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# Resisting and justifying changes

How to make the new acceptable in the Ancient,  
Medieval and Early Modern world

ed. by

ELISABETTA PODDIGHE and TIZIANA PONTILLO

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ELISABETTA Poddighe

## JUSTIFYING NOVELTY IN POLITICAL THEORY: ARISTOTLE ON POLITICAL AND LEGAL INNOVATION

### Abstract

In Aristotle's political thought, innovation is "acceptable" when it is achieved in the name of the common good and when the benefit is great. Against the notion that political and legal innovation may be either absolutely beneficial or absolutely harmful, Aristotle discusses concrete instances such as the size of the benefit the innovation produces, the aim of whoever proposes the new action and the need to exercise political control over every innovation. The lexical and conceptual dyad represented by the verbs *kainotomein* (to seek the new) and *kinein* (to change radically) allows us to follow Aristotle's thinking and to identify the univocal result it reaches, both when it addresses theoretical proposals for innovation as well as examples of innovation that have already been implemented.

We find broad consensus among scholars with regard to Aristotle's position on the subject of innovation. When Aristotle discussed the question in his *Politics*, mainly in relation to the idea of innovating in legal and constitutional arenas, scholars assert that novelty (*kainotomia*) was clearly not a positive concept<sup>1</sup>. Aristotle's claimed reluctance to advocate innovation in politics has been recently reasserted by Benoît Godin in his *Innovation Contested: The Idea of Innovation over the Centuries*, where he discusses more generally the attitude of the Greeks toward innovation and change. Here Godin states:

Two theses exist about change in antiquity. One suggests that change is not accepted among Greeks. The other is that it is. [...] *Kainotomia* may offer a solution to the controversy: change (*metabole*)—yes (with careful consideration and conscious acceptance), innovation (*kainotomia*)—no. [...] innovation is humankind's. It is change to the established order and is not accepted. Like we moderns, Ancient Greeks consider that novelty (*kainon*) is everywhere and that innovativeness (the propensity to innovate) is a fact of life. Yet things are different with regard to innovation. To the Greeks, *kainotomia* is not equiva-

<sup>1</sup> See Voegelin 1957: 324, 334, 359; Collins 1997: 221; Swanson 1997: 157; Duffy 2007; Godin 2015; Kuin 2018.



lent to innovativeness or creativity originality. Innovation is subversive of the established order<sup>2</sup>.

Godin bases much of his argument on an analysis of Aristotle's *Politics* and claims that Aristotle had assumed an unequivocal position against innovation which he rejected outright and equated with the subversion of the political order<sup>3</sup>. Godin (along with other scholars) affirms that Aristotle was hostile to innovation since the quest for the new (*kainotomein*), unlike other kinds of change, was distinguished by a wish for novelty and as such should be rejected<sup>4</sup>.

While there can be no doubt that the distinctive feature of the *kainotomein* was the quest for the new, I would like to challenge the assumption that for Aristotle it was the nature of innovation itself that made change dangerous. In this context I will take a more general look at Aristotle's views on political and legal innovation.

### 1. *Kainotomein in Aristotle's Politics*

Aristotle uses the verb *kainotomein*<sup>5</sup> to refer to changes (either theorized or achieved) whose distinctive feature is a quest for novelty. These are innovations which are perceived as such by an external observer, in that they refer "to conscious activity undertaken with the new as its goal"<sup>6</sup>. There is also another type of change which Aristotle considers when referring to political change (*metaballein*), but such changes (the *metabolai*) are not distinguished by an apparent and conscious search for novelty<sup>7</sup>. The *metabolai* may represent the result of changes so slow as to be imperceptible, occurring gradually, without being realized, and so slipping unnoticed<sup>8</sup>. Such unnoticed changes obviously do not represent any perceived novelty with respect the past. Or alternatively, the *metabolai* may refer to models for political reform that look to former times and, hence, do not pursue change for the sake of "seeking the

<sup>2</sup> Godin 2015: 33.

<sup>3</sup> Godin 2015: 25-33.

<sup>4</sup> Godin 2015: 31. See Kuin 2018: 134, 136.

<sup>5</sup> Aristotle's is a metaphorical use of a word whose meaning was "making new cuttings", i.e. "opening new mines". The same metaphor from mining is in Ar. *Eccl.* v. 584, 586 (Edelstein 1987: 89; Godin 2015: 22; Canfora 2016: 194-315). For a literal use of *kainotomein* cf. Xen. *Por.* 4. 27-30 (Aperghis 1997; Godin 2015: 19; Pishedda 2018: 90). See Oranges in this volume.

<sup>6</sup> D'Angour 2011: 25; Camassa 2018: 59.

<sup>7</sup> Contogiorgis 1978; Bertelli 1989; Polansky 1991. On the concept of *metabole* in Aristotle's political thought see Poddighe 2014: 22-28, 114-115, 139-154.

<sup>8</sup> Arist. *Pol.* 5.2.1302b 4, 5.3.1303a 20ff, 5.7.1307a 40-b 1. Polansky 1991: 325, 332; Poddighe 2014: 115; Godin 2015: 26; Zizza 2016: 396.

new”. This latter type of *metabole* was evoked in Athenian political debate between the V and IV centuries BCE. It was part of Athenian democratic ideology which developed a “justificatory vision of change” (Camassa 2018: 60) and advocated for certain abrupt political innovations as a return to the past<sup>9</sup>. We find an excellent example of this type of *metabole* in Isocrates’ *Areopagitikos*. Here the orator exhorts the Athenians to choose a different constitution from their present one, modelled instead on that constitution long ago established by Athens’ best citizens (foremost, Solon)<sup>10</sup>. But Isocrates also makes the point that the change he hopes for (achievable only through a *metabole*) has nothing to do with revolutionary actions that seek to bring about the new (*neoteron pragmaton*)<sup>11</sup>. His exhortation to “change” the present constitution is merely a proposal to return to the past<sup>12</sup>.

My essay does not deal with these two types of political changes, the “imperceptible” change or the change which looks to past forms for its legitimization<sup>13</sup>, and it should be said that Aristotle never confuses the different kinds of change: “imperceptible” change (dressed up as continuity), change that cloaks novelty in the mantle of the old (which makes “the new seem old”) and change which is distinguished by the quest for the new. Nor are his considerations of the two types of “hidden” change brought up when he discusses the *kainotomein*. Hence, I have chosen to treat Aristotle’s discussion of political and legal change differently from scholars who either assert that Aristotle rejected political innovation because in politics he admitted only “small” and “imperceptible change” (Godin 2015: 25-33), or who argue that Aristotle rejected legal innovation because in politics “it is imperative to make the new seem old” (Kuin 2018: 137)<sup>14</sup>.

I adopt a different tack here. I treat only the type of change, either proposed (or accomplished), that is a “novelty” and focus on what Aristotle has to say about this.

<sup>9</sup> Cf. Arist. *Ath. Pol.* 29.3.

<sup>10</sup> Isoc. *Areop.* 16. Cf. Arist. *Pol.* 1274a 15ff.

<sup>11</sup> Isoc. *Areop.* 57-59.

<sup>12</sup> From this viewpoint, the Athenians did not innovate, only renovated (Osborne 2006: 14). Cf. de Romilly 1966: 184-185; Edelstein 1987: 129; D’Angour 2011: 30-31.

<sup>13</sup> See Sancho Rocher in this volume.

<sup>14</sup> Aristotle’s ideas about property in *Politics* 7 (1329b 25-36) represent the case study considered by Kuin (2018: 134-136) in order to demonstrate that Aristotle approved of innovation only when it was concealed behind continuity with the past. But, in fact, that nucleus of reflections (reviving an old practice that have been interrupted) is never recalled by Aristotle the moment he comes to criticize Plato’s “new ideas” about property in *Politics* 2 (see § 1.1) and this shows that it was not relevant in the context of the discussion of political innovation.

Let us begin by observing that Aristotle is not prejudicially hostile to innovation in the political and legal spheres. Aristotle never states that innovation and the political culture that promotes it are unacceptable nor he affirms that political innovation must be achieved only making “the new look old”. Proof of this is the position he takes in *Politics* 2 where he discusses novelty as being the distinguishing feature of the constitutional models of Plato, especially in the *Republic*<sup>15</sup>, and of Hippodamus of Miletus<sup>16</sup>. In both cases, Aristotle weighs the benefit that “ought” to result from an implementation of the proposed innovation, but without any preconceived positions. In this Aristotle diverges considerably from the views of Aristoxenus of Tarentum who recommended (attributing this to the Pythagoreans) avoiding any legal (and hence, political) innovation since this was *never* beneficial. According to Aristoxenus, the Pythagoreans “approved abiding by the customs and laws of their fathers, even if they should be somewhat worse than those of others; in fact, easily abandoning existing laws and an inclination to introducing innovations (καινοτομίας) would in no way be either beneficial or useful”<sup>17</sup>. Unlike the Pythagoreans, Aristotle was not concerned about the *kainotomia per se* and he did not definitely prefer staticity to *any* development in the legal and constitutional field. His approach to the *kainotomein* was to evaluate any proposed or already achieved innovation in relation to the amount of benefit it delivered and to its proponent’s original purpose.

