

## Remarks on Andreas Abegg's paper "From the Social Contract to a Social Contract Law"

Maurizio Borghi

Abegg's paper addresses on phenomena that we are barely able to measure, and with respect to which it would be an exaggeration to try to have an all-embracing understanding. Thus, this is just a preliminary, and not a definitive statement.

I shall go straight to what, in my view, seems to be the heart of the matter.

The fact that a big, tacit social contract (Rousseau) crumbles into a multitude of tiny *explicit* contracts, which govern a load of social duties, relationships and behaviours, is a striking and enigmatic phenomenon. A similar *Zergliederung* [dissection] undoubtedly occurs in many other areas of the Law, producing the overall effect of a "law-saturated society." However, the most relevant feature in this process is not the astonishing shift from one legal paradigm to another, but the – mostly unnoticed – emergence of the trait of *functionality*. The two instances are properly termed "*functional equivalent*": *social contract* on the one hand, and multiple contracts between "politics" and "society" on the other. But what is the *function* according to which the *equivalence* between the two figures is eventually measured? The point is that this character of *functionality* does not obey to a neutral, exogenous unit of measurement according to which all different legal systems can be compared. Instead, *functionality* is the leading trait of the sole "multiple-contract" system, and thus of the mushrooming of contractual figures and forms of socio-political contracts that are analysed in part III of the paper. Therefore, it is only in the light of such outcomes that the traditional social contract appears to be a functional equivalent. Yet, social contract and cases (*Fallkonstellationen*) of contracts are *per se* incommensurable instances.

This does not mean, however, that the trait of functionality is not already present (though in a concealed way) within the theory of the social contract. To a certain extent, the fact of asserting that the essential form of human *Miteinandersein* [togetherness] is a *contract* implicitly means to consider human beings, not as having an end in themselves (Kant), but as being functional to one another. As a matter of fact, the Latin language terms *societas* means only a specific form of being together, namely, that of being together *in function of a common purpose or end* (irrespective of whether the end is in itself worthy or vicious: e.g. *societas regni, societas sceleris*, etc.). Still, the "society" envisaged in the theories of social contract explored in part II of the paper is not yet an instance which only purpose is that of functioning. On the contrary, the above mentioned cases (*Fallkonstellationen*) take place in a society which only function is, precisely, the perpetuation of its functioning. To put it in a formula: *functioning for functioning's sake*.

This phenomenon is not only challenging, but strictly speaking vertiginous. I am not entirely persuaded that the perspective of the social contract law (*Gesellschaftsvertragsrecht*), which is mentioned at the end of the paper, has the slightest chance of dealing with it. But here I am only making a tentative, non-definitive claim. On the other hand, in my opinion, the paper sheds light on an *Abgrund* [abyss] for which no "theory" is currently able to unravel. Moreover, it does so in a worthwhile way, that is, by insisting on a specific perspective (namely, that of the rules governing the relationship between the state and the citizens), without taking the common shortcut of making use of philosophical theories hastily adapted to the context.