

HEADNOTES:

- 1. The unequal treatment of marriage and registered civil partnerships with regard to survivors' pensions under an occupational pension scheme for civil service employees who have supplementary pensions insurance with the Supplementary Pensions Agency for Federal and Länder Employees (Versorgungsanstalt des Bundes und der Länder – VBL) is incompatible with Article 3.1 of the Basic Law (Grundgesetz – GG).**
- 2. If the privileged treatment of marriage is accompanied by unfavourable treatment of other ways of life, even where these are comparable to marriage with regard to the life situation provided for and the objectives pursued by the legislation, the mere reference to the requirement of protecting marriage under Article 6.1 of the Basic Law does not justify such a differentiation.**

Order of the First Senate of 7 July 2009

– 1 BVR 1164/07 –

in the proceedings on the constitutional complaint of Mr. D...,

- authorised representative: Lawyer ... –

against a) the judgment of the Federal Court of Justice (Bundesgerichtshof) of 14 February 2007 – IV ZR 267/04 –,

b) the judgment of Karlsruhe Higher Regional Court (Oberlandesgericht) of 21 October 2004 – 12 U 195/04 –,

c) the judgment of Karlsruhe Regional Court (Landgericht) of 26 March 2004 – 6 O 968/03 –.

RULING:

1. The judgment of the Federal Court of Justice (Bundesgerichtshof – BGH) of 14 February 2007 – IV ZR 267/04 –, the judgment of Karlsruhe Higher Regional Court (Oberlandesgericht) of 21 October 2004 – 12 U 195/04 – and the judgment of Karlsruhe Regional Court (Landgericht) of 26 March 2004 – 6 O 968/03 – violate the complainant's fundamental right under Article 3.1 of the Basic Law insofar as they find that the action for a declaration that the defendant has an obligation to pay a pension corresponding to the survivor's pension under § 38 of the Rules of the VBL is unfounded.
2. The judgment of the Federal Court of Justice of 14 February 2007 – IV ZR 267/04 – is overturned in this extent. In this respect, the matter is referred back to the Federal Court of Justice.

FOUNDATIONS:

A. – I.

The constitutional complaint relates to the unequal treatment of marriage and registered civil partnerships with regard to survivors' pensions under an occupational pension scheme for employees in the civil service according to the Rules of the Supplementary Pensions Agency for Federal and Länder Employees (*Versorgungsanstalt des Bundes und der Länder* – VBL). 1

1. As a supplementary pensions institution for civil service employees, the VBL has a duty to grant employees of its member employers under private law an old-age pension, benefits on the reduction of earning capacity and a survivor's pension. This supplements a pension under the statutory pension scheme. The relationship between the VBL, its member employers and their employees is triangular in nature. The employees have a direct employment-law claim against their employers for a supplementary pension. In order to comply with this requirement, the employer enters into a group insurance contract under private law with the VBL in favour of its employees. 2

This contract gives the employee an insurance claim to a supplementary pension against the VBL.

Until 31 December 2000, the VBL's system of supplementary pensions was based on the Collective Agreement on Pensions for Federal and Länder Employees and for the Employees of Local Government Administrative Authorities and Establishments (*Tarifvertrag über die Versorgung der Arbeitnehmer des Bundes und der Länder sowie von Arbeitnehmern kommunaler Verwaltungen und Betriebe – VTV*) of 4 November 1966. This provided for compulsory insurance with the VBL and made certain fundamental decisions. The specific structure of supplementary pensions was laid down in the VBL Rules in the version in effect until 31 December 2000 (VBL Rules, old version). Pursuant to this, the supplementary pension normally to be reached by the employee (§§ 37 et seq. VBL Rules, old version) was based on what was known as the total pension principle. This provided that an insured person should be granted a particular total pension level, which was oriented to civil service pensions. When the VBL amended its Rules on 22 November 2002, it retroactively altered its supplementary pensions system. The total pension system was formally terminated at 24:00 on 31 December 2000. In practice, the total pension system of the previous Rules was continued for a transitional period in the year 2001. The change of system was agreed by the parties to collective agreements in the Collective Agreement on Occupational Old-Age Pensions of the Employees of the Civil Service (*Tarifvertrag über die betriebliche Altersversorgung der Beschäftigten des öffentlichen Dienstes (Tarifvertrag Altersversorgung – ATV)*) of 1 March 2002. The earlier total pension system contained in the VTV, based on the employee's final salary, was thus abandoned and replaced by a contribution-based occupational pension scheme using a points system. The requirements and terms of the benefits to which the insured persons are entitled are defined in detail in the ATV by the parties themselves, whereas the old VTV only laid down the basic elements. The new VBL Rules (VBL Rules) incorporate the terms of the new collective agreement.

a) In § 10 ATV, the parties to the civil service collective agreement created a provision for an occupational pension for survivors. In this, they largely followed § 46 of the Sixth Book of the Code of Social Law (*Sozialgesetzbuch Sechstes Buch – SGB VI*). § 46 SGB VI, as amended on 20 April 2007, in force from 1 January 2008, reads as follows:

§ 46

Widow's pension and widower's pension

(1) After the death of their insured spouse, widows or widowers who have not remarried have a claim to a small widow's pension or a small widower's pension if the insured spouse completed the general qualifying period. The claim exists for a maximum of twenty-four calendar months after the end of the month in which the insured person died.

(2) After the death of their insured spouse who completed the general qualifying period, widows or widowers who have not remarried have a claim to a large widow's pension or a large widower's pension if they	8
1. are bringing up a child of their own or a child of the deceased spouse which has not yet reached the age of eighteen,	9
2. have reached the age of forty-seven, or	10
3. have reduced earning capacity.	11
The following are also deemed to be children:	12
1. stepchildren and foster children (§ 56.2 nos. 1 and 2 of the First Book) who have been taken into the household of the widow or widower,	13
2. grandchildren and siblings who have been taken into the household of the widow or the widower or who are mainly supported by the widow or the widower.	14
Care for a child of the widow or widower or of the insured spouse in a common household, where the child, by reason of physical, mental or psychological disability, is incapable of maintaining itself, is equivalent to upbringing even after the child has reached the age of eighteen.	15
(2a) Widows or widowers have no claim to a widow's pension or a widower's pension if the marriage did not last for a minimum of one year, unless in the particular circumstances of the case it is unjustified to assume that the sole or predominant purpose of the marriage was to acquire a claim to a survivor's pension.	16
(2b) Nor is there a claim to a widow's pension or a widower's pension from the calendar month at the beginning of which pension splitting is carried out. The notice granting the widow's pension or widower's pension is to be cancelled with effect from this date on; §§ 24 and 48 of the Tenth Book do not apply.	17
(3) If the other requirements of subsections 1 to 2b are satisfied, surviving spouses who have remarried have a claim to a small or large widow's pension or widower's pension if the new marriage is dissolved or annulled (widow's pension or widower's pension in relation to the last-but-one spouse).	18
(4) With regard to a claim to a widow's pension or widower's pension, marrying also includes entering into a civil partnership, marriage also includes a civil partnership, widow or widower also includes a surviving civil partner, and spouse also includes a civil partner. The dissolution or termination in another manner of a new civil partnership is equivalent to the dissolution or nullity of a new marriage.	19
The provision of § 46.4 SGB VI was inserted in the Code by the Act for the Revision of the Law of Civil Partnerships (<i>Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts</i>) of 15 December 2004. In addition to providing for a somewhat theoretical special case contained in § 105a no. 1 SGB VI, this created statutory equal treatment of marriage and civil partnerships in relation to widows' and widowers' pensions. At	20

the same time, equal treatment was also created in connection with pensions paid by reason of the upbringing of children, by the insertion in § 47 SGB VI of a subsection 4 corresponding to § 46.4 SGB VI.

