

# Aristotle on Legal Change

## La discusión aristotélica del cambio legal

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### Abstract

Aristotle's discussion of legal change in *Politics* II.8 is the subject of this article. The aim is to show that Aristotle viewed legal change positively, when changes to the law were required, and that his discussion was mainly concerned with the two rather distinct roles of the demos and of the legislator. This essay deals with a re-examination of 1268b 25ff. in book II of Aristotle's *Politics* and its connection with book III. The analysis is also extended to Aristotle's *Rhetoric* and *Nicomachean Ethics*, and to Plato's *Politicus* and *Laws*.

**Key-words:** Aristotle, legal change, *Politics*, *Rhetoric*, *Nicomachean Ethics*, Plato's *Laws*, Plato's *Politicus*.

### Resumen

La discusión de Aristóteles sobre el cambio legal en *Política* II.8 es el tema de este artículo. El objetivo es mostrar que Aristóteles vio el cambio legal positivamente, cuando se requieren cambios a la ley, y que su discusión se refería principalmente a los dos roles bastante distintos del demos y del legislador. El análisis implica un nuevo examen de 1268b 25ss en el libro II de la *Política* de Aristóteles y su conexión con el libro III. El análisis también se extiende a la *Retórica* de Aristóteles y la *Ética a Nicómaco*, y al *Político* y las *Leyes* de Platón.

**Palabras-clave:** Aristóteles, cambio legal, *Política*, *Retórica*, *Ética a Nicómaco*, *Leyes de Platón*, *Político de Platón*.

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The theme of change is crucial in Aristotle's discussion on the role of the law. His approach is one that he typically adopted when reflecting on legal matters: totally embedded *in politics*<sup>2</sup> and "bound up with the historical reality of the polis"<sup>3</sup>. His exposition unfolds through an examination of questions that have relevance for political theory and debate. He looks at issues that had long been the subject of enquiry in Greek thought though he never becomes systematic in the sense of adopting a "doctrine" or a legal theory<sup>4</sup>. Like his discussions of the other characteristics that constituted the law – generality, authority, rationality<sup>5</sup> – Aristotle's views on the topic of change are characterized by his positive assessment of the law. He sees the law as product of human societies which reveals relative and ever changing configurations<sup>6</sup>. For Aristotle the law is one of the "products of politics", which best defines the order of the city<sup>7</sup> and is itself the source of every constituted political order<sup>8</sup>. Thus, the theme of change occupies an important place within his discussion in which his aim is to identify and define what causes the polis' legal order to evolve over time<sup>9</sup>. Studying legal change means studying the evolution of the *politeia*<sup>10</sup>. Every form of change involving the law – whether profound or hardly perceptible, gradual or rapid, written down or not<sup>11</sup> – is of crucial importance in an enquiry that identifies in discontinuities the seeds of the polis' historical evolution.

In his assessment of earlier discussions, Aristotle is particularly critical of his predecessor's theorisations. Any attempt to identify whether he takes a clear stance either in favour or against changing the laws will be fruitless, if the terms of reference are the ones adopted in the past. The abstract question of whether or not the change was useful, the problem of the size of the change – the kind of change that results from reforming the current legal order<sup>12</sup> or

<sup>2</sup> Bertelli 1989: 275-326 (310).

<sup>3</sup> Maffi 2007: 197-200 (197).

<sup>4</sup> Kelsen 1957: 125-128; Aubenque 1965: 103-104, 108; Contogiorgis 1978: 246; Wormuth 1978: 26; Aubenque 1980: 147-150; Brunschwig 1980: 539-540; Bordes 1982: 379-454; Schroeder 1981: 17-31; Yack 1993: 178-208; Lisi 2000: 29-53; Maffi 2007: 197; Miller 2007: 80. For a critical assessment of the positions expressed with regard to the positivist character of Aristotle's thought cf. Weinrib 1987a: 143-145, Weinrib 1987b: 62 ff.; Frank 2005: 125-126.

<sup>5</sup> Kelsen 1957: 110-126; Von Leyden 1985: 3 ff.; Schroeder 1981: 17 ff.; Miller 2007: 80-85.