*Kainotomein/kainotomon* are used in the *Politics* to refer to both political innovations that were only “proposed” and to already implemented actions that had “sought the new”. When dealing with theoretical models, Aristotle speculates on their achievability and utility; for already implemented actions, he judges them on their actual outcomes as revealed in the history of the poleis. In both cases Aristotle looks at whether the innovations proposed/achieved would bring about or effectively did bring about a significant improvement to the common good. With an important difference. When his attention is directed to historical examples, Aristotle can draw on knowledge of real world outcomes produced by the “search for novelty” which he assesses in relation to the amount of benefit that resulted and how this result compared with the original aims of its proponent. On the other hand, when he considers theoretical models, he is concerned with their achievability. Aristotle

<sup>15</sup> Arist. *Pol.* 2.1260b 27-1265b 17.

<sup>16</sup> Arist. *Pol.* 2.1267b 22-1269a 28.

<sup>17</sup> Cf. Aristox. fr. 33 Wehrli = Iambl. *VP*, 176; Stob. 4.25.45. Camassa 2003: 151-153. See § 3.1.

starts from the fact that their declared aim is the common good. These are theoretical models in which new ways of conceiving relationships among citizens are intended to strengthen unity in the polis, their aim being common usefulness. The problem here is to see what is useful in the proposed innovations and to assess if they would effectively produce the utility envisaged.

In Aristotle's analysis of theoretical models he strives to identify their inherent errors or their failure to foresee conditions that would prevent them bringing about a collective benefit. According to Aristotle, such errors or the failure to foresee are the result of an inadequate assessment of the innovation's practical implications. The theoretical models "conceived by certain authors" and discussed in *Politics 2* also include those of Plato and Hippodamus which stand out for their innovativeness<sup>18</sup>. I would like to show that in both these models Aristotle develops a discussion that is in keeping with his declared aim "to see what is useful therein" and to evaluate if an effective benefit would result if these proposals were implemented<sup>19</sup>.

### 1.1. *To kainotomon in Plato's Republic*

I shall begin with Plato's innovative proposal for the ideal polis: owning children, wives and property in common. Aristotle discusses this innovation in *Politics 2* and he has this "novelty" in mind when he states that "all Socrates' *logoi*"—that is, the discourses Plato has Socrates speak in the *Republic*—are "original" and "show novelty of views"<sup>20</sup>. Aristotle's thinking here has been widely studied, especially his relativist and empirical approach in treating Platonic theory: an approach which in the view of some scholars fails to acknowledge the theoretical system in the *Republic*<sup>21</sup>. It is widely agreed that Aristotle does not attempt to discuss the *Republic* as a whole and that he is less interested in the work's political philosophy than in its constitutional proposals<sup>22</sup>. Still a matter of debate is whether Aristotle's evaluation of Plato's proposal to share wives and children exclusively on the basis of its achievability represents a limitation in his approach. While several scholars see it as evidence of Aristotle's complete failure to understand

<sup>18</sup> For a comparative analysis with other cases discussed in *Politics 2*, cf. Lisi 2008.

<sup>19</sup> Arist. *Pol.* 2.1.1260b 30-33.

<sup>20</sup> Arist. *Pol.* 2.6.1265a 10-12.

<sup>21</sup> Stalley 1991: 181-182 for a *status quaestionis*. Cf. Coby 1988; Saunders 1995: 104-114; Mayhew 1997: 59-94; Simpson 1998: 77-91; Lisi 2008; Lockwood 2015: 64-83; Knoll 2016.

<sup>22</sup> Stalley 1991: 182.

Plato<sup>23</sup>, others focus on why the question of the communism of women, children and property dominates Aristotle's treatment of the *Republic* to the exclusion of almost everything else<sup>24</sup>.

Recently the problem has been examined by Thornton Lockwood who argues that Aristotle's main focus in the *Politics* 2 is not Plato's theory but a more general issue: "the problematic nature of political innovation"<sup>25</sup>. Indeed, Aristotle uses the same approach when he discusses the innovations advanced by Hippodamus: to evaluate the effects of a potential implementation of the proposed innovations.

The central importance of the problem of political innovation in *Politics* 2 is also discussed by Armand D'Angour. In his book *The Greeks and the New* he considers *Politics* 2 "a useful starting-point for the investigator who seeks to distinguish Greek attitudes to novelty in different spheres of activity"<sup>26</sup>. I shall return to D'Angour's argument later (see §3) to determine whether he is correct in what he has concluded (along with other scholars) from Aristotle's reflections i.e. that in certain domains the Greeks admitted innovation while in others they rejected it. Now let us just consider D'Angour views on how Aristotle assesses the novelty of communism of women and children. With regard to the innovative proposal in the *Republic* where Socrates says that children, wives and property should be held in common<sup>27</sup>, D'Angour affirms that "Aristotle gives guarded praise to his teacher's clever if impracticable proposal"<sup>28</sup>. In reality, Aristotle criticizes the proposal more for its uselessness than for its non-achievability and, on this point, Aristotle is quite far from judging the Plato's proposed innovation as "clever"

Aristotle's treatment of the theme of communism of women and children reveals his judgment and the method of his critical inquiry<sup>29</sup>. His starting point is the aim of the proposed innovation: the communism of women and children as a means to the unity of the city and as a benefit for the citizens. "I do not think"—Socrates observes near the beginning of Book 5 (*Resp.* 457d)—"that there would be debate concerning the benefit of a community of women and a community of children". It is

<sup>23</sup> Cf. Stalley 1991: 186. Saunders 1995: 104-114; Mayhew 1997: 59-94; Simpson 1998: 77-91; Lisi 2008; Lockwood 2015: 64 n. 3.

<sup>24</sup> Stalley 1991: 186.

<sup>25</sup> Lockwood 2015: 64-83 (65).

<sup>26</sup> D'Angour 2011: 36.

<sup>27</sup> Arist. *Pol.* 2.1.1261a 6-9.

<sup>28</sup> D'Angour 2011: 36.

<sup>29</sup> With similar results to those reached in the discussion of communism of property, i.e. the cure offered in the *Republic* was worse than the disease (Ryan 1989: 213-216). Cf. Stalley 1991: 194-196; Lockwood 2015.

this very point that Aristotle questions: whether the new rule (*nomos*) would deliver the benefit it promises to produce, the unity of the polis.

It should be noted that, from the standpoint of Aristotle, who is more concerned with the utility of Plato's innovation than with the philosophical system in which it is embedded, his main task is identifying the proposal's dystonic aspects with respect to the aim it intends to reach. This aspect is more important than his fundamental divergence with Plato over whether the polis should be a perfect unity and so should seek to share possessions and persons<sup>30</sup>. Hence, most of Aristotle's discussion is devoted to demonstrating that such a communism will not increase affection, but will actually destroy any already existing affection, thereby creating disunity in the city, the opposite of Plato's intention<sup>31</sup>. Aristotle's detailed treatment addresses the "many difficulties" raised by the proposed forms of shared property and he observes that "what is presented as being the greatest good for a city" not only will not save it but "destroys cities themselves"<sup>32</sup>. He rejects this innovation after identifying many generators of discord to which, in his view, Plato had not devoted sufficient attention<sup>33</sup>.

Let me take a single example, one that has been well elucidated by Robert Mayhew who has long studied the problem of Aristotle's criticism of Plato's *Republic*. Mayhew convincingly argues that for Aristotle the main flaw in the proposal to share women and children was Plato's underestimation of the importance of religion in holding together the parts of the city<sup>34</sup>. Aristotle, who never dwells on the ethical aspects of the promiscuity that would result from the "new" rule<sup>35</sup>, identifies the defect that would make it impractical in the life of the polis: i.e., that over time it would become impossible to identify kinship ties between individuals, a situation that would transform "simple" crimes (inevita-

<sup>30</sup> Mayhew 1997: 59-94. Saxonhouse (1992: 194-211) takes a different position on this point.