The amount of the survivors' pensions of statutory pensions insurance varies depending on standard situations of social need. If it is impossible or unreasonable for the survivor to engage in gainful employment by reason of the upbringing of children, of occupational disability or total disability and of the age of the survivor after reaching the age of forty-seven (until 31 December 2007 the provision applied after the age of forty-five), the survivor has a claim to what is known as the large widow's and widower's pension (§ 46.2 SGB VI). The pension is 55 per cent of the insured person's pension. If the spouse died before 1 January 2002 or if the marriage was entered into before this date and at least one spouse was born before 2 January 1962, the pension is 60 per cent of the insured person's pension. What is known as a small widow's or widower's pension is granted if the above typical situations of social need do not apply (§ 46.1 SGB VI). The amount of the small widow's and widower's pension is 25 per cent of the insured person's pension (§ 67 no. 5 SGB VI). The duration of a claim to the small widow's and widower's pension is restricted to a maximum of twenty-four months (§ 46.1 sentence 2 SGB VI). Under § 242a.1 SGB VI, the only situation in which this restriction does not apply is where the partner died before 1 January 2002 or where at least one partner was born before 2 January 1962 and the marriage was entered into before 1 January 2002. Both the small and the large widow's and widower's pensions are paid until the end of the third calendar month after the end of the month in which the spouse died (known as the death quarter), in the amount of 100 per cent of the insured person's pension (§ 67 nos. 5 and 6 SGB VI). A claim to widow's or widower's pension is excluded in the case of a marriage merely entered into for the sake of maintenance (§ 46.2a SGB VI) and in the case of pension splitting (§ 46.2b SGB VI).

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b) The collective agreement in § 10 ATV was incorporated into the VBL Rules with only minor changes of wording. Following the fifth amendment of the Rules, § 38 VBL Rules reads as follows:

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§ 38

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Occupational pension for survivors

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(1) On the death of an insured person who completed the qualifying period (§ 34) or of a person entitled to an occupational pension, the surviving spouse has a claim to a small or large occupational pension for widows/widowers if and as long as there is a claim to a widow's/widower's pension under the statutory pension scheme or there would be such a claim if no pension splitting had been carried out between spouses.

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The nature (small/large occupational pensions for widows/widowers), the amount (the applicable pension type factor after the end of the death quarter under § 67 nos. 5 and 6 and § 255.1 SGB VI) and the duration of the claim are based – in the

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absence of provisions to the contrary below – on the corresponding provisions of the statutory pensions insurance scheme.

The assessment basis of occupational pensions for survivors is in each case the occupational pension which the deceased received or could have received if he/she had, at the date of his/her death, ceased employment on the grounds of total disability. 27

The legitimate children of the deceased, or the children who by statute have an equal status to these, have a claim to an occupational pension for orphans or half-orphans corresponding to sentences 1 to 3. 28

The claim must be documented by a notice from the organisation responsible for statutory pensions insurance. 29

(2) There is no claim to an occupational pension for widows/widowers if the marriage to the deceased lasted less than twelve months unless in the particular circumstances of the case it is unjustified to assume that the sole or predominant purpose of the marriage was to acquire an occupational pension for the widow/the widower. 30

(3) Widows'/widowers' pensions and orphans' pensions may not together exceed the amount of the occupational pension on which they are based. If the sum of the survivors' pensions is greater, they shall be proportionately reduced. If one of the proportionately reduced survivors' pensions expires, the remaining survivors' pensions shall be correspondingly increased from the beginning of the following month, but only to a maximum of the full amount of the occupational pension of the deceased. 31

This provides, therefore, subject to the provision on the exclusion of a claim in the case of a marriage entered into for the sake of maintenance (see § 38.2 VBL Rules), that a widow or a widower has a claim to an occupational pension if he or she is able to claim a widow's or widower's pension under the statutory pension scheme. The same applies if the only reason why they do not receive a widow's or widower's pension under the statutory pension scheme is because pension splitting between spouses has been carried out (see § 38.1 sentence 1 VBL Rules). 32

The amount of the survivor's pension is also based on the corresponding provisions of SGB VI. The VBL occupational pension therefore also exists in the forms of a small and a large pension. The small pension is 25 per cent of the deceased's occupational pension, and the large pension is either 55 per cent or 60 per cent of the deceased's occupational pension. In this calculation, the figure for the deceased's occupational pension is to be the occupational pension the deceased actually received if he or she received a pension from the VBL at the date of his/her death. Failing this, the basis of assessment of the survivor's pension is the pension that the deceased could have claimed if he or she, at the date of his/her death, had at the date of his/her death, had ceased employment on the grounds of total disability. There is no equivalent in the 33

VBL occupational pension of the provision in statutory pensions law for continuation in full of the deceased's pension for the death quarter.

Neither the ATV nor the VBL Rules provide for a survivor's pension for registered civil partners. Collective agreements amending the ATV and amendments of the VBL Rules of a later date than the introduction of equal treatment of civil partners with regard to statutory pensions by § 46.4 SGB VI did not include provisions to this effect. 34

2. The registered civil partnership is a family-law institution for a same-sex relationship of a permanent nature between two persons. The Act on Registered Civil Partnerships (*Gesetz über die eingetragene Lebenspartnerschaft – Lebenspartnerschaftsgesetz* – LPartG – Civil Partnerships Act) of 16 February 2001 (Federal Law Gazette – *Bundesgesetzblatt* I p. 266), which came into force on 1 August 2001, for the first time gave same-sex couples the possibility of entering into a registered civil partnership. The purpose of the Act is to remove discrimination against same-sex couples and to give them a legal framework for partnerships of a permanent nature. 35

The Civil Partnerships Act in the first instance provided for the creation and dissolution of registered partnerships and governed the personal and financial legal relationships between the civil partners. It structured the law of maintenance by analogy to matrimonial law. The Act for the Revision of the Law of Civil Partnerships of 15 December 2004 (Federal Law Gazette I p. 3396), which came into force on 1 January 2005, brought the law of registered civil partnerships even closer to matrimonial law; in this connection, there was extensive reference to the provisions of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) on marriage. The Act for the Revision of the Law of Civil Partnerships governs the adoption of matrimonial property law, the more extensive harmonisation of the law of maintenance, the assimilation of the requirements for dissolution to those of divorce law, the introduction of stepchild adoption and of pension rights adjustment, and the integration of the civil partners in the provisions for survivors in statutory pensions insurance. 36

a) The registered civil partners have a duty to give each other care and support and to organise their lives together. They bear responsibility for each other (§ 2 of the LPartG). They have a mutual duty to maintain their relationship as partners to a reasonable extent “through their work and with their property” (§ 5 sentence 1 LPartG). § 1360 sentence 2, §§ 1360a, 1360b and § 1609 of the Civil Code, which are directly applicable to spouses, apply to civil partners with the necessary modifications (§ 5 sentence 2 LPartG). If they are living apart, one civil partner may require from the other maintenance that is reasonable with regard to the standard of living and the earning and financial circumstances of the civil partners; § 1361 and § 1609 of the Civil Code apply with the necessary modifications (§ 12 LPartG). In this way, in the case of living apart, the civil partner who is not gainfully employed is placed in the same situation as the spouse who is not gainfully employed. 37

b) The registered civil partners are governed by the matrimonial property regime of the community of accrued gains, unless they agree otherwise in a civil partnership 38

agreement; § 1363.2, § 1364 to § 1390 and § 1409 to § 1563 of the Civil Code apply with the necessary modifications (§§ 6, 7 LPartG). Under § 8 of the Civil Partnerships Act, other financial effects (the presumption of ownership to protect creditors, and a spouse's statutory authorisation to purchase necessities in the other spouse's name) are dealt with as in the case of marriage. The statutory right of intestate succession of the registered civil partners corresponds to that of spouses (§ 10 LPartG).