<sup>6</sup> Kelsen 1957: 126 ff.; Aubenque 1980: 147-150; Weinrib 1987b: 59; Schroeder 1981: 17; Lisi 2000: 29; Poddighe 2014: 54-61.

<sup>7</sup> Cf. Aubenque 1965: 149; Aubenque 1980: 147-150; Vergnières 1995: 211-212; Frank 2005: 112 ss.; Miller 2007: 81.

<sup>8</sup> Cf. Miller 2007: 81-85, 99 ff. That is why Aristotle criticizes his predecessors in *EN* 1181b 13-23 for not having sufficiently considered legislation: Aubenque 1980: 104, 108 ff.; Pezzoli 2014: 175.

<sup>9</sup> Contogiorgis 1978: 243-251; Polansky 1991: 322-45; Bates 2013: 59-75; Poddighe 2014: 54-61.

<sup>10</sup> Brunschwig 1980: 538-539; Ober 2005: 407; Swanson –Corbin 2009: 42; Bates 2013: 62 ff.; Poddighe 2014: 46-61. See also Schwartzberg 2007: 6-7; Canevaro 2015: 9-17.

<sup>11</sup> Brunschwig 1980: 538-540; Zingano 2013: 203-207; Poddighe 2014: 14, 36-37, 41, 51-59.

<sup>12</sup> It is the change of "ancestral laws in favour of better laws" with a view to the common good that can determine constitutional change (*Pol.* 1268b 26-31).

change that adjusts the law to respond to a particular case<sup>13</sup>, or again, the question of changing the law in relation to its circumstances of use (whether written or not).

Aristotle profoundly reconsiders the terms his predecessors used to enunciate or discuss these problems. This is shown, for example, in the *Politics* (1268b 25-1269a 28) in which he deals with the problem of whether or not a legislative change is useful. Aristotle corrects the traditional formulation, and argues against the notion that legislative change may be either absolutely beneficial or absolutely harmful while introducing concrete instances into the discussion, such as the size of the benefit the change produces<sup>14</sup>. His detailed enquiry is also filled with real examples about the difference between change understood as a permanent modification of the law and *ad hoc* adjustments of the law. Here he raises real issues that the polis' institutional practice must face, such as the question of people to be entrusted with amending or adapting both the laws governing the polis' public institutions and the laws that regulate individual relationships between citizens<sup>15</sup>.

### **To change the law or not? Aristotle's position in the *Politics* (1268b 25 – 1269a 28) and the *aporia* of an incorrectly formulated question.**

“Some people have wondered whether it is harmful or beneficial for the city to change its ancestral laws in favour of other improvements”<sup>16</sup>. This is how Aristotle broaches the topic of legal change in Book II of the *Politics*. Who are these “some people” who wondered about the usefulness of legislative change and who raised the *aporia* (ἀποροῦσι)? And why is the question posed in terms of an *aporia*<sup>17</sup>? Greek political debate and theory had long engaged with the questions of the variability/permanence of ancestral laws<sup>18</sup>, and this might explain why Aristotle's reference is “vague”<sup>19</sup>. The theme was at the centre of Athenian political debate in the fifth century as we learn from Thucydides, especially in Book 3 of his work which contains a rhetorical debate

<sup>13</sup> It is the problem of change that is due to the limitation in the written law, by definition general and universal (Pol. 1269a 8-12; 1286a 10-31).

<sup>14</sup> *Infra* 186-192.

<sup>15</sup> *Infra* 192-199.

<sup>16</sup> Pol. 1268b 26-28 ἀποροῦσι γάρ τινες πότερον βλαβερὸν ἢ συμφέρον ταῖς πόλεσι τὸ κινεῖν τοὺς πατρίους νόμους, ἂν ἢ τις ἄλλος βελτίων.

<sup>17</sup> See now Rapp 2018.

<sup>18</sup> On a debate that was ancient but still current at the time Aristotle was writing cf. Moraux 1965: 131-136, 148, 150; de Romilly 1971: 213 ff.; Contogiorgis 1978: 248-249; Wormuth 1978: 16-17; Brunschwig 1980: 516-517; Jouanna 1980: 257-259; Bertelli 1989: 311-312; Swanson 1997: 178-179, n. 11; Piepenbrink 2001: 77-87; Camassa 2003: 151-161; Camassa 2005: 29-36; Camassa 2011: 163-176; Ober 2005: 405-411; Schwartzberg 2007: 38-43; Canevaro 2015: 5-22; Pezzoli 2017: 84-89.