<sup>31</sup> Mayhew 1996: 54. Cf. Stalley 1991: 191. This also explains why Aristotle glosses over both Plato's proposed correctives (limiting communism to the guardians of the city) and the evidence that this "novelty" has disappeared in Plato's *Laws*. It is also remarkable that Plato in the *Laws* emphasises both the advantages of a mutual familiarity between citizens (5.738d-e) and the importance of knowing the origin of the spouses (6.771 d-e), but that in none of these cases his reflection is addressed to the issue of the communism of women.

<sup>32</sup> Arist. *Pol.* 2.2.1261b 8-9. Cf. Stalley 1991: 191-193; Mayhew 1996: 54; Simpson 1998: 77-91.

<sup>33</sup> Mayhew 1997: 59-94. Cf. Stalley 1991; Saunders 1995; Simpson 1998; Lisi 2008.

<sup>34</sup> Mayhew 1997: 59-94.

<sup>35</sup> Saxonhouse 1992: 161 n. 6, 201-204.

ble in every polis) into “impious” crimes inasmuch as “they would be committed against those with close ties of kinship”<sup>36</sup>. The most serious consequence here, according to Aristotle is that, were it impossible to identify kinship ties, the city would be unable to purify itself through the traditional rites from the condition of “impiety” the new “rule” had led it into. And this would result in ruin and disintegration<sup>37</sup>. Not only would the law fail to bring any benefit to the city, it would lead to its break up. Aristotle therefore rejects “the innovation of communism of children and women” proposed by Plato<sup>38</sup>.

Significantly, Aristotle uses the expression *to kaitonomon* to refer to the innovative character of Plato’s constitutional models<sup>39</sup>, but this usage (a *hapax*) does not seem to indicate either a hostile prejudice against political innovation<sup>40</sup> or a “guarded praise” for his teacher’s “clever if impracticable proposal”<sup>41</sup>. Aristotle’s core concern is not the value of the novelty as such, but whether its implementation will lead to the common good, which for Plato is the fullest possible unity of the city.

### 1.2. *Kainotomein, kainoi nomoi*: “seeking the new” in the history of the poleis

When Aristotle discusses historical examples of achieved *kainotomia* his aim is to identify both the limits of the action of “seeking the new” (*kainotomein*) whose goal is personal enrichment, and the utility of “new laws” (*kainoi nomoi*) intended to bring about the common good.

An illustration of the first type of *kainotomein* is the episode of Hipparinos of Syracuse who is mentioned in *Politics* 5 within the discussion of political upheavals resulting from a “search for the new” by individuals who are in power and who, having dissipated their wealth, “seek the new” in order to reacquire their lost status. Hipparinos, a

<sup>36</sup> Mayhew 1996: 55, rightly distinguishes Aristotle’s judgment who does not believe “the holy (in the religious sense) is a legitimate moral concept” from his firm conviction that most citizens “do believe impiety is a legitimate moral concept” and therefore “they do would diminish the unity of the city”.

<sup>37</sup> Mayhew 1996. Cf. Schütrumpf 1991: 182-184; Saunders 1995: 114; Simpson 1998: 81; Lisi 2008: 8.

<sup>38</sup> Arist. *Pol.* 2.7.1266a 35.

<sup>39</sup> In Canfora’s convincing view (2016: 194-315), Aristophanes’ reiterated references to the Athenian inclination towards *kainotomein* in the *Ecclesiazusae* (vv. 584, 586) would target this feature of Plato’s dialogues, in the background of the parody of women’s communism as a “necessary innovation” propounded in the *Republic*. Cf. Edelstein 1987: 89.

<sup>40</sup> Pezzoli 2012: 236.

<sup>41</sup> D’Angour 2011: 36.

member of the local oligarchy, in seeking the new, “made Dionysos tyrant of Syracuse” and precipitated a regime change from an oligarchy to a tyranny<sup>42</sup>. Information on Hipparinos is scanty, we know that he was the father of one of Dionysos’ later wives, Aristomache, and of Dion of Syracuse<sup>43</sup>. The traditional account that holds him responsible for the tyranny of Dionysos I has been questioned by Andrew Lintott who argues that the interpretation of Hypparinos’ motives (i.e., he had lost his money and was seeking to recover it) was presumably made by the opponents of the tyranny<sup>44</sup>.

The question, however, has little relevance for Aristotle’s general approach. In Aristotle’s view, fictitious (or certainly not true) examples can be taken, as long as they are functional to the theoretical development of a specific subject<sup>45</sup>. Mentioning the episode makes it possible to consider the kind of *kainotomein* that is born out of personal ambition with no view to the common good.

As Cesare Zizza has shown, the premise behind Aristotle’s theoretical consideration is clearly the wish by formerly wealthy persons who have become impoverished to overthrow an oligarchy whose downfall meets their desire for the new. Tension towards the tyranny is not the only way *kainotomein* manifests itself even if this dissatisfaction was already envisaged in the consequences<sup>46</sup>. Nor does the fact that the political change led to a tyranny suggest that Aristotle views the *kainotomein* negatively. Just below, in fact, Aristotle mentions various strategies to bring about the “new” that are in no way motivated by tyrannical intentions<sup>47</sup>.

The target of Aristotle’s analysis is something else: it is the *kainotomein* whose aim is personal gain. On the question of “seeking the new” by individuals who practice politics to satisfy personal ambition rather than the common good, Aristotle clearly expresses his view later on in the *Politics* when he again considers the condition of oligarchs “who are among those in government (*heghemones*) and who after losing their

<sup>42</sup> Arist. *Pol.* 5.6.1305b 39-1306a 2. Cf. Simpson 1998: 383-384; Zizza 2016: 370-371; Lintott 2018: 119. A scanty reference to the case of the rich who “bankrupt themselves” in Simonton 2017: 91 n. 76.

<sup>43</sup> Diod. 14.44.6-7; 16.1-2; Plut. *Dion.* 3.3. D’Angelo 2010. On Dion cf. De Vido 2017.

<sup>44</sup> Lintott 2018: 119.

<sup>45</sup> Cf. Poddighe 2020: 40-41.

<sup>46</sup> Zizza 2016: 370-371; cf. Schütrumpf 1991: 205-208; Saunders 1995: 21-122; Simpson 1998: 383-384; Lintott 2018: 119.

<sup>47</sup> Cf. Zizza 2016: 371, on the examples provided by Aristotle with no connection to tyrannical intentions.



wealth “go in search of the new” again with the aim of personal enrichment<sup>48</sup>.

Georges Contogiorgis has classified these cases of *kainotomein* as “projets révolutionnaires oligarchiques”, and appropriately emphasizes the distinction Aristotle makes between those who have dissipated their wealth (1305b 40) and oligarchs who, having been impoverished in “times of war”, propose as compensation a new distribution of land (1306b 37-40). What is different is their ways of reacting to the condition of impoverishment. While the dissipaters of their own wealth “attempt to introduce some kind of sudden uprising” (1305b 39-1306a 9) like Hipparinos who sought the establishment of the tyranny, the impoverished, “war weary” oligarchs argue for a redistribution of landed property (1307a 1-3).

Contogiorgis explains Aristotle’s distinction by what he defines as the “contenu du projet révolutionnaire”<sup>49</sup>. It is the “social support” of the two projects that differs: the oligarchs who have been impoverished by war, harmed by a chance event, are the spokespersons for a project Contogiorgis calls “collectif” while the dissipaters are assigned “la qualification d’individuel”<sup>50</sup>. Individual does not mean that the actions of oligarchs like Hipparinos were undertaken by one individual (an irrelevant condition for Aristotle) but that the aim of the action was to benefit one individual instead of “un nombre assez important d’oligarques”. A further and related distinction concerns the legitimization of the project for reform which, according to the oligarchical principle of justice, holds that it is fair to compensate only the war impoverished oligarchs, who as members of a regime, suffered damage from an unforeseeable event<sup>51</sup>. What Aristotle is evaluating is the *measure* of individual or collective benefit such actions proper to the *kainotomein* have delivered, along with the projects’ original aims.

Also when Aristotle looks at the history of the great legislative reforms, at the *kainoi nomoi* that led to profound political changes, he continues to be interested in the *measure* of the common good these legislative reforms have delivered and the aim behind the proposal for renewal.

The value of legislative reforms made in the common interest is recognized by Aristotle when he looks at the history of the Athens<sup>52</sup>. De-

<sup>48</sup> Arist. *Pol.* 5.12.1316b 19-21. Cf. Contogiorgis 1978: 95-97.

<sup>49</sup> Contogiorgis 1978: 96.

<sup>50</sup> Contogiorgis 1978: 96.

<sup>51</sup> Contogiorgis 1978: 96.