c) The requirements for the dissolution of a registered civil partnership are largely assimilated to the requirements for the dissolution of a marriage by divorce (§ 15 LPartG). After dissolution, each civil partner is responsible for his or her own maintenance. If he or she is not in a position to do this, he or she has a claim against the other civil partner for maintenance corresponding to that in § 1570 to § 1586b and § 1609 of the Civil Code (§ 16 LPartG). Maintenance after the end of a civil partnership thus conforms to post-marital maintenance for spouses. 39

d) Pension rights adjustment is dealt with in § 20 LPartG. It is carried out by applying the Pension Equalisation Act (*Versorgungsausgleichsgesetz*), to which § 20.1 LPartG refers, with the necessary modifications. § 1587 of the Civil Code also contains a reference to this Act for spouses. Before 1 January 2005, the Act on Registered Civil Partnerships contained no pension rights adjustment between registered civil partners. Therefore, by reason of the protection of legitimate expectations, pension rights adjustment for civil partnerships registered before that date is only effected if both registered civil partners declared to the Local Court (*Amtsgericht*) before or on 31 December 2005 that such a pension rights adjustment is to be effected (§ 20.4 LPartG). Civil partnerships registered from 1 January 2005 on, on the other hand, are automatically governed by pension rights adjustment provisions corresponding to those for spouses. 40

e) Parental custody for a natural child is governed by general provisions. Under § 9.1 LPartG, the registered civil partner of a person who is entitled to sole parental custody acquires a "limited right of custody" (like a step-parent under § 1687b.1 of the Civil Code). Civil partners may not jointly adopt a child. If a civil partner adopts a child alone, then, as in the case of spouses, the consent of the other civil partner is necessary (§ 9.6 LPartG). However, since 1 January 2005 what is known as "stepchild adoption" has been possible (§ 9.7 LPartG). 41

II.

1. The complainant, who was born in 1954, has been a civil service employee since 1977 and has supplementary insurance with the VBL, the defendant in the original proceedings. Since 2001 he has lived in a registered civil partnership. Neither of the two civil partners has custody of a child. 42

When the VBL's pensions system was restructured, the VBL calculated the pension expectancy which the complainant had acquired up to 31 December 2001 and informed him of the amount. Insofar as the complainant's fictive net salary was used as 43

an operand, the VBL based the income tax not on tax class III/0, which applies to married persons, but on tax class I/0, which applies to unmarried persons. In addition, it informed the complainant that it would not pay his civil partner the survivor's pension provided in § 38 VBL Rules for the spouse of a deceased insured person or person entitled to an occupational pension.

The complainant commenced legal proceedings at the Regional Court and applied *inter alia* for a declaration that the VBL was obliged to base pensions calculations for the complainant on tax class III/0. In addition, he applied for a declaration that if the civil partnership was still in existence on his death, his civil partner should be granted a survivor's pension like a widow's or widower's pension in accordance with the Rules. 44

2. The Regional Court, in its judgment of 26 March 2004, which is challenged by the constitutional complaint, dismissed the applications for declarations as unfounded. In his appeal to the Higher Regional Court, the complainant further pursued his applications for declarations. The Higher Regional Court dismissed the appeal (judgment of 21 October 2004 – 12 U 195/04 –, *Zeitschrift für das gesamte Familienrecht – FamRZ* 2005, pp. 1566 et seq.). 45

The Federal Court of Justice held that the complainant's appeal on points of law was unfounded (judgment of 14 February 2007 – IV ZR 267/04 –, 2007, pp. 805 et seq.). 46

The court held that the wording of the VBL Rules did not give rise to the claims. It stated that the VBL Rules lacked a provision like that in the statutory pensions insurance scheme to the effect that claims to widows' and widowers' pensions have now also been created for registered civil partners. The terms "marrying", "spouse" or "marriage" used in § 38.1 sentence 1 and 2 VBL Rules, as legal concepts, presupposed a community of persons of different sex entered into under the provisions of §§ 1310 et seq. of the Civil Code. There was no room, according to the court, for an interpretation extending the terms relating to marriage in the direction of registered civil partners. 47

Nor could the claims be derived from a supplementary interpretation or an analogy. When the parties to collective agreements, including corporations under public law such as the Federal Government, the *Länder* and the local authorities, had entered into the old-age pension scheme and the ATV, on which the VBL Rules are based, the Civil Partnerships Act had been known. Despite knowledge of the Civil Partnerships Act, neither the parties to collective agreements nor the VBL's supervisory board, when passing the new Rules based on the above collective agreement, had drafted an improvement of the situation of insured persons who had entered into a registered civil partnership. Nothing had changed in this respect as a result of the collective agreements introducing amendments or the alterations to the VBL Rules. Nor, the court stated, had the Act for the Revision of the Law of Civil Partnerships, which had amended many statutes and statutory orders in favour of registered civil partners, as yet given any cause to amend the VBL Rules. 48

Nor did the exclusion of registered civil partners from the survivor's pension in the VBL Rules violate prior-ranking law. 49

Insofar as the appeal on points of law invoked the fundamental right under Article 3.1 of the Basic Law, which the VBL as a public-law institution was obliged to take into account, the court held, the VBL itself recognised that although privileged treatment of marriage as against registered civil partnerships was not constitutionally required, in view of Article 6.1 of the Basic Law it was permissible. It remained the case that it was typical for married employees to have children, to earn their living from their employment and to bear the costs of providing for their spouse and the children; these costs were not incurred by unmarried persons or persons without children. This justified preferential treatment for married persons in the manner made by the VBL. 50

Nor was the appeal on points of law successful with regard to the claim that it was in violation of European law. The fact that Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Directive) did not conflict with the challenged provisions of the VBL Rules could not reasonably be doubted, the court held. It had not been necessary to submit the matter to the Court of Justice of the European Communities – ECJ. 51

3. In his constitutional complaint, the complainant challenges these court decisions. He submits that there has been a violation of the general principle of equality before the law (Article 3.1 of the Basic Law), and, by reason of the failure to conduct proceedings for a preliminary ruling before the Court of Justice of the European Communities, a violation of his right to his lawful judge (Article 101.1 sentence 2 of the Basic Law): 52

a) His fundamental right under Article 3.1 of the Basic Law has been violated, for Article 6.1 of the Basic Law does not justify the unequal treatment in the present case. 53

Article 6.1 of the Basic Law is not qualified without any additional substantive grounds to justify unequal treatment of civil partnerships in contrast to marriage. 54

The unequal treatment of marriage and civil partnerships should be measured by the standards that have been developed by the Federal Constitutional Court (*Bundesverfassungsgericht*) in established case-law with regard to personal characteristics. The legal institution of marriage is typically directed to heterosexual persons, and the legal institution of the registered civil partnership is typically directed to homosexual persons. An individual cannot choose his or her sexual identity at will. The fact that the target groups of legislation on marriage and civil partnership are different gives rise to a particularly close connection to the principle of equality before the law. For differentiation leads to unequal treatment of groups of persons, at all events indirectly. In addition, the element of sexual orientation or identity approaches very closely the elements set out in Article 3.3 of the Basic Law, in particular that of sex, and the challenged judgments do not critically consider this. 55

This defect is relevant to the decision. It led to all three decisions misjudging the pro- 56

tective effect of Article 3.1 of the Basic Law to the disadvantage of the complainant and as a result proceeding on the basis that Article 6.1 of the Basic Law has fundamental priority over Article 3.1 of the Basic Law. But such a fundamental priority cannot be derived from the previous case-law of the Federal Constitutional Court.

The less favourable treatment of the complainant in contrast to married insured persons – including those similarly without children – is not justified by the fact that marriages are typically entered into with a view to the spouses having children of their own. It is even questionable whether this assumption is still applicable at all. There are a large number of childless marriages, and at the latest after the Act for the Revision of the Law of Civil Partnerships entered into force and stepchild adoption was introduced, civil partnerships too could be entered into with a view to the partners having children of their own, and this is increasingly the case.

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However, this is not the crucial issue. For the provisions of the VBL Rules clearly do not have the purpose of giving favourable treatment to marriage as a “long-term relationship which in the normal case is presumed to be capable of reproduction”. Especially when a person’s own old-age pension is calculated and a survivor’s pension is granted, no regulatory purpose to this effect can be implied. For both when an old-age pension is received and in the case where one partner predeceases the other, it is as a general rule clear whether the marriage resulted in children. In addition, the objective that the challenged decisions imputed to the drafter of the Rules (the promotion of marriages by reason of the fact that they produce children) would be very inadequately achieved by privileged treatment of marriages including childless marriages in contrast to unmarried insured persons with children.