<sup>19</sup> According to Moraux 1965: 148, and Pezzoli 2012: 298.

about the opposition between immutable laws (*nomoi akinetoi*) which may be imperfect and flawless laws without authority (*nomoi akyroi*)<sup>20</sup>. This problem also appears to have been discussed theoretically<sup>21</sup>. A fragment of Aristoxenos attributes to the Pythagoreans the theory that advocated the immutability of ancestral laws<sup>22</sup>. Plato takes up the problem several times in the *Statesman* (298e-299e) and the *Laws* (769d-772d), even if – as we shall discuss below – his attitude about legal change is less intransigent and more nuanced than the views attributed to the followers of Pythagoras<sup>23</sup>. Whether the “some people” Aristotle is referring to were, in fact, the Pythagoreans<sup>24</sup> and whether Plato was the theoretician he intends to “deal with”<sup>25</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>26</sup> in such a way as to leave unresolved the *aporia* on the usefulness of legal change. Aristotle’s judgment of the question is clear: it makes no sense to assume an absolutely positive or absolutely negative<sup>27</sup> stance on legal change (and even less so to adopt a middle position<sup>28</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>29</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)<sup>30</sup>. Aristotle does

<sup>20</sup> The reference is to the two speeches given by Cleon and Diodotus in the Mitylenian debate (3. 37-45). Cf. Moraux 1965: 134; de Romilly 1971: 214 ff.; Brunschwig 1980: 531-532; De Fidio 1995: 31-47; Boegehold 1996: 209-210; Camassa 2003: 156-158; Camassa 2011: 171-173; Schwartzberg 2007: 38-39; Cusumano 2016: 69-72; Pezzoli 2017: 86-87.

<sup>21</sup> Cf. Moraux 1965: 131 ff.; de Romilly 1971: 218 ff.; Jouanna 1980: 257-259; Brunschwig 1980: 531 ff., 537 ff.; Swanson 1997: 157-159; Camassa 2003: 151-161; Camassa 2005: 32; Schwartzberg 2007: 38-43; Pezzoli 2012: 297-298; Pezzoli 2017: 84-89.

<sup>22</sup> Iamblichus, *On the Pythagorean Life*, 176; Stob. IV, 25, 45: τὸ μένειν ἐν τῷ πατριῶς ἔθεσι τε καὶ νόμοις ἔδοκίμαζον, εἰ καὶ μικρῶ χεῖρω τῶν ἐτέρων εἴη. Cf. Brunschwig 1980: 531; Camassa 2003: 151-152; Pezzoli 2012: 297 ff. and Pezzoli 2017: 85.

<sup>23</sup> *Infra* 187 and 193.

<sup>24</sup> Cf. Pezzoli 2017: 85.

<sup>25</sup> Cf. Bertelli 2017: 51. *Infra* n. 54.

<sup>26</sup> Brunschwig 1980: 535.

<sup>27</sup> For a discussion of Aristotle’s view cf. Strauss 1964: 21-25; Aubenque 1965: 109; Moraux 1965: 131-136; de Romilly 1971: 220-225; Contogiorgis 1978: 243-251; Wormuth 1978: 16-18; Brunschwig 1980: 512-540; Nussbaum 1988: 37-39; Bertelli 1989: 310-312; De Fidio 1995: 31-47; Miller 1995: 185-186; Vergnières 1995: 217-219; Boegehold 1996: 210-212; Swanson 1997: 157-159; Simpson 1998: 109-111; Schüttrumpf 2001: 279-280; Camassa 2003: 161-162; Camassa 2005: 32; Camassa 2011: 174-176; Frank 2005: 123-124; Miller 2007: 99-102; Schwartzberg 2007: 63-64; Horn 2013: 225-226; Pangle 2013: 8 ff., 83-85; Saunders 2014: 391-393; Canevaro 2015: 29 ff.; Destrée 2015: 207, 213; Lockwood 2015: 74-75; Pezzoli 2017: 79-92.