<sup>52</sup> Cf. D’Angour 2011: 31. On Aristotle’s assessment of institutional developments in 6<sup>th</sup> century Athens cf. Poddighe 2014.

scribing the reforms of the *politeia* undertaken by Cleisthenes, Aristotle states that “aiming at the multitude he established new laws” (*Ath. Pol.* 22.1). Aristotle expresses the same view with regard to the “equal” laws written for the Athenians by Solon (cfr. *Ath. Pol.* 12.4) who “saved” the city (*Ath. Pol.* 6.3)<sup>53</sup>.

There is no question that Aristotle thought the changes made by both these legislators had benefited the “many” and we ought not to dismiss the “novelty” of their legislative reforms—as described in the *Athenaion Politeia*—by arguing that sixth century legislators nonetheless strove to keep intact the institutional framework in which these “new” laws were inserted<sup>54</sup>. In the case of Cleisthenes, it is true, the “new laws” (*kainoi nomoi*) are added to those of Solon which had not been suspended, but obliterated during the years of the tyranny<sup>55</sup>. Cleisthenes’ *kainoi nomoi* therefore do not substitute the *corpus* of previous laws but supplement them<sup>56</sup>. But the case is different for Solon’s new laws. Here the collective benefit is measured as the common choice to suspend the previous laws, Draco’s. This fact is all the more relevant if we consider that Draco’s laws were entrenched<sup>57</sup>. In this case the collective decision by the Athenians in the name of the common interest legitimized the change of the laws<sup>58</sup>. Draco’s laws were superseded after less than thirty years, since Solon was given a special commission to enact “new laws” that could have overridden any entrenchment clause of Draco<sup>59</sup>.

We should bear in mind that the attention Aristotle devotes to the question of improving political regimes is closely related to his dis-

<sup>53</sup> On Aristotle’s reconstruction of Solon’s reform as a constitution that achieves the common good cf. Poddighe 2014: 171-209, and 123-154 on the specific features of Aristotle’s method.

<sup>54</sup> This according to Swanson 1997: 178 n. 11, with regard to Solon’s laws and in an attempt to defend the idea that Aristotle was hostile to legal change (157-159). But cf. Demont 1991: 19-21, and D’Angour 2011: 31, on the ancestral constitution which reminded Athenians “of the bold innovations that had created their democratic system in the preceding century”.

<sup>55</sup> Arist. *Ath. Pol.* 22.1. That Solon’s laws were not suspended, but merely ignored, during the tyranny is clearly stated: *καὶ γὰρ συνέβη τοὺς μὲν Σόλωνος νόμους ἀφανίσθαι τὴν τυραννίδα διὰ τὸ μὴ χρῆσθαι*.

<sup>56</sup> Camassa 2005.

<sup>57</sup> Canevaro 2015: 11-12.

<sup>58</sup> Arist. *Ath. Pol.* 7.1, on Solon who “established a constitution and made other laws, and they ceased to observe the ordinances of Draco, except those relating to homicide”. On the “others” Draco’s laws (besides those relating to homicide) see Gagarin 1986: 55-56, 76; Leão, Rhodes 2016<sup>2</sup>: 2-3, and comment on fr. 22.

<sup>59</sup> Leão, Rhodes 2016<sup>2</sup>: 2-3 and comment on fr. 22.

cussion of the problem of legal innovation<sup>60</sup>. The point for Aristotle is that the legislator must improve the laws “with a view to what is right insofar as it is equally so” or “what is useful for the entire city and community of citizens” (3.13.1283b 38-42)<sup>61</sup>. Contrary to what has often been argued with regard to Aristotle’s alleged opposition to legal innovation<sup>62</sup>, Aristotle considers the reforming action to be indispensable if the benefit appears to be significant. In that case the legislator must intervene with suitable measures in order to rectify critical situations in real regimes<sup>63</sup>.

Aristotle expresses his position on the question of legal innovation more clearly in the section of *Politics* 2 devoted to Hippodamus’ innovative proposals. But before taking a close look at this section (§3) let me compare Aristotle’s views on the “search for the new” with what Thucydides had to say on this point.

2. “That misplaced love of the things that are not” (*Thuc. 6.13.1*).  
*Personal ambition and the search for the new*

Like Aristotle, Thucydides disapproves of the search for the new in the political domain if the aim behind it is not the common good. Thucydides’ position becomes clear in his treatment of the debate over the proposed Sicilian expedition when he compares Nicias’ caution in seeking to dissuade the Athenians from a risky enterprise, putting to a vote a decree that had already passed, with Alcibiades’ dynamism in asking the Athenians not to be swayed by the “love of inactivity expressed in Nicias’ speeches” and to uphold their initial decision<sup>64</sup>.

Thucydides approves of Nicias’ wisdom who had a clear idea of the aim of politics: “to obtain as many benefits as possible for one’s country” and who never gave in to that “misplaced love of the things that are not”<sup>65</sup>, while he disapproves of the position taken by Alcibiades who in order to satisfy his personal ambition asks the Athenian citizens to venture down untrodden roads while arguing that inertia does not

<sup>60</sup> Cf. Keyt 2005: 209-215; Horn 2013: 229; Destrée 2015: 204-223; Saxonhouse 2015: 196-203. *Contra*: Voegelin 1957: 324, 334, 359; Collins 1997: 221; Swanson 1997: 157, 177 n. 10.

<sup>61</sup> Cf. Cooper 2005: 70; Keyt 2005: 210; Miller 1995: 211-213.

<sup>62</sup> Voegelin 1957: 324, 334, 359; Collins 1997: 221; Swanson 1997: 157; Godin 2015: 25-33; Kuin 2018.

<sup>63</sup> Bertelli 2015: 24. Cf. Kraut 2002: 375; Destrée 2015: 204-223. See § 3.

<sup>64</sup> Thuc. 6.14-18. See De Vido in this volume.

<sup>65</sup> Thuc. 6.13.1. The used expression (13.1) is *δυσέρωτας εἶναι τῶν ἀπόντων*. Gomme’s (1970: 238) remark that the expression “has more emotional association for Greeks than for us” is not very helpful.

benefit Athens<sup>66</sup>. Ultimately the “desire to embark on the expedition”<sup>67</sup> prevailed and it was, according to Thucydides, the disastrous consequences for the polis of that “desire” which revealed the ruinous character of the “new” enterprise.

It is clear, however, that Thucydides did not consider searching for the new as being negative in itself. His criticism of Alcibiades’ dynamism was because it served his personal ambition and not the good of the city<sup>68</sup>. In Thucydides’ criticism of Pericles’ successors, in which Alcibiades takes a prominent place, the focus is on private ambitions and private interests<sup>69</sup>. The crucial questions for Thucydides were the aim of the political leader who proposed a new undertaking and whether he had the ability to guide the polis with a steady hand. In Thucydides’ subsequent analysis of the failure of the Sicilian campaign, what brings about the losses there is not the drive toward expansion but the lack of effective leadership which is essential to enable the city to maintain that constant motion over time<sup>70</sup>.

Paul Demont has rightly pointed out that according to Thucydides “les entreprises nouvelles tournèrent à la catastrophe, sauf dans les rares circonstances où des hommes sages purent maîtriser le peuple d’Athènes”, that “ces innovations sont folles, lorsque la sagesse ne les inspire plus” and that “Périclès, un temps, incarna la sagesse qui, seule, garantit l’efficacité de l’innovation”<sup>71</sup>. Neither Thucydides (nor Aristotle) harbor an *a priori* rejection of *kainotomia* or *neoteropoiia*. The crucial point is whether the innovation is beneficial for the many and whether whoever is guiding the search for the new has firm control.

Thucydides’ view of innovation appears quite different in his account of an earlier episode in Athenian history, when the city was under the steady guidance of Pericles: here he praises the “quest for the new” as a positive characteristic of the Athenians<sup>72</sup>.

<sup>66</sup> Thuc. 6.18.6.

<sup>67</sup> Thuc. 6.24.3. The term “desire” (ἔρως) recurs remarkably in the words of Nicias (6.13.1) and in the judgment of Thucydides. See Forde 1986: 437-440.

<sup>68</sup> Saxonhouse 2017: 349-35. Cf. Demont 1991: 20-21; Schwartzberg 2007: 39-40; Camassa 2011: 167-168; 2018: 65-66.

<sup>69</sup> Thuc. 2.65.7, with Forde 1986: 440; Mara 2009: 112-113; Alexiou 2018: 123.

<sup>70</sup> Thuc. 6.15.3. Cf. Forde 1986: 439; Forde 1989; Saxonhouse 2017: 349-351. On Thucydides’ complaint about the inadequacy of new leaders cf. Allen 2006: 195-198, 213-214.