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The true and also the only acceptable purpose of the Rules’ privileged treatment even of childless marriages is to take account of the statutory maintenance burdens that typically arise in a marriage. In this respect, however, there is no difference between marriages and registered civil partnerships.

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b) In addition, the judgment of the Federal Court of Justice also violates the complainant’s claim to his lawful judge under Article 101.1 sentence 2 of the Basic Law. The Federal Court of Justice violated its obligation, arising from Article 101.1 sentence 2 of the Basic Law, to apply to the Court of Justice of the European Communities.

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c) Insofar as the complainant, in addition to the above, also bases his constitutional complaint on the fact that the calculation of his pension expectancy and the judgments confirming this violate his fundamental rights with regard to the tax class on which they are based, this argument has been split off and will be dealt with in separate constitutional complaint proceedings. The subject of the present constitutional complaint is the challenged decisions as far as they relate to the asserted claim for an occupational survivor’s pension.

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III.

Opinions on the constitutional complaint were submitted by the VBL, the Federal Labour Court (*Bundesarbeitsgericht*), the Federal Finance Court (*Bundesfinanzhof*), the Employers' Association of German *Länder* (*Tarifgemeinschaft deutscher Länder* – TdL), the trade union dbb tarifunion, the Confederation of German Trade Unions (*Deutscher Gewerkschaftsbund* – DGB), the *Arbeitsgemeinschaft für betriebliche Altersversorgung*, the *Arbeitsgemeinschaft kommunale und kirchliche Altersversorgung*, the *Lesben- und Schwulenverband in Deutschland* and the *Bundesarbeitsgemeinschaft Schwule und Lesbische Paare e.V.* 62

1. The VBL submitted that under the *Abrechnungsverband West* (the settlement organisation for West Germany), which applies in the present case, the benefits were essentially paid out of contributions. When the apportionment rate was fixed at the beginning of the period covered, extra expenses for surviving registered civil partners were not provided for. It was therefore necessary in the first instance to make an actuarial calculation to determine to what extent benefits for civil partners can be taken into account in supplementary pensions. 63

The challenged judgments did not violate Article 3.1 of the Basic Law. Nor, for example, was there any differentiation by sexual orientation. The permissibility of the different treatment followed from Article 6.1 of the Basic Law and could not be seen as unfavourable treatment of registered civil partners. Sexual orientation did not approach the element of sex referred to in Article 3.3 of the Basic Law particularly closely. 64

It was typical for married persons to have children and bring them up. This elementary social achievement for the future could not be made by registered civil partnerships in the same way as by married persons, even if children might grow up in registered civil partnerships, after an adoption or following earlier heterosexual partnerships. Consequently, it was the standard situation for spouses to bear duties to maintain their children or the spouse who brought up the children and to bear corresponding costs of providing for them; these costs were not incurred in this form in a registered civil partnership. 65

2. The President of the Federal Labour Court submitted a statement by the President of the Third Senate and an opinion of the President of the Sixth Senate. The President of the Third Senate stated that since the proceedings with the file number 3 AZR 20/07 were still in progress, he would not submit an opinion; this no longer applies, following the judgment of 14 January 2009 pronounced in these proceedings (*Neue Zeitschrift für Arbeits- und Sozialrecht* – NZA 2009, p. 489). The President of the Sixth Senate referred to the previous decisions of his senate on questions of the equal treatment of registered civil partners (*Entscheidungen des Bundesarbeitsgerichts* – BAGE 110, 277-287; 120, BAGE 55-68); 66

3. The President of the Federal Finance Court submitted opinions of the Second and the Eighth Senates. The Second Senate referred to its case-law on inheritance and 67

gift tax (order of 1 February 2007 – II R 43/05 –, unpubl.; *Sammlung der Entscheidungen des Bundesfinanzhofs* – BFHE 217, 183), the Eighth Senate referred to its case-law on child benefits for same-sex spouses under the law of the Netherlands (judgment of 30 November 2004 – VIII R 61/04 –, *Sammlung der Entscheidungen des Bundesfinanzhofs* – BFH/NV 2005, p. 695).

4. The TdL submitted that the essential provision of the Rules corresponded to the provision in the collective agreement and therefore was a product of autonomy in negotiating pay agreements. The question as to whether registered civil partners should be granted a claim to a survivor's pension was considered in the negotiations on the change of system. Ultimately, however, no such claim had been agreed, and the points system had been correspondingly actuarially calculated as a contribution-based promise of benefits. In other respects, the TdL in substance follows the challenged judgment of the Federal Court of Justice.

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5. The trade union dbb tarifunion submitted that the question of extending the area of application of survivors' pensions had been considered in the collective bargaining negotiations. In the negotiations on the change of system in the year 2001, the employers had rejected an extension to surviving registered civil partners by reference to a similar rejection in the statutory pension scheme. In the year 2007, by reason of the amendment of § 46.4 SGB VI that had now been made, the trade unions again called for survivors' pensions to be extended to registered civil partners. The employers had again rejected this. In the interest of the overall agreement which was necessary to enter into the collective agreement, the trade unions at this date had to give up the attempt to achieve this objective, while at the same time stating that they would raise the demand again in future negotiations.

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6. The Confederation of German Trade Unions submitted that Article 3.1 of the Basic Law had been violated, for Article 6.1 of the Basic Law did not justify the unequal treatment in question. Registered civil partnerships did not differ from marriage in a way that would justify the unequal treatment, either with regard to the partners' obligations to maintain or with regard to founding a family. The image of the family had fundamentally changed.

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7. The Arbeitsgemeinschaft für betriebliche Altersversorgung (aba) submitted that from the aspect of equality it was permissible with regard to the typically increased need of provision of spouses to treat them more favourably than registered civil partners. Survivors' benefits were traditionally granted in occupational pension plans in order to support the employee's family after his/her death. In addition, it was intended to support the spouse, who as a general rule was not gainfully employed, who was responsible for bringing up the children and for the other household concerns and thus supporting the employee in order that he or she could concentrate on work without restriction. A surviving spouse typically needed more provision, because as a result of bringing up the children he or she was not in a position to build up sufficient provision for his or her old age.

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aba submitted that there were no precise figures as to how many marriages and partnerships had resulted in children. An evaluation by the Federal Statistical Office (*Statistisches Bundesamt*) showed that in the year 2006 in the west, three-quarters of all children were born in wedlock, whereas the figure for the east was only 40 per cent of children. A survey carried out by the Bundesarbeitsgemeinschaft Schwule Juristen among the *Länder* had revealed that in the year 2004 there were probably between 12,500 and 14,000 registered civil partnerships. Only approximately 0.03 per cent of persons gainfully employed lived in a registered civil partnership. The financial repercussions of including registered civil partnerships in survivors' pensions would therefore be relatively slight. In summary it could be said: Most children were born in wedlock and more than two-thirds of the households in which children lived were marriages. The proportion of marriages in which children currently lived in the household was now somewhat smaller than the proportion of marriages in which no children lived in the household. The proportion of persons who lived in a registered civil partnership was relatively small in relation to the total population.

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8. The Arbeitsgemeinschaft kommunale und kirchliche Altersversorgung (AKA) e.V. similarly submitted that there was no unjustified unequal treatment, and in its legal remarks it followed the challenged judgment of the Federal Court of Justice. The survivors' benefits of the VBL were traditionally designed to ensure that there was support for the surviving spouses and children. The surviving spouse had frequently been unable to be gainfully employed, by reason of the upbringing of children and taking care of the household.

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9. The Lesben- und Schwulenverband in Deutschland (LSVD) submitted that the challenged decisions violated Article 3.1 of the Basic Law. Spouses and registered civil partners were in a comparable situation with regard to survivors' pensions. The survivor's pension replaced the maintenance that the deceased insured person had previously provided through his or her income. With regard to the mutual duties of maintenance, however, there were no longer any differences between spouses and registered civil partners.

