidably and very considerably in the next 50 years. This concurs with other demographic studies, and can be predicted with a high degree of reliability (see [for instance] […] *Bundestag* printed paper 13/11460, pp. 69-70). The number of live births per woman has fallen rapidly in Germany since the mid-sixties, from 2.49 to its present level of 1.3. The effect has been observed in most economically developed countries that, as standards of living and per capita income increase, the birth rate in some cases falls far below 2.0. As also stated by the expert, there is no indication that the circumstances which are responsible for this development will change fundamentally in the near future. A rapid increase in the birth rate cannot be expected, especially since the fact of it falling far below the replacement level has already set in motion an unstoppable downward spiral. The population is not shrinking solely by virtue of the fact that fewer children are born than are necessary to maintain the numbers. This development is quite significantly amplified by the fact that, as a result of this development, there are fewer and fewer people who can father, or give birth to, children. Furthermore, more and more women are remaining childless. In accordance with the information provided by the expert, if one intended to stabilise today's age structure purely by increasing the birth rate or immigration, in purely mathematical terms either the birth rate per woman of child-bearing age would have to increase immediately from 1.3 to 3.8, or 188 million younger people would have to immigrate by 2050. 65

bb) The described development was already recognisable in 1994, and was to be accommodated by the legislature on enacting the Eleventh Book of the Code of Social Law. On the basis of the data already available at this time, it was unable to presume that the ageing of society could be sustainably alleviated by an increase in the birth rate. It had been aware for a long time of the rapid fall in and the consolidation of the birth rate at the present level below 1.5 starting in the mid-seventies (see *Bundestag* printed paper 12/5262, picture 1.1). Regardless of the different presumptions and of the different values to be derived from this, the tendency in demographic developments until the mid-21st century was already clearly recognisable at the start of the nineties. On a database dated 31 December 1989, the Federal Statistical Office forecast in its "seventh co-ordinated population projection" (see the summary of results in Sommer, *Entwicklung der Bevölkerung bis 2030, WiSta (Wirtschaft und Statistik)* 1992, pp. 217 et seq.), that the population in Germany would fall by more than 10 % by 2030, and that more than one-third of the population would be 60 or over. In the "eighth co-ordinated population projection" of the Federal Statistical Office (see in this instance Sommer, *Entwicklung der Bevölkerung bis 2040*, WiSta 1994, p. 497), which is based on data from 31 December 1992, it was presumed that the birth rate would remain essentially unchanged, whilst the migration conduct of foreigners could not be assessed with certainty. 66

Even if the probability of occurrence of the risk of long-term care remains unchanged, the considerable fall in child-raising activity means not only that the ratio be- 67

tween (younger) contributors and (older) persons in need of long-term care becomes worse and worse. There are also no reliable indications that older people will be subject in future to a much lower risk of needing long-term care than is the case today. Equally high, if not indeed increasing, benefit expenditure will have to be funded by fewer and fewer people. This also leads to a situation in which a shrinking number of younger insured persons, in addition to their contribution burdens, will contribute to ensuring the functionality of social long-term care insurance, and bear the cost burden of child-raising. The same burden of insurance contributions leads to a recognisable imbalance between the total contribution which those raising children make to insurance, and the monetary contribution of the childless. Herein lies a disadvantage of child-raising insured parties which is to be compensated for in the law on contributions. A certain degree of compensation is provided by the fact that insured parties who are engaged in caring for and raising children, while making the same contributions as the childless, also receive benefits for the other family members. This favourable situation however does not compensate completely for the generative contribution additionally made through child-raising activity and the concomitant disadvantage of those raising children in terms of the advantage accruing to the childless. Accordingly, the compensation for the disadvantage requires more than the contribution-free acquisition of the right to claim long-term care services by family members.

D.

I.

1. The legislature has several possibilities at its disposal to eliminate the unconstitutionality of § 54.1 and 54.2, § 55.1 sentences 1 and 2, as well as § 57, of the Eleventh Book of the Code of Social Law. For this reason, to the degree manifest from the ruling, these provisions are to be only declared incompatible with Article 3.1 in conjunction with Article 6.1 of the Basic Law. 68

2. A declaration of incompatibility in principle has the consequence that the unconstitutional provisions may no longer be applied. They may continue to be applicable by way of exception. In the interest of legal certainty, and with regard to the fact that the legislature must review which paths are viable and fundable to bring about a constitutional legal situation, it is necessary in the present case to permit the further application of § 54.1 and 54.2, § 55.1 sentences 1 and 2, as well as § 57, of the Eleventh Book of the Code of Social Law until 31 December 2004 (see BVerfGE 92, 53 (73) with further references; established case-law). The legislature must enact a new constitutional regulation at the latest by this time. In the assessment of the period, the Senate has taken account of the fact that the significance of the instant ruling will also have to be examined for other branches of social insurance. 69

II.

The legislature has broad latitude in drafting the law on contributions in accordance with Article 3.1 in conjunction with Article 6.1 of the Basic Law in social long-term care insurance. The Basic Law only obliges it to relatively decrease the burden on insured parties subject to obligatory contributions with one or several children in the assessment of contributions in comparison with childless members of social long-term care insurance. 70

The equalisation accordingly to be carried out between parents and childless persons must however take place by means of provisions which reduce the burden on the parents' generation during the time of care and child-raising, since the contributions made by today's generation of children later as adults also benefit childless insured parties who at that time belong to the years which are vulnerable to needing long-term care, or who are in need of long-term care, and are materially based on the child-raising activities of their parents who are today subject to obligatory insurance. The concomitant burden on parents occurs in their gainful employment phase; it is hence also to be compensated for in this period. The constitutionally necessary compensation between members of social long-term care insurance raising and not raising children can therefore not take place via different benefits in the event of the occurrence of need of long-term care. 71

It is left to the legislature to decide how to accommodate care and child-raising activity in assessing the contributions of insured parties subject to obligatory contributions with children. 72

Having said that, it is constitutionally obliged to select a solution which decreases in relative terms the burden on those subject to a maintenance obligation from the first child onwards. The fact of caring for and raising of the first child already leads to a situation in which that which is unequal is treated equally in an unconstitutional manner in the law regulating contributions to social long-term care insurance. 73

III.

[…] 74-75

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