<sup>28</sup> For example, Collins 1997: 216; Pangle 2013: 8, and Lockwood 2015: 74 n. 35. *Contra*: Brunschwig 1980: 516.

<sup>29</sup> Contogiorgis 1978: 246; Brunschwig 1980: 539; Swanson – Corbin 2009: 42; Horn 2013: 225-226.

<sup>30</sup> In Aristotle’s theory of justice where the just is identified with the common interest, legislative

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 the law (1269a 21-23). And this is why he discusses the topic concretely, refuting the apodictic positions that underlie the '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 below, these latter questions were important concerns for Aristotle for a long time<sup>31</sup>.

In order to understand Aristotle's position on legal change and to recognize the line of reasoning he adopts in this celebrated passage of the *Politics*, it is worth considering its context. Aristotle introduces the *aporia* on the usefulness of legislative change immediately after discussing the constitutional project devised by Hippodamus of Miletus (1267b 22-1268b 25)<sup>32</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>33</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" because it could potentially lead to "political upheaval" (1268b 22-25). 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 of the community" (1268b 29-31),

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change is acceptable if it is useful for the many and the legislator "in his effort to improve the law" must bear in mind "what is just in so far as it is equally so" that is, "what is useful for the entire city and community of citizens" (*Pol.* 1283b 35-42). *Infra* 192-199.

<sup>31</sup> *Infra* 192-199.

<sup>32</sup> Discussion of the earlier studies in Pezzoli 2017: 79-80. See also Ferrucci 2017: 31-57.

<sup>33</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. *Infra* 192-199.

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>34</sup>. For this reason he widens the scope of his exposition on the topic of change 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<sup>35</sup>: even change introduced for the sake of small benefits may lead to upheavals in the *politeia*<sup>35</sup>. This does not mean that Aristotle is opposed to the possibility of change *per se*<sup>36</sup>. 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 often put forward by Greek writers such as Thucydides<sup>37</sup> and Plato in the *Statesman* and the *Laws*<sup>38</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>39</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>40</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

<sup>34</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>35</sup> Cf. Wormuth 1978: 16-19. On regime change caused by small legislative innovations cf. *Pol. V. 1307a 40- b 6* (with Pezzoli 2017: 80, 84).

<sup>36</sup> As argued by de Romilly 1971: 220-225; Collins 1997: 217; Swanson 1997: 157-159. *Contra*: Strauss 1964: 21-25; Contogiorgis 1978: 243-251; Wormuth 1978: 16; Brunschwig 1980: 539; Nussbaum 1988: 37-39; Bertelli 1989: 311; Vergnières 1995: 217-18; Simpson 1998: 109-111; Camassa 2003: 161-162; Camassa 2005: 174-176; Horn 2013: 225-226; Pangle 2013: 8 ff., 83-85; Destrée 2015: 207, 213; Pezzoli 2015: 83. Cf. also Saunders 2014: 393 “it is very clear that fundamentally he is in favour of change, provided of course, it is for the better, i.e. more greatly contributing to human happiness”.

<sup>37</sup> Thuc. 1.71.3. Cf. Moraux 1965: 134; De Fidio 1995: 46-47; Camassa 2003: 155-156.

<sup>38</sup> Plat. *Pol.* 293, 294a-295e. Cf. Accattino 2013: 224.

<sup>39</sup> Cf. Weil 1965: 176-178; Destrée 2015: 207; Lockwood 2015: 75-75.

<sup>40</sup> The letter of the law is not always able to regulate a concrete case (*Rhet.* 1374a 1 ff.; *Pol.* 1287b 19-20) because a particularity has escaped the legislator, or because the legislator necessarily must make general prescriptions, not for all, but for most cases. In fact, the legislator’s judgement is concerned with the future and the universal (*Rhet.* 1354b 5 ff.). *Infra* 192-199.

of general laws that are not always suited to regulate actual cases<sup>41</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>42</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 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>43</sup> The solution for those who, like Aristotle, acknowledge the risk of “easy” change is not to reject change outright<sup>44</sup>, but rather to alter laws only if the benefit will be considerable. His idea is to determine, on a *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>45</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>46</sup>, and it resolves the *aporia* raised at the beginning<sup>47</sup>: Aristotle’s solution is that changing the laws is useful *if* the benefit is great.