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The unfavourable treatment of civil partners was not suitable to promote marriage. The failure to grant persons with same-sex orientation a survivor's pension was not capable of causing them to enter into marriage instead of a civil partnership. This was not altered by the fact that through unequal treatment the VBL saved funds, since it did not use these funds deliberately to promote its married insured persons and since the number of registered civil partners was in any case still very small as yet, as a result of which the VBL insured who were civil partners did not have an actuarially measurable effect.

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10. The Bundesarbeitsgemeinschaft Schwule und Lesbische Paare (SLP) e.V. submitted that the challenged decisions violate Article 3.1 of the Basic Law and the decision of the Federal Court of Justice also violates Article 101.1 sentence 2. The VBL Rules were strictly bound by Article 3.1 of the Basic Law, because they indirectly dis-

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advantaged homosexuals as a group of persons. The fact that homosexual persons were also married to partners of the other sex and that children resulted from these marriages was more applicable to the past, when what are known as marriages of convenience were necessary to conceal a person's sexual orientation. But above all it did not change the fact that the institution of marriage is primarily directed to heterosexuals and the institution of registered civil partners is primarily directed to homosexuals.

B.

The constitutional complaint is admissible and is well-founded. The challenged judgments violate the complainant's fundamental right under Article 3.1 of the Basic Law (I.). It may remain undecided whether the decision of the Federal Court of Justice in addition violates his right to his lawful judge (Article 101.1 sentence 2 of the Basic Law) (II.).

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I.

1. The general principle of equality (Article 3.1 of the Basic Law) demands that all persons be treated equally before the law. It also prohibits the exclusion of favourable treatment that violates the principle of equality in which favourable treatment is granted to one group of persons while it is denied to another group of persons (see BVerfGE (*Entscheidungen des Bundesverfassungsgerichts* (Decisions of the Federal Constitutional Court – BVerfGE) 110, 412 (431)); 112, 164 (174); 116, 164 (180)).

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It is against this precept that the VBL Rules must be tested. They are of a private-law nature and apply to the group insurance contracts that are entered into by the public employers who are VBL members in favour of their employees. Admittedly, the Federal Court of Justice's established case-law has therefore classified the provisions of the Rules as standard business terms und private law in the form of general insurance conditions (see Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ) 48, 35 (37 et seq.); 103, 370 (377 et seq.); 142, 103 (105 et seq.); this is constitutionally unobjectionable (see BVerfG, order of the Second Chamber of the First Senate of 22 March 2000 – 1 BvR 1136/96 –, *Neue Juristische Wochenschrift* – NJW 2000, p. 3341 (3342); Chamber Decisions of the Federal Constitutional Court *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK) 11, 130 (140); order of the Third Chamber of the First Senate of 18 April 2008 – 1 BvR 759/05 –, *Deutsches Verwaltungsblatt* 2008, p. 780).

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Nevertheless, the VBL Rules must be tested directly against the principle of equality of Article 3.1 of the Basic Law, since the VBL as a public-law institution performs a public-sector task (on this, see also BVerfGE 98, 365 (395); 116, 135 (153); 103, 370 (383)).

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Nor does the commitment to the principle of equality fail to apply in these circumstances by reason of the provision on survivors' pensions (§ 38 VBL Rules) resulting

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in full from an agreement made between the parties to the collective agreement (§ 10 ATV) which in turn are acting in exercise of their autonomy in negotiating pay agreements, which is constitutionally protected by Article 9.3 of the Basic Law. At all events, in connection with the arrangements for provision for dependants in the civil service the latitude granted to the parties to collective agreements does not release them from the obligation to observe the requirement of equal treatment.

2. § 38 VBL Rules results in unequal treatment of insured persons who are married and insured persons who live in a registered civil partnership. 82

An insured person who has entered into a marriage receives, as part of his or her own position under a supplementary pension, as set out in more detail under § 38 VBL Rules, an expectancy to the effect that if he or she dies, the person legally associated with him or her – his or her spouse – will receive a survivor’s pension. An insured person who has entered into a registered civil partnership does not acquire such an expectancy for the person legally associated with him or her – his or her civil partner. § 38 VBL Rules expressly provides a claim to a survivor’s pension only for spouses. It contains no provision corresponding to § 46.4 SGB VI by which, for the purposes of a claim to a widow’s or widower’s pension, the establishment of a registered civil partnership is also deemed to be a marriage. 83

3. The unequal treatment is not justified. 84

a) The unequal treatment of married persons and registered civil partners under § 38 VBL Rules requires a strict standard for reviewing whether a sufficiently weighty reason for differentiation exists. Depending on the subject involved and the differentiating elements, the general principle of equality results in differing limits for the legislator or rulemaker, varying from the mere prohibition of arbitrariness to a strict subjection to proportionality requirements (see BVerfGE 88, 87 (96); 110, 274 (291); 117, 1 (30); established case-law). In the present case, particular account must be taken of the requirements justifying the different treatment of groups of persons (aa). A special need for justification also follows from the fact that the unequal treatment of spouses and registered civil partners relates to the personal characteristic of sexual orientation (bb) and that § 38 VBL Rules largely follows the provisions of SGB VI concerning widows’ and widowers’ pensions, but abandons this link, to the disadvantage of registered civil partnerships (cc). 85

aa) If a legal provision treats a group of persons to whom a specific statute applies differently from other persons to whom the statute applies, although there are no differences between the two groups of such a nature and such weight that they could justify the unequal treatment, it violates the general principle of equality of Article 3.1 of the Basic Law (see BVerfGE 55, 72 (88); 84, 197 (199); 100, 195 (205); 107, 205 (213); 109, 96 (123); established case-law). Article 3.1 of the Basic Law requires that the unequal treatment must be linked to a factually justified distinguishing element. It is not sufficient to justify unequal treatment of groups of persons that the legislator or rulemaker took account of a distinguishing element that was suitable by its nature. In- 86

stead, there must also be an inner connection between the differences found and the differentiating provision to justify the degree of differentiation, a connection which can be adduced as an objectively justifiable differentiating factor of sufficient weight (see BVerfGE 81, 208 (224); 88, 87 (97); 93, 386 (401)).

bb) The requirements in the case of unequal treatment of groups of persons are all the stricter the greater the danger is that a link to personal characteristics that are comparable to those of Article 3.3 of the Basic Law will lead to the discrimination of a minority (see BVerfGE 88, 87 (96); 97, 169 (181)). This is so in the case of sexual orientation. 87

A strict standard of review in connection with unequal treatment relating to sexual orientation, which approaches the standard applied in connection with other prohibitions of discrimination, is also in line with the development of European law. Both Article 13 of the EC Treaty and Article 21.1 of the Charter of Fundamental Rights of the European Union include sexual orientation in the group of prohibitions of discrimination. The case-law of the European Court of Human Rights (ECHR) also requires just as “serious grounds” to justify differentiations based on sexual orientation as for those based on sex (ECHR, judgment of 24 July 2003 – no. 40.016/98 – Karner v. Austria, *Österreichische Juristen-Zeitung* 2004, p. 36 (38) with further references). 88

By this yardstick, unequal treatment under § 38 VBL Rules between insured persons who are married and those who live in a registered civil partnership is subject to a strict review, since it relates to the personal characteristic of sexual orientation. The decision of an individual for a marriage or a registered civil partnership is connected to his or her sexual orientation in a virtually indissoluble way. 89

The view of the Federal Court of Justice, which in the challenged decision considers that the personal or marital status which constitutes the differentiating criterion is available to the persons affected irrespective of their sexual orientation, is too formal and does not do justice to real life. It is legally permissible for heterosexually oriented persons of the same sex to enter into a registered civil partnership and for homosexually oriented persons of different sexes to marry. In order to respect the privacy of the persons involved, the legislature did not require a marriage or a registered civil partnership to be a sexual partnership, nor that the respective sexual orientation of the parties should be examined before a marriage or a registered civil partnership was entered into, but this does not alter the fact that the institution of the registered civil partnership, according to the intention of the legislature, is directed towards persons with same-sex sexual orientation, and in reality it is also used by these to establish a legally protected long-term partnership. 90