<sup>71</sup> Demont 1991: 21.

<sup>72</sup> Thuc. 1.70. 2; 71.2. Forde 1986: 438; Demont 1991: 20-21; De Fidio 1995: 33-35; Camassa 2003: 155-156.

The praise of dynamism is found in Book I (68-71) in the public speech (*demegoria*) given by the Corinthians<sup>73</sup>. In order to incite the Spartans into action, the Corinthians' speech paints a portrait of the Athenians that emphasizes the contrast between the Athenian and the Spartan attitude to novelty. While the inhabitants of Athens are "natural innovators" (*neoteropoi*), and *kinesis* and restlessness mark their life, Sparta is characterized by "antiquated" practices<sup>74</sup>. In the speech attributed to the Corinthian ambassador, the most cogent argument deployed against Spartan conservatism is that in times of war or great political upheaval it is inevitable that what is "new" will prevail: "It is the law as in art, so in politics, that improvements ever prevail; and though fixed usages may be best for undisturbed communities, constant necessities of action must be accompanied by the constant improvement of methods" (71.3). "Therefore the ways of the Athenians are much more modernized (*κεκαίνωται*), on account of manifold experience"<sup>75</sup>. To emphasize the superiority of the new over the old, Thucydides speaks of "what happens after" (*ta epigignomena*) and he makes it clear that this "dominates" (*kratei*) the ancient (*archaiotropa*)<sup>76</sup>. The word *kekainotai* is a neologism coined by Thucydides<sup>77</sup>.

Bur here too Thucydides' views on innovation cannot be reconstructed too schematically. The Corinthians' speech needs to be read antistrophically with respect to the rather differently toned *demegoria* delivered later by the Spartan king Archidamus who stresses the importance of remaining faithful to the traditional laws (1. 80-85)<sup>78</sup>. Nor should we draw any conclusion from the celebration of the Athenians as *neoteropoi* that Thucydides and the Athenians, in general, were therefore favorable to innovation in legal matters. While Melissa Schwartzberg has vigorously defended this view<sup>79</sup>, it is clear that Thucydides does not express himself unequivocally by giving voice to either a defense or criticism of the immutability of the Athenian laws. The opposing *logoi* on the question have been widely studied and there is no need

<sup>73</sup> Review of studies in De Fidio 1995: 34 n. 15. Fundamental Camassa 2011 (170-173); 2018 (65-66). Cf. Schwartzberg 2007: 39-40; D'Angour 2011: 37, 43, 221; Godin 2015: 19.

<sup>74</sup> Thuc. 1.69-71.

<sup>75</sup> Thuc. 1.70.1; 71. 3. Saxonhouse 2017: 345-346; Camassa 2018: 65-66.

<sup>76</sup> Thuc. 1.71.2. Edelstein 1987: 87; Burkert 1997: 26.

<sup>77</sup> De Romilly 1966: 171.

<sup>78</sup> De Romilly 1966: 171; De Fidio 1995: 36; Camassa 2018: 66.

<sup>79</sup> "Ancient Athenians regarded the capacity to change laws and, generally, to confront contingency with new institutional solutions as a defining characteristic of their democracy" (Schwartzberg 2007: 31, 39). See also De Fidio 1995.

to add to what scholars have already shed light on<sup>80</sup>. It is in reference to this question of the immutability of the laws that Giorgio Camassa has considered the antistrophic character of the *logoi* that juxtapose in Book 3 the arguments of Cleon against Diodotus and in Book 6 the arguments of Nicias against Alcibiades. Camassa has rightly stated that we should be careful not to draw any conclusions as to Thucydides' own views on the immutability of the laws from any one element in these opposing pairs of speeches<sup>81</sup>. What we have in the text are carefully constructed opposing viewpoints: each opinion expressed is counterbalanced by a contrasting perspective which is equally true from the theoretical standpoint<sup>82</sup>.

There are, however, at least two things we can take away from Thucydides' reference to the issue of the immutability of the laws. The first is that the issue was highly relevant to the contemporary debate<sup>83</sup>. In Book 3 (37-41) Cleon speaks for all those who opposed mitigating, and therefore *changing*, the decree issued the day before by the assembly to punish the rebellion of Mytilene. He admonished the Athenians to remain undeterred, arguing that the greatest weakness in a democracy is "the constant change of measures" and that "bad laws which are never changed (*akynetoï*) are better for a city than good ones that have no authority"<sup>84</sup>. In Book 6 Thucydides attributes a similar position to Alcibiades himself who merges his belligerency and faith in Athens' interventionist spirit with a recommendation not to tamper with the city's customs (*ethe*) and laws (*nomoi*)<sup>85</sup>. Here again his approach is to convince the Athenians not to opt for change by amending a decree that has already passed. What appears clear in Cleon's and Alcibiades' speeches is the conscious intention to refer the case to the more general *gnome* with regard to the problem of the stability of the laws<sup>86</sup>. The positions of Cleon and Alcibiades appear to be in line with literary and epigraphic sources that attest to the central question of the immutability of the laws

<sup>80</sup> De Romilly 1966: 171-175; Cogan 1981: 50-65; Edelstein 1987: 85-87; De Fidio 1995; Yunis 1991; Debnar 2000; Camassa 2011; Mara 2009; Harris 2013; Lee 2015; Mara 2015; Cusumano 2016; Stadter 2017: 283-295.

<sup>81</sup> Camassa 2011: 172-173.

<sup>82</sup> De Fidio 1995: 34-44; Camassa 2011: 170-173. *Supra* n. 80.

<sup>83</sup> De Romilly 1966: 172; De Fidio 1995.

<sup>84</sup> Thuc. 3.37.3-4 Brunschwig 1980: 531-532; De Fidio 1995: 36-37; Boegehold 1996: 209-210; Camassa 2003: 156-158; Camassa 2003: 156-158; Camassa 2011: 171-173; Schwartzberg 2007: 38-39; Cusumano 2016: 69-72; Pezzoli 2017: 86-87.

<sup>85</sup> Thuc. 6.18.17. De Fidio 1995: 40-43; Camassa 2003: 158; Camassa 2011: 172.

<sup>86</sup> De Romilly 1966: 172; De Fidio 1995: 38. Nicias is therefore obliged to reassure the assembly that re-examining a decree that has already been voted is not the same as "abolishing the laws" (*luein tous nomous*): Thuc. 6.14.

in Athens and, more generally, in the Greek world<sup>87</sup>. The views they express are remarkably consistent with those of the Pythagoreans<sup>88</sup>. The longer the *nomoi* remain unaltered the more they are respected and, hence, their prestige should not be undermined by changing them too easily. What Thucydides confirms is that the problem of whether the laws should be mutable or immutable was highly relevant to the political debate and remained unresolved.

A second thing we learn from Thucydides is that part of the “dialectic baggage” used by those who favored change was the analogy between *nomos* and *techne*, an analogy that served as a basis and justification for recommending innovation<sup>89</sup>. It is therefore from this analogy that Aristotle begins when examining the question of legal innovation.

### 3. Kinein tous patrious nomous: *Aristotle on Hippodamus of Miletus and legal innovation*

When Aristotle’s reflection turns to the question of legal innovation as addressed in the Greek theoretical debate and raised by Hippodamus, his stance continues to be characterized by an evident pragmatism. His approach to the question is distinguished by two aspects: a) the discussion of the analogy between technical progress and the art of politics (which includes legislative activity) does not aim to make a distinction between the domains, but rather to focus on the usefulness the innovation produces; b) the discussion of cases where legal innovation is advisable assigns a crucial role to identifying those institutional figures entrusted with overseeing every legislative reform (§3.2).

Let us begin with the first point. On the value of the analogy between technical progress and the art of politics a premise is necessary. Aristotle’s discussion in *Politics 2* develops as an appendix to the constitutional model proposed by Hippodamus of Miletus. Aristotle describes Hippodamus—a V century architect and urbanist who invented the subdivision of cities into blocks—“as the first among those who had not practiced politics to attempt to speak about the best constitution” (*Pol.* 1267b 29-30). Hippodamus made the theme of innovation the political principle of his constitutional theory and intended to make innovation a statute of legitimacy<sup>90</sup>. He proposed a law according to which political innovators—“those who had invented something useful for the city”—should be rewarded.

<sup>87</sup> Camassa 2011; Canevaro 2015.

<sup>88</sup> Camassa 2011: 170.

<sup>89</sup> De Fidio 1995: 46.

<sup>90</sup> Boyer 2008; Ferrucci 2017; Kuin 2018.