This objective of the Civil Partnerships Act follows from its very name in the long form (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften* – Act to Terminate Discrimination against Same-Sex Partnerships). Accordingly, the introduction of the statement in support of the bill begins with an objective of this nature (“The discrimination of same-sex couples is to be removed”, see *Bun-* 91

destag printed paper (*Bundestagsdrucksache* – BTDrucks) 14/3751, p. 1). The legislature wanted for the first time to grant homosexual persons rights that were to help them to a better development of their personality and that were to lead to a removal of long-term discriminations (see BVerfGE 104, 51 (60); 105, 313 (314)). In addition, the statement in support of the bill states that following a request to this effect by the European Parliament, it is aimed to avoid unequal treatment of persons with same-sex sexual orientation, and this concern is to be “implemented with regard to same-sex partnerships” in the Civil Partnerships Act (see *Bundestag* printed paper 14/3751, p. 33). Not only marriages, but also registered civil partnerships, are therefore typically partnerships which are also sexual partnerships, in the view of the legislature. With logical consistency, the impediments to marriage that exist starting at a particular degree of relationship (§ 1307 of the Civil Code), which at all events *inter alia* serve to protect the sexual self-determination of the individual, essentially also apply to entering into a registered civil partnership (§ 1.3 no. 2 and no. 3 LPartG).

Provisions which govern the rights of registered civil partners therefore typically relate to homosexual persons, and those which govern the rights of spouses typically relate to heterosexual persons. If marriages and civil partnerships are treated differently with regard to survivors’ pensions, therefore, there is unequal treatment on the basis of sexual orientation (on unfavourable treatment by reason of sexual orientation in the meaning of Article 2.2 letter a of the Framework Directive and/or § 1 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – AGG), see: ECJ, judgment of 1 April 2008 – *Maruko* – C-267/06 – OJ 2008, C 128, 6; Federal Labour Court, judgment of 14 January 2009 – 3 AZR 20/07 –, *Neue Zeitschrift für Arbeits- und Sozialrecht* – NZA 2009, p. 489 (492)).

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Since the unequal treatment of married couples and registered civil partnerships created by § 38 VBL Rules contains a link to sexual orientation, substantial differences between these two forms of a long-term, legally recognised partnership are necessary in order to justify the concrete unequal treatment.

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cc) Another reason for an increased need of justification of the unequal treatment is the fact that the provisions of the Rules are on the one hand closely based on social security law, both with regard to the requirements and with regard to their legal consequences, but on the other hand they are not linked to the provisions of social security law on the equal treatment of registered civil partnerships (§ 46.4 SGB VI). If a legislature or rulemaker incorporates in a set of rules a consistent set of provisions taken from another set of rules, and in doing so deviates from it with regard to an individual provision, it is particularly likely that there is a violation of Article 3.1 of the Basic Law. Admittedly, one exception from a system cannot in itself result in a violation of the principle of equality. However, there must be a plausible reason for the exception (see BVerfGE 68, 237 (253); 81, 156 (207); 85, 238 (247)). This applies all the more in the present case, because the exception is capable of leading to inconsistent results in more than one respect.

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For example, the claims of widows or widowers to VBL survivors' pensions, because they are subject to the requirements of the statutory pension, end not only if they re-marry, but also if they enter into a registered civil partnership (§ 38.1 sentence 1 VBL Rules in conjunction with § 46.1 sentence 1, 46.2 sentence 1 and 46.4, § 100.3 sentence 1 SGB VI). In this respect, therefore, account is taken, to the disadvantage of the persons affected, of the fact that the registered civil partnership is also a mutual support arrangement. On the other hand, no account is taken of this to the advantage of registered civil partners. 95

Since § 20 LPartG entered into force on 1 January 2005, there has been an adjustment of pension rights between the civil partners on the dissolution of a registered civil partnership. The VBL pension expectancy is included in the pension rights adjustment. This means that after the dissolution of a registered civil partnership a former civil partner, if the necessary requirements are satisfied, profits not only from the statutory pension scheme, but also from the occupational old-age pension of the other partner, that is, where applicable, also from the partner's VBL pension. With regard to the VBL pension, a former civil partner with lower pension rights is therefore in a better position after the dissolution of the civil partnership than a civil partner with lower pension rights after the other partner's death. 96

b) The unequal treatment of marriage and registered civil partnerships is not justified, measured against these requirements. 97

aa) The submissions of the unions which enter into collective agreements and the public employers in the constitutional complaint proceedings do not reveal any joint motives for the differentiation in question that might have influenced the VBL Rules. According to the statements of dbb tarifunion, in the year 2001 the employers' side justified its rejection of the equality initially demanded by the unions' side by the argument that before the year 2005 this had not yet been implemented in statutory pensions insurance either. In the collective bargaining negotiations in the year 2007 – that is, after the introduction of equal treatment of registered civil partners with regard to survivors' pensions in statutory pensions insurance and pension rights adjustment – the employers' side once more did not wish equality to be introduced; dbb tarifunion made no report of any reasons for this discussed at that time. dbb's justification for the fact that the unions' side accepted this was not a concrete consideration related to the issue, but only the statement that it had been necessary to achieve an overall agreement. Therefore, at least for the period from 2005 on, no relevant and joint grounds of the parties to collective agreements for the unequal treatment of the registered civil partnership can be established. 98

bb) Nor is an objective reason for differentiation discernible. 99

A mere reference to marriage and its protection under the constitution (Art. 6.1 of the Basic Law) is not sufficient here to justify the unequal treatment (1). Viable objective reasons for unequal treatment in the area of occupational survivors' pensions do not exist, taking into account the objectives and the concrete structure of this pen- 100

sions system, and in particular also do not result from an inequality of the life situations of married couples and civil partners (2).

(1) Article 6.1 of the Basic Law places marriage and family under the special protection of the state. Here, the constitution not only guarantees the institution of marriage, but also requires a particular protection by the state as a binding value decision affecting the whole area of private and public law relating to marriage and the family (see BVerfGE 6, 55 (72); 55, 114 (126); 105, 313 (346)). In order to fulfil the requirements of the mandate of protection, it is in particular the duty of the state to refrain from everything that damages or otherwise adversely affects marriage, and to promote marriage by suitable measures (see BVerfGE 6, 55 (76); 28, 104 (113); 53, 224 (248); 76, 1 (41); 80, 81 (92-93); 99, 216 (231-232)). 101

By reason of the constitutional protection of marriage, the legislature is in principle not prevented from treating it more favourably than other ways of life (see BVerfGE 6, 55 (76-77); 105, 313 (348)). Thus, the Federal Constitutional Court has held that it is justified to give preferential treatment to marriage in the social-law provisions on the financing of artificial insemination, in particular out of consideration for the legally protected status of marriage as a responsible relationship and guarantee of stability (see BVerfGE 117, 316 (328-329)). The provisions that treat marriage more favourably with regard to maintenance and pensions and in tax law may also find their justification in the spouses' joint shaping of their lives. This applies in particular, *inter alia*, from a financial point of view, and it justifies treating the spouses more favourably in the case of the dissolution of marriage by separation or death than persons who live in less binding relationships. The justification of the privileged treatment of marriage, even where it is childless, in particular when it is considered separately from the protection of the family, lies in the responsibility for the partner which is assumed in the long term and which is also legally binding. In this respect, however, there is no difference between registered civil partnerships and marriage. Both are of a permanent nature and create a mutual obligation of support. 102

Apart from this, insofar as privileged treatment of marriage is based on the fact that it produces children, the constitutionally permissible and constitutionally required promotion of parents is primarily the subject of the constitutional protection of the fundamental rights of the family, and as such it is not restricted to married parents (see BVerfGE 106, 166 (176 et seq.); 112, 50 (67 et seq.); 118, 45 (62 et seq.)). 103

It does not appear that the drafters of the Rules had a family-policy objective for children to grow up with married parents if possible, as a result of which incentives for marrying were to be created, and in addition this could at most justify privileged treatment as against couples who could marry, that is, as against unmarried heterosexual cohabitation, but not as against same-sex registered civil partnerships. 104

If the privileged treatment of marriage is accompanied by unfavourable treatment of other ways of life, even where these are comparable to marriage with regard to the life situation provided for and the objectives pursued by the provisions, the mere ref- 105

erence to the requirement of protecting marriage does not justify such a differentiation. For the authority to give favourable treatment to marriage over other ways of life in fulfilment and further refining of the constitutional mandate to promote marriage does not give rise to a requirement contained in Article 6.1 of the Basic Law to disadvantage other ways of life in comparison to marriage. It cannot be constitutionally justified to derive from the special protection of marriage a rule that other partnerships are to be structured in a way different from marriage and to be given lesser rights (see BVerfGE 105, 313 (348)). Beyond the mere reference to Article 6.1 of the Basic Law, a sufficiently weighty factual reason is required here which, measured against the given subject and objective of regulation, justifies the unfavourable treatment of other ways of life.