In *Politics* 2.8 Aristotle rejected the idea of providing legal incentive for innovation, observing that “to honour those who discover anything which is useful to the state is a proposal which [...] cannot safely be enacted by law” (1268b 23-24). The point made by Aristotle is that under pretense of doing a public service people may introduce measures which are really destructive to the laws or the constitution (1268b 27-1269a 14). His hostility toward the idea was based on the practical concern that people would generate novelties merely to obtain a reward rather than to achieve any particular benefit.

It should be noted that there is no refusal here of innovation, but only of the proposal to pass a law to reward innovators. Aristotle does not contest the merit, but the method of Hippodamus’ proposal. It is revealing that other public proposals made after Hippodamus and known to Aristotle did not become the object of his criticism. In the *Rhetoric* Aristotle shows that he is aware of Isocrates’ “advice” to reward persons of value rather than only “honoring physical qualities with gifts” (1414b 33-35). Aristotle knew that Isocrates was advocating state compensation for those who worked for the common good. This point had been expressed by Isocrates in the *Panegyricus* (1-3, 10) and by Xenophon in the *Hiero*, an essay on good government where he states that innovators should be compensated (9, 10)<sup>91</sup>.

In this context, seems not convincing Irene Kuin’s opinion that Aristotle was suspicious of Hippodamus’ view that honor and recognition were the basis for individual action and that his remarks were concerned with the risk of generating disputes among citizens from the social competition (Kuin 2018). I do not believe (and shall return to this point at § 3.1) that Aristotle was criticizing the prospect of triggering social competition by the decision to publicly reward innovators Hippodamus’ law would end up incentivizing<sup>92</sup>. If there was ever a century in which personal ambition was explicitly encouraged it was the IV. This is evident in the views of Isocrates and Xenophon, and the Athenians’ explicit embracing of individual ambition (*philotimia*) is a distinctive feature of the IV century<sup>93</sup>.

The question for Aristotle is whether innovating is *always* useful and advantageous in political and legislative domains, which it generally is for the arts. It is in this context that Aristotle discusses the value of the

<sup>91</sup> Edelstein 1987: 154-155; Alexiou 2018: 126; Keim 2018; Illaraga 2020.

<sup>92</sup> Kuin 2018.

<sup>93</sup> On the Athenians embracing this love of honour and celebrating *philotimia* in the fourth century BCE see Whitehead 1983; Ferrucci 2013; Alexiou 2018; Keim 2018; Illaraga 2020.



analogy between *technai* and *nomoi/nomima* used in the contemporary debate to argue for the need for innovation.

While Aristotle's analysis has been considered "an example of the distinction drawn between those areas in which innovation tended to be espoused by the Greeks and those in which it was rejected"<sup>94</sup>, the crux of his concern is not that progress is admissible only in some domains and inadmissible in others<sup>95</sup>.

What is most important for Aristotle is the amount benefit which needs to be measured in political affairs but not in other domains<sup>96</sup>. While the arts have special requirements so that technical innovation is *always* an improvement, political innovation must be carefully evaluated in terms of the collective benefits resulting from the change<sup>97</sup>.

3.1 "Some people raise the question whether to alter the ancestral laws, supposing another law is better, is harmful or advantageous to states"<sup>98</sup>

This is how Aristotle broaches the topic of legal innovation in *Politics* 2<sup>99</sup>. Who are these "some people" who wondered about the usefulness of legal innovation? And why is the question posed in terms of an *aporia*<sup>100</sup>?

Greek political debate and theory had long engaged with the questions of the variability/permanence of ancestral laws<sup>101</sup>, and this might explain why Aristotle's reference is "vague"<sup>102</sup>. The theme, as seen, was at the centre of Athenian political debate in the fifth century (above §2)<sup>103</sup>. The problem also appears to have been discussed theoretically<sup>104</sup>. As seen, a fragment of Aristoxenos attributes to the Pythagoreans the

<sup>94</sup> D'Angour 2011: 38-39, 227.

<sup>95</sup> De Fidio 1995: 32, 34; Baltussen 2009; Godin 2015: 28-31.

<sup>96</sup> Contogiorgis 1978; Poddighe 2019.

<sup>97</sup> Edelstein 1987: 173.

<sup>98</sup> *Pol.* 1268b 26-28 ἀποροῦσι γὰρ τινες πότερον βλαβερὸν ἢ συμφέρον ταῖς πόλεσι τὸ κινεῖν τοὺς πατρίους νόμους, ἂν ἢ τις ἄλλος βελτίων.

<sup>99</sup> The paragraph draws on and modifies material in Poddighe 2019.

<sup>100</sup> See now Rapp 2018.

<sup>101</sup> On a debate that was ancient but still current at the time Aristotle was writing cf. Moraux 1965: 131-136, 148, 150; Contogiorgis 1978: 248-249; Brunschwig 1980: 516-517; 1997: 178-179 n. 11; Ober 2005: 405-411; Schwartzberg 2007: 38-43; Camassa 2011: 163-176; Canevaro 2015: 5-22; Pezzoli 2017: 84-89.

<sup>102</sup> According to Moraux 1965: 148, and Pezzoli 2012: 298.

<sup>103</sup> The reference is to the Mitylenian debate (Thuc. 3.37-45). See §2.

<sup>104</sup> Cf. Moraux 1965: 131ff.; Brunschwig 1980: 531ff., 537ff.; Swanson 1997: 157-159; Camassa 2003: 151-161; 2005: 32; Schwartzberg 2007: 38-43; Pezzoli 2012: 297-298; 2017: 84-89.

theory that advocated the immutability of ancestral laws (see §1)<sup>105</sup>. Plato takes up the problem several times in the *Statesman* (298e-299e) and the *Laws* (769d-772d), even if his attitude about legal change is less intransigent and more nuanced than the views attributed to the followers of Pythagoras<sup>106</sup>.

Whether the “some people” Aristotle is referring to were, in fact, the Pythagoreans<sup>107</sup> and whether Plato was the theoretician he intends to “deal with”<sup>108</sup> is not easy to establish. There is however no need to seek an interlocutor here. It is likely that Aristotle made a point of introducing the question vaguely because he recognized that, by and large, earlier discussions had posited the problem in dichotomous and abstract terms<sup>109</sup> in such a way as to leave unresolved the *aporia* on the usefulness of legal innovation.

Aristotle’s judgment of the question is clear: it makes no sense to assume an absolutely positive or absolutely negative<sup>110</sup> stance on legal innovation (and even less so to adopt a middle position)<sup>111</sup>. The question itself needs to be cast in other terms. Whatever improvement is brought by changing the law needs to be reviewed on a case by case basis<sup>112</sup>. Aristotle considers altering the law to be useful if the benefit “is not small” (1269a 14-15) and this is the case when it proves to be a benefit to the community (1268b 14-15).

Aristotle does not share the view of those who hold that changing the law is always the best option. On the one hand, it is correct to recognize the advantages of progress in laws (1268b 33-1269a 8) and the limitations of written laws (1269a 9-13), on the other hand we also need to recognize that altering the laws may not always be the best option. An assessment of legal change will have to be made on a case by case basis according to how beneficial such a change will be.

Aristotle was aware that change exposes to hazards. For example, one of its negative effects is a loosening in peoples’ habit of respecting

<sup>105</sup> Stob. 4.25.45 τὸ μένειν ἐν τῷ πατρίῳ εἶθεσί τε καὶ νόμοις ἐδοκίμαζον, εἰ καὶ μικρῶν χεῖρων τῶν ἐτέρων εἴη. Cf. Brunschwig 1980: 531; Camassa 2003: 151-152; Pezzoli 2012: 297ff.; 2017: 85.

<sup>106</sup> See my discussion in Poddighe 2019: 35, 43.

<sup>107</sup> Cf. Pezzoli 2017: 85.

<sup>108</sup> Cf. Bertelli 2017: 51.

<sup>109</sup> Brunschwig 1980: 535.

<sup>110</sup> Discussion and review of studies in Poddighe 2019: 36 n. 25. See also Contogiorgis 1978: 243-251; Brunschwig 1980: 512-540; Swanson 1997: 157-159; Simpson 1998: 109-111; Camassa 2011: 174-176; Canevaro 2015: 29ff.; Destrée 2015: 207, 213; Lockwood 2015: 74-75; Pezzoli 2017: 79-92.

<sup>111</sup> Collins 1997: 216; Lockwood 2015: 74 n. 35. *Contra*: Brunschwig 1980: 516.