(2) Measured against these principles, the failure to take account of the surviving civil partner in occupational survivors' pensions needs a special factual ground of justification that goes beyond the abstract promotion of marriage. For the structuring of provision for surviving dependants takes account of factual situations that occur in the same way in marriages and in civil partnerships. On the basis of the objectively pursued goals of survivors' pensions, no differences under non-constitutional law or factual differences can be identified which justify treating registered civil partners less favourably than spouses with regard to the VBL survivor's pension. 106

(a) The VBL survivor's pension is a benefit from an occupational pension scheme. Benefits from occupational old-age pensions constitute remuneration, according to the unanimous case-law of the Federal Labour Court and the Federal Court of Justice (see BAGE 62, 345 (350); BGH, judgment of 20 September 2006 – IV ZR 304/04 –, NJW 2006, p. 3774 (3776); see also BVerfGE 65, 196 (212-213)). The same applies to the VBL supplementary pension. Its nature as remuneration has even increased as a result of the change to the points model system (see BGH, judgment of 20 September 2006 – IV ZR 304/04 –, NJW 2006, p. 3774 (3776)). As regards the objective of granting remuneration, no differences can be identified between married employees and employees who live in a civil partnership. 107

(b) The same applies to the reason occasionally cited as a motive for occupational pensions: remunerating an indirect contribution to the success of the employment relationship, which is attributed to the partner (see Rolfs, in: Blomeyer/Rolfs/Otto, BetrAVG, 4th ed. 2006, Appendix § 1 marginal no. 201). Insofar as one regards such a contribution as being supplied by the care, support for going to work and stabilisation of life expected of a partner, there are no typical differences between spouses and registered civil partners. Under § 2 sentence 1 of the Civil Partnerships Act, registered civil partners are obliged to organise their lives together. It is not evident why a civil partnership should offer less of a guarantee for a stable private life of the employee which benefits the quality of his or her work. 108

(c) Finally, benefits from occupational old-age pensions have the nature of provision for old age. They are intended to guarantee a supplementary pension for the employ- 109

ees benefited after they leave gainful employment, and, if a survivor's pension is granted, an additional protection of the survivors in the case of death (see BAGE 62, 345 (350)). As a result, pensions systems may make provisions that the grant and the amount of benefits depend on a typical need for provision. This applies in particular to survivors' pensions. The death of the insured person and the consequent cessation of his or her income from employment or pension create a pension gap for the surviving dependants who have previously been supported by him or her in whole or in part. Consequently, in the case of survivors' pensions, it may be considered whether typically, before the deceased died, the survivor had a claim to maintenance which ended as a result of the death (see BAG, judgment of 18 November 2008 – 3 AZR 277/07 – *Neue Zeitschrift für Arbeitsrecht, Rechtsprechungs-Report* – NZA-RR 2009, p. 153 (156)).

In this respect too, there are no differences that justify unequal treatment between VBL insured persons who are married and those who live in a registered civil partnership. A differentiation according to differing situations of need is permissible in this connection and required, but linking this to whether the insured person lives in a marriage or in a registered civil partnership is neither suitable nor necessary. 110

The marital status of the insured person does not result in a typical need for maintenance on the part of the survivor. The legislation concerning the obligations to provide maintenance within marriages and registered civil partnerships is almost identical, and therefore the same standards apply when measuring the maintenance requirement of a person entitled to maintenance and the maintenance gap arising upon the death of a person liable for maintenance. Admittedly, the concrete need may vary depending on the personal situation of the person entitled to maintenance. It depends on his or her current personal circumstances and working life. However, there are no differences that could be universalised in establishing a need for maintenance in the case of surviving spouses and surviving civil partners. 111

No reason for differentiating between marriage and registered civil partnerships can be found, contrary to the opinion of the Federal Court of Justice, in the fact that married couples typically have a different pension requirement than civil partners because of gaps in their working lives due to their bringing up of children (but also of this opinion: Decisions of the Federal Administrative Court (*Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE) 129, 129 (134); BVerfG, order of the First Chamber of the Second Senate of 6 May 2008 – 2 BvR 1830/06 –, NJW 2008, p. 2325 on the family allowance under civil service law). Not every marriage has children. Nor is every marriage oriented towards having children. Nor can it be assumed either that the role allocation in marriages is such that one of the two spouses is considerably less occupation-oriented. With regard to survivors' pensions under the statutory pension scheme, as early as 1975, in the Second Widower's Pension decision, the Federal Constitutional Court held that orientation to a typical normal marriage with one breadwinner and one home-maker was no longer compatible with Article 3.2 of the Basic Law (BVerfGE 39, 169 (187-195)). Consequently, the image of 112

the “breadwinner marriage”, in which one of the spouses maintains the other, which is no longer a correct categorisation of social reality, can no longer be regarded as the yardstick for assigning survivors’ benefits. Marriage can no longer be tied to a particular distribution of roles. Instead, it is the right of the spouses under Article 6.1 und Article 3.2 of the Basic Law to decide on the nature of their marital cohabitation themselves with equal rights (see BVerfGE 99, 216 (231); 105, 313 (345)).

On the other hand, in registered civil partnerships too it is certainly possible that the roles will be allocated in such a way that one partner is more strongly oriented towards his or her occupation and the other partner more strongly towards the domestic sphere, including childcare. Children live in a large number of registered civil partnerships, especially in those between women. The Bundesarbeitsgemeinschaft Schwule und Lesbische Paare e.V. pointed this out in its opinion. According to a study by the State Institute for Family Research at the University of Bamberg (*Staatsinstitut für Familienforschung an der Universität Bamberg*), an estimated number of approximately 2,200 children in Germany live in the present 13,000 registered civil partnerships (Rupp/Bergold, in: Rupp, *Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften*, 2009, p. 282). This finding of fact is independent of the possibility of joint legal parenthood, which till now has been restricted to stepchild adoption. The proportion of children living in registered civil partnerships is thus far lower than that living with married couples, but it is by no means negligible. In the various provisions in § 9 of the Civil Partnerships Act relating to children of a civil partner, the legislature has taken account of this reality (see also BAG, judgment of 14 January 2009 – 3 AZR 20/07 –, NZA 2009, p. 489 (493)). Just as in marriage, in civil partnerships the community of the partners may be structured in such a way that one partner has an increased need of provision. If the survivor’s pension is designed in such a way that civil partners are excluded, this aspect is overlooked. Consequently, the unequal treatment of spouses and civil partners in survivors’ pensions has a particularly harsh effect on those surviving partners in a civil partnership who – for example by reason of bringing up children or because the deceased partner bore the majority of the costs in the mutual support arrangement – are in a situation comparable to spouses with an increased need of provision.

In one view, it is typical for a special need for provision to arise in marriage by reason of the upbringing of children, and the privileged treatment of marriage in survivors’ pensions is assumed to result from taking account of this need for provision; but this privileged treatment is not justified *inter alia* because any periods of bringing up children or another individual need of provision independent of marital status may be taken into account more concretely, as has already happened both in the law of statutory pensions insurance and also in the VBL Rules.