<sup>112</sup> Contogiorgis 1978: 246; Brunschwig 1980: 539.

the law (1269a 21-23). And this is why he discusses the topic concretely, refuting the apodictic positions that underlie ‘the wrong question’ of whether the alteration of the laws is beneficial or harmful for the city. Looking at the real world he asks: which laws might be profitably changed and, above all, by whom (1269a 24-26)? As we shall see (§3.2), these latter questions were important concerns for Aristotle.

In order to understand Aristotle’s position on legal innovation and to recognize the line of reasoning he adopts in this celebrated passage of *Politics* 2, it is worth returning to consider its context. Aristotle introduces the *aporia* on the usefulness of legislative change immediately after discussing the constitutional project devised by Hippodamus (1267b 22-1268b 25)<sup>113</sup>.

Among the various proposals Hippodamus included in his project for the “best constitution”, two are more closely connected with the theme of legislative innovation: the former encourages jurors to alter the law by means of their verdicts by turning themselves into arbitrators with the power to set an amount for damages that may be different from the amount claimed by the injured party (1268b 4-13)<sup>114</sup>; the latter rewards anyone who has invented something that is beneficial for the community (1268b 22-23). It is especially with regard to this second proposal that Aristotle expresses the view that the suggestion will be “not without danger, if implemented by means of a legal measure”.

Here what Aristotle affirms:

As for the view that an honor ought to be awarded to those who invent something advantageous to the state, legislation to this effect is not safe, but only specious to the ear; for it involves malicious prosecutions and, it may even happen, constitutional upheavals. (1268b 22-25)

According to Aristotle, the main drawback in Hippodamus’ proposal is that it uses a law—general by very definition—to reward *any* innovation deemed to be useful to the community (1268b 22-24) without at all considering the range of the benefit the legal innovation will bring. In this regard, Aristotle’s assertion that is not easy to speedily agree to this proposal, unless the change itself doesn’t lead to obvious benefits is quite understandable. Aristotle, singles out the risk that “someone may propose to abrogate certain laws or the entire constitution for the benefit

<sup>113</sup> Discussion of earlier studies in Pezzoli 2017: 79-80. See also Boyer 2008; Ferrucci 2017: 31-57; Kuin 2018; Poddighe 2019.

<sup>114</sup> Collins 1997: 216, argues that the proposal for the legal advancement of the sentence serves as an introduction to Aristotle’s treatment of the question of change. See § 3.2.

of the community” (1268b 29-31), and in doing so they will argue that abrogating the laws or the constitution will lead to public benefit, when in reality the resulting advantage may be little or not existing at all<sup>115</sup>.

A second drawback in Hippodamus’ proposal to reward innovation “by means of a legal measure” is the risk of “malicious prosecutions”, i.e. sycophancy.

With regard to the relationship between legally rewarded innovation and disputes between citizens arising out of sycophancy, Irene Kuin suggests that Aristotle is evoking sycophancy in relation to the question of social competition (Kuin 2018). But I suspect Aristotle’s remarks here are not concerned with the risk of generating disputes among citizens from the social competition. Rather, the criticism Aristotle levels against Hippodamus is that establishing a “legal” reward for innovators would mean risking of prosecutions for false innovations (Boyer 2008: 414). The risk is explicitly envisaged by Aristotle himself when he comments ironically that Hippodamus believed he was proposing something new “that the children of those who died in war should be maintained by the state” while failing to realize that this “novelty” had already existed in the VI century (*Pol.* 2.8.1268a 8-9). To obtain the envisaged compensation one might attempt to pass off as an innovation something that wasn’t, hence the prosecutions.

Nor can it be excluded that the accusations might have targeted the lack of utility of innovation. In all cases, however, these accusations (malicious or not) would not be the direct consequence of the social competition that Hippodamus allegedly encouraged. Instead, they are the consequence of the fact that Hippodamus’ law gave a new legal basis to the numerous disputes between citizens.

It is for the risk of both sycophancy and constitutional upheavals that Aristotle widens the scope of his exposition on the topic of legal innovation and observes that it is well worth “adding some further brief considerations on the topic” and that “doubt reigns over the solution to be given to this problem” (1268b 32-33). It is a mistake to promote change to obtain a “small” benefit—which is what Hippodamus’ proposal implies, in that it does not distinguish between large and small advantages: even innovation introduced for the sake of small benefits may lead to upheavals in the *politeia*<sup>116</sup>. This is not to say that Aristotle is opposed

<sup>115</sup> Cf. Brunschwig 1980: 537, and Pezzoli 2012 (294): only if it were established that changing the traditional laws is always and truly useful for the city would we be truly in agreement with the Miletan’s proposal. See also Simpson 1998: 110, and Saunders 2014: 393.

<sup>116</sup> On regime change caused by small legislative innovations cf. *Pol.* 5.7. 1307a 40-b6 (with Pezzoli 2017: 80, 84).

to innovation *per se*. On the contrary, Aristotle recognizes that changes may bring large benefits and he convincingly reproduces the arguments advanced by “those to whom it might seem more advantageous to introduce changes” (1268b 33-34). These include arguments based on the progress observed in the sciences and arts as well as in law-making (1268b 34 -1269a 8) which were put forward by Greek writers such as Thucydides<sup>117</sup> and Plato in the *Statesman* and the *Laws*<sup>118</sup>.

Aristotle acknowledges the cogency of such reasoning as well as the historical evidence supporting it and concludes with the remark that “it is absurd to remain faithful to beliefs of the ancients out of prejudice”<sup>119</sup>. To these traditional arguments Aristotle adds that “it is not the most beneficial thing to leave written laws unaltered” considering that “also with regard to the political order it is impossible to set all the laws down in every detail because written measures are always expressed in general terms while concrete practices concern individuals” (1269a 8-12)<sup>120</sup>. To the observation that improvements have been made in written legal codes Aristotle adds the warning of the concrete difficulty involved in implementing laws in everyday life: in acting on the basis of general laws that are not always suited to regulate actual cases<sup>121</sup>. In this first long section, Aristotle generally recognizes the validity of the arguments against the immutability of legal codes. On the one hand, he asserts that we cannot deny the benefit of progress of norms understood as comprising both written and unwritten laws<sup>122</sup>, on the other, that we must not fail to point out the inherent limitation in any written law: its general nature.

Drawing on all these considerations Aristotle states that “the laws, at least some of them and in some cases, need to be changed” (1269a 12-13), however with that “great caution” suggested by those “who view change from another perspective”, in other words, whoever recognizes the risk of adopting easy and lightly considered change (1269a 13-14). Caution advises against “moving easily away from the laws currently in

<sup>117</sup> Thuc. 1.71.3. Cf. Moraux 1965: 134; De Fidio 1995: 46-47; Camassa 2003: 155-156; Camassa 2018: 65-66.

<sup>118</sup> Pl. *Plt.* 293, 294a-295e. Cf. Accattino 2013: 224.

<sup>119</sup> Cf. Weil 1965: 176-178; Destrée 2015: 207; Lockwood 2015: 75-75.

<sup>120</sup> *Rh.* 1354b 5ff., 1374a 1ff.; *Pol.* 1287b 19-20. On this point see Poddighe 2020: 40-42.

<sup>121</sup> The problem is discussed in Poddighe 2019: 40-41; 2020: 73-80, 96-98.

<sup>122</sup> No law is immune from the possibility of being changed. Cf. Brunschwig 1980: 538; Poddighe 2014: 51-60; 2016: 88-89; Pezzoli 2017: 80 n. 5. *Contra*: Swanson 1997: 159.

force to new laws” because this movement weakens the authority of the law (1269a 22-25) and leads to a loosening of the *politeia*<sup>123</sup>.

The solution for those who, like Aristotle, acknowledge the risk of *easy* change is not to reject change outright<sup>124</sup>, but rather to alter laws only if the benefit will be considerable. His idea is to determine, on an *ad hoc* basis, the size of the benefit to be obtained and, if this is too little, to keep “some of the errors of legislators and governors” (1269a 16-17)<sup>125</sup>.

The advantages and disadvantages brought about by changing the laws should not be assessed in absolute terms but within the context of the actual situation in which the change intervenes, or is proposed. This only becomes clear and measurable when the benefit resulting from *that* particular change in *that* particular situation will be either large or small. In any given situation it will therefore be necessary to measure the size of the benefit that the change produces: who and how many will benefit from an alteration in the laws. This kind of methodological approach is “positivist”, as Brunschwig made clear<sup>126</sup>: Aristotle’s solution is that changing the laws is useful *if* the benefit is great.

The expository pattern Aristotle employs in this section of the *Politics* is in keeping with the dialectic method he uses elsewhere in his works. His contribution to the theoretical debate is not that he chooses from among positions already expressed about legal change but that he strives to identify the critical issues those earlier viewpoints contained and to correct whatever was mistaken in the traditional approach<sup>127</sup>.