In the Second Widower’s Pension Decision, the Federal Constitutional Court enjoined the legislature not to use too rough and therefore inappropriate elements of differentiation when taking into account the reality that different courses of life lead to different provision requirements (BVerfGE 39, 169 (191 et seq.)). Since then, this has

increasingly been implemented in the statutory pension scheme. In this process, the particular need that may arise as a result of gaps in working life resulting from bringing up children was taken into account in several ways.

In calculating the amount of all pensions on death, since the Act for the Reorganisation of Surviving Dependants' Pensions and the Recognition of Child-Raising Periods in Statutory Health Insurance (*Gesetz zur Neuordnung der Hinterbliebenenrenten sowie zur Anerkennung von Kindererziehungszeiten in der gesetzlichen Krankenversicherung*) of 11 July 1985 (Federal Law Gazette I pp. 1450 et seq.) entered into force on 1 January 1986, a distinction is made depending on the degree to which pensions have the function of replacing maintenance. Thus, the distinction between the large and small widow's pension in § 46 SGB VI creates categories to take account of different needs for provision. The only persons who receive the large widow's and widower's pension are those who are either bringing up a child (a child of their own or a child of the deceased, or a child under eighteen who, as set out in more detail in § 46.2 SGB VI, has an equal status to these; if the child is seriously disabled, the age limit of majority does not apply) or have already reached the age of forty-seven or have reduced earning capacity. In contrast to the large widow's and widower's pension, the small widow's and widower's pension is not merely less than half the amount, but also limited to twenty-four calendar months for many persons affected.

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Under § 78a SGB VI, surviving dependants who are bringing up or have brought up children receive additional personal pension credit points in the widow's and widower's pension, the amount of which depends of the duration of the period of bringing up children to the age of three.

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Account is also taken of the concrete need of provision in that there is a sliding-scale imputation of the surviving spouse's own income from earnings, allowance for loss of earnings and investment to the widow's and widower's pension (§ 97 SGB VI). If the survivor's own income (within the meaning of §§ 18a to 18e of the Fourth Book of the Code of Social Law (*Sozialgesetzbuch Viertes Buch – SGB IV*) coincides in date of receipt with the widow's or widower's pension, then at the end of the death quarter 40 per cent of the survivor's own income, provided it exceeds a particular tax allowance, is counted towards the pension. To this extent, the widow's and widower's pension is suspended. The claim may be suspended in full if it coincides with income of the survivor's own that substantially exceeds the tax allowance. The crediting of the income results in the survivor's pension being of greater financial significance for a partner whose deceased partner previously bore the main responsibility for the costs of the joint household.

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Two negative requirements for a claim are also expressions of the view of the pension as typically replacing maintenance: On the one hand, there is no claim to a widow's or widower's pension in the case of a mere "marriage for maintenance" (§ 46.2a SGB VI); On the other hand, the same applies in the case of pension splitting (§ 46.2b and § 105a no. 2 SGB VI).

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In addition to the matters taken into account in connection with the widow's and widower's pension, periods of bringing up children also play a role in building up one's own pension claims. Under § 3 sentence 1 no. 1 SGB VI, bringing up a child in the first three years of its life, if the more detailed requirements of § 56 SGB VI are satisfied, creates an obligation to be insured in the statutory pension scheme. The periods of bringing up a child are compulsory contribution periods, which are assessed in the calculation of a pension at a fixed pension credit point value per calendar month. The contributions for periods of bringing up children are paid by the Federal Government (§ 170.1 no. 1 SGB VI). 120

The instruments of the statutory pension scheme to take account of varying needs of provision have largely been incorporated into the VBL Rules. As a result, matching the two types of statutory widow's and widower's pensions, there are also a small and a large VBL survivor's pension for widows/widowers. The reference to the statutory pension scheme means that the only persons who receive the large occupational pension are those who satisfy one of the particular need situations set out in § 46.2 SGB VI. In addition, there is no claim to the survivor's pension under § 38 VBL Rules where it is a case of a mere "marriage for maintenance". The amount and duration of the claim to a survivor's pension follow the corresponding provisions of SGB VI, unless there are special provisions in § 38 VBL Rules. The provisions of the statutory pensions scheme on coincidence of pension and income apply to the VBL survivor's pension with the necessary modifications, subject to the proviso that any tax allowances and the income that is counted towards the pension from the statutory pension scheme are not taken into account (§ 41.5 VBL Rules). In addition, under the VBL Rules periods spent bringing up children are taken into account in creating a person's claim to an occupational pension (§ 37.1 VBL Rules). 121

Admittedly, it would be conceivable to take the individual's pension needs even more into account. However, the account taken of various pension needs by categorising them already ensures that those surviving partners who have a greater pension need by reason of their concrete working life receive higher pension benefits than those who do not need maintenance. This applies not only with regard to the widow's and widower's pension, which carries more weight with regard to individual provision, but also to the VBL survivor's pension, which supplements the statutory pension. 122

II.

It is not necessary to decide whether the judgment of the Federal Court of Justice also violates the complainant's claim to his lawful judge under Article 101.1 sentence 2 of the Basic Law because the court failed to comply with its duty to apply to the Court of Justice of the European Communities for a preliminary ruling with regard to the prohibition of discrimination on grounds of sexual identity which follows from the Framework Directive. 123

C.

Where general conditions of insurance – as in this case the VBL Rules – infringe Article 3.1 of the Basic Law, this results, according to the case-law of the civil courts, which is constitutionally unobjectionable, in the clauses concerned being invalid (see BGHZ 174, 127 (175)). Gaps in the conditions which arise from this can be filled by way of a supplementary interpretation (see BGHZ 174, 127 (177)). In the present case too, there is an unintended gap in the provisions for survivors' pensions, albeit not as a result of the deliberate exclusion of civil partners in the wording of § 38 VBL Rules, but as a result of the determination that this drafting is invalid for constitutional reasons. The violation of the principle of equality cannot be removed by the mere failure to apply § 38 VBL Rules, because this, contrary to the underlying intention, would exclude survivors' pensions for spouses too. The drafting intention pursued in the survivor's pension scheme under § 38 VBL Rules can thus only be completed in such a way that the provision for spouses will, with effect from 1 January 2005, also apply to registered civil partners. This also corresponds to the hypothetical intention both of the VBL and of the parties to collective agreements, which would have included registered civil partners in survivors' pensions if they had been aware of the violation of the principle of equality established in the present case. There are no apparent conflicting fundamental rights that might give rise to well-founded constitutional objections to the gap-filling interpretation, and in particular, in view of the small number of persons affected, it appears out of the question that the VBL's financial burden will be unreasonably increased (on this, see BGHZ 117, 92 (99-100)). Nor are any objections raised with regard to the autonomy in negotiation, which is protected by Article 9.3 of the Basic Law, of the parties to collective agreements, which in § 10 ATV entered into an agreement on which § 38 VBL Rules is based. In particular there is no indication that the parties to collective agreements were aware of the violation of the general principle of equality.

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Furthermore, neither the parties to collective agreements nor the VBL are prevented from removing the violation of Article 3.1 of the Basic Law by a different provision which ensures equal treatment of spouses and registered civil partners in the award of a survivor's pension. Within the limits of constitutional law, they are free to structure the requirements for a survivor's pension in a different way, identically for marriage and for civil partnerships, and in particular to take even more account of the concrete need for maintenance.

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The judgment of the Federal Court of Justice is overturned for violation of Article 3.1 of the Basic Law. Under § 95.2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the matter is referred back to the Federal Court of Justice.

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The decision on the reimbursement of expenses is based on § 34a.2 of the Federal Constitutional Court Act. 127

Judges: Papier, Hohmann-Dennhardt, Bryde, Gaier, Eichberger,
Schluckebier, Kirchhof, Masing

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 7. Juli 2009 -
1 BvR 1164/07**

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