Once Aristotle recognized the usefulness of controlled change<sup>128</sup>, he proceeds to organize his enquiry in such a way as to deal with the different problems involved in the implementation of change and in keeping with this: (1) he distinguishes between change as a permanent alteration

<sup>123</sup> Cf. Poddighe 2014: 162-163, 246.

<sup>124</sup> De Romilly 1971: 220-225, and Swanson 1997: 157-159. Cf. also Boegehold 1996: 210, 212.

<sup>125</sup> Camassa 2011: 174-176. Cf. also Brunschwig 1980: 531; Simpson 1998: 109-110; Schütrumpf 2001: 279-280; Miller 2007: 101.

<sup>126</sup> Brunschwig 1980: 512-540.

<sup>127</sup> Poddighe 2019: 43-44. Cf. Brunschwig 1980: 535.

<sup>128</sup> Pezzoli 2017: 83: “The examination of arguments for and against changing the laws led Aristotle to conclude that the legislator may and must change the laws, if the circumstances call for it, but he must do so with extreme caution (Bertelli 1989: 310-312), because he knows the function of the *nomoi* in the polis and the importance of the passage of time in order for that function to unfold”. Cf. also Destrée 2015: 207, 213, on the fact that Aristotle considers changing the laws not only advisable but necessary and useful to the polis “bad laws need to be improved”. See also Strauss 1964: 21-25; Contogiorgis 1978: 243-251; Nussbaum 1988: 37-39.

of the laws and *ad hoc* adjustments of the law to respond to particular situations—adaptations that do not require the laws to be altered but can be achieved by other means; (2) he identifies the responsibilities of those who must act in both the first and second cases. These are important questions that significantly affect how Aristotle looks at the role of the law in the functioning of the polis' public institutions and in regulating the relationships among its citizens.

### 3.2. Controlling legal innovation<sup>129</sup>

Controlling innovation when it has become necessary: this is the main problem Aristotle is concerned with<sup>130</sup>. Once we have admitted that “laws are open to be changed”, according to Aristotle, there are two concrete aspects that “need to be established”: “whether all the laws should be open to change and in every constitution”<sup>131</sup> and whether “anyone should be able to introduce changes or just certain people?” (1269a 25-26).

The enquiry—which Aristotle leaves “for other occasions (1269a 27-28)—touches essential questions which would be wrong to write off as “rhetorical”<sup>132</sup>.

The topic, in fact, appears to be taken up again in *Politics* 3 when Aristotle again considers the two forms of change the laws may be subject to: the improvement of laws framed in the common interest of the citizens (1283b 35-42) and adaptations of the law which must be made to meet particular situations (1286a 10-31, 1287a 19-28).

The idea underlying these considerations is the distinction between permanent change to the laws (i.e. legal innovation) and *ad hoc* adjustments to suit particular cases which Aristotle already admitted in *Politics* 2 in his critical examination of the views expressed by Hippodamus (and Plato). In this section, however, these two types of change are now referred to the problem of the institutional figures who are entrusted with controlling it. These are different institutional groups who act—at different levels of the *politeia*—each with his own set of tools.

<sup>129</sup> I deal briefly here with what I discussed at greater length in Poddighe 2019.

<sup>130</sup> Cf. Contogiorgis 1978: 248-250.

<sup>131</sup> The expression used (*pasa politeia*) may be understood as “in every part of the *politeia*”. This is the meaning it appears to have in Plato (*Ep.* 7.325) and Antiphon (*Tetr.* 3.1.1). Cf. Bordes 1982: 363, 367.

<sup>132</sup> Which is the view of de Romilly 1971: 220-225; Swanson 1997: 158; Kuin 2018: 132. *Contra*: Contogiorgis 1978: 244; Brunschwig 1980: 534; Ober 2005: 398. See also Pezzoli 2017: 83.

In the case of the kind of change which passes for legal reform control is exercised through the “wisdom” of the legislator<sup>133</sup>. This is the change that scholars tend to identify as “reform” and describe as a larger scale intervention<sup>134</sup>, even though Aristotle makes no reference to the quantitative aspects of change<sup>135</sup>. Then there is the control of change brought about by the need to adapt<sup>136</sup> the written laws. This is the great problem besetting general prescriptions which cannot predict all the individual situations that may arise in *praxis* and to which the laws will need to be adapted on a case by case basis<sup>137</sup>. In this second case, the responsibility for controlling change is entrusted to the “many”.

Let us take a closer look at the contents of Aristotle’s enquiry. Change understood as a permanent correction and improvement of the existing legal code—as we have seen examining *Politics* 2 (1268b 26-31)—is admissible when it is undertaken in the name of the common good and when the benefit is great. For this type of change intervention on the part of the legislator—in Aristotle’s view—is indispensable<sup>138</sup>.

The most explicit statement of this we find in *Politics* 3 where Aristotle asserts that the legislator “must improve the laws” with a view to “what is right in so far as it is equally so” or “what is useful for the entire city and community of citizens” (1283b 35-42).

Aristotle’s views on the control of change which the legislator must exercise through his wisdom (*phronesis*) bear on the issue of the polis’ “salvation” (*soteria*) and its constitutional stability<sup>139</sup> and these problems are the backdrop against which the legislator performs his controlling function. It is his task to avoid easy alterations, preserve the existing order and change as little as possible<sup>140</sup>.

It is with this aim that the legislative *phronesis* must *necessarily* and *dialectically* measure itself against the principle of political stability (*soteria*)<sup>141</sup>. The legislator whose task is to frame laws is therefore the

<sup>133</sup> Cf. Schwartzberg 2007: 3, on this specific aspect of legal change “as deliberate and legislative, rather than interpretive and judicial”.

<sup>134</sup> Schwartzberg 2007: 6-7; Canevaro 2015: 9-17.

<sup>135</sup> Swanson 1997: 158, points out that for Aristotle the size of the change is not directly proportional to the size of the benefit. Cf. Contogiorgis 1978: 246; Brunschwig 1980: 538.

<sup>136</sup> Schwartzberg 2007: 72, 198.

<sup>137</sup> Aubenque 1965: 109-113; Harris 2013: 177-182. Cf. Bertelli 1989: 311.

<sup>138</sup> Cf. Camassa 2005: 34; Pezzoli 2017: 84.

<sup>139</sup> Saxonhouse 2015: 196-203.

<sup>140</sup> Voegelin 1957: 324, 358-359; Contogiorgis 1978: 246ff.; Collins 1997: 217-218; Swanson 1997: 157-159, 177-178 n. 10; Destrée 2015: 204-223; Saxonhouse 2015: 196-203.

<sup>141</sup> Saxonhouse 2015: 198. Cf. also Bertelli 1989: 309.



only figure who may intervene to improve them—provided that the improvement is “useful for the entire city”.

The assumption underlying this reasoning is the substantial difference that Aristotle recognizes between framing laws and applying them, in particular the different levels of competence he assigns to the two cases: legislative wisdom—which is the prerogative of the *nomothetes*—and political wisdom required by the citizens whose task is to apply the laws.

Aristotle excludes the ordinary people from making legal reforms while allowing them to apply the law in particular cases<sup>142</sup>. The theoretical justification for this hierarchy is clear in Aristotle’s works and he expresses himself on this point unequivocally not only in the *Politics* but also in the *Nichomachean Ethics*: legislation that concerns the universals is a matter reserved for the few, while the many may act to decide the single cases of the *praxis*<sup>143</sup>.

Hence, it is no surprise that when enquiring into the problem of legal change, especially with regard to the institutional figures to be empowered with controlling change, he again evokes the same hierarchy.

As is clear, Aristotle in *Politics* 3 answers the questions he posed in *Politics* 2: who should bear the responsibility for changing the law and for what purpose? Aristotle does not harbor an *a priori* rejection of legal and political innovation. Instead, what we find in *Politics* 2 and 3 is a careful analysis of the questions raised by the prospect of political and legal innovation on each occasion: for whom does one decide to propose an innovation, for how many and to do what?

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<sup>142</sup> The action of the sovereign *archai* intervenes to judge and decide individual cases that the law cannot decide or cannot decide well (*Pol.* 1287a 19-28; cf. 1282b 2-10). See Poddighe 2019: 52-53, 63.

<sup>143</sup> *Rh.* 1354a 31-b16; *Eth. Nic.* 1141b 21-29; *Pol.* 1292a 32-37. Analytical discussion in Bullen 1997: 229-241. Cf. Bertelli 1989: 21-26; Simpson 1998: 308-309; Harris 2013: 177-182.

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