<sup>41</sup> *Infra* 192-199.

<sup>42</sup> No law is immune from the possibility of being changed. Cf. Brunschwig 1980: 538; Poddighe 2014: 51-60; Poddighe 2016: 88-89; Pezzoli 2017: 80 n. 5. *Contra*: Swanson 1997: 159.

<sup>43</sup> Cf. Poddighe 2014: 162-163, 246.

<sup>44</sup> de Romilly 1971: 220-225, and Swanson 1997: 157-159. Cf. also Boegehold 1996: 210, 212.

<sup>45</sup> Camassa 2011: 174-176, rightly observes that Aristotle is not opposed to legal change, unless the benefit to the community “is of little account”, in other words, for Aristotle legal change is desirable if “the benefit obtained by changing” compensates the community for “the damage incurred by habituating it to disobedience” (176). Cf. also Brunschwig 1980: 531; Simpson 1998: 109-110; Schüttrumpf 2001: 279-280; Miller 2007: 101.

<sup>46</sup> A crucial contribution by Brunschwig 1980: 512-540 (taken up by Vergnières 1995: 217-219, and Horn 2013: 225-226) who shifts the discussion away from the abstract approach preferred by earlier scholarship.

<sup>47</sup> For the idea that Aristotle wanted to leave the *aporia* unresolved cf. Brunschwig 1980: 514-515, 523. The solution to the *aporia* has often been identified in the possibility of correction when the law is applied to a particular case (Aubeneque 1965: 110; Simpson 1998: 110-112; Horn 2013: 226; Saunders 2014: 391-393). *Contra* Lockwood 2015: 73-81 and n. 58.

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>48</sup>. Aristotle proceeds in a similar fashion when in the *Nicomachean Ethics* he deals with the question of the mutability of natural right<sup>49</sup>. In that case as well, Aristotle refutes the traditional opinion on the absolute immutability of natural right and reformulates the very question.<sup>50</sup> Just as he does here in the *Politics* when he deals with the problem of changing ancestral laws, Aristotle restates a question that had been posed incorrectly by “some” who had formulated it dichotomously<sup>51</sup>. For Aristotle viewed the initial question to have been made incorrectly, we should not ascribe too much importance to the explicit reference he makes to his predecessors: the first of them mentioned in the section being Hippodamus and those later on, variously identified with either the Pythagoreans<sup>52</sup> and with Thucydides<sup>53</sup>. It is, however, worth devoting some attention to his relationship with Plato who, according to some scholars, is the real target of criticism in this passage of the *Politics*<sup>54</sup>. Aristotle’s relationship with Plato’s views on the question of legal change has been much discussed. On the one hand, the divergence between the two philosophers is relatively clear when it comes to identifying the agents of general change in the political order (*politeia*)<sup>55</sup>, on the other hand it is more difficult to highlight the difference about the specific area of legal change. There is no consensus in scholarship on Aristotle’s relationship with Plato’s work, nor have even they been unanimous in their interpretations of Plato’s own views in the *Laws* and the *Statesman*<sup>56</sup>. Plato’s *Laws* - according

<sup>48</sup> Poddighe 2014: 41. Cf. Brunschwig 1980: 535.

<sup>49</sup> Arist. *NE*, 1134b 18-35. Brunschwig 1980: 538; Pezzoli 2017: 59-60; Poddighe 2016: 88-89.

<sup>50</sup> Poddighe 2016: 88-89

<sup>51</sup> Pezzoli 2017: 80, is right in referring the dialectic scheme to two alternatives: a) changing the traditional *nomoi* in favour of a better law is harmful; b) changing the traditional *nomoi* in favour of a better law is beneficial.

<sup>52</sup> Pezzoli 2017: 85.

<sup>53</sup> Cf. De Fidio 1995: 31-47.

<sup>54</sup> On the fact that the criticisms of Hippodamus’ theory provide “the pretext for raising a particularly relevant *aporia*, on the variability/permanence of the laws, which indirectly helps Aristotle also settle with the Plato of the *Statesman*” cf. Bertelli 2017: 51, who elsewhere also considers that when Aristotle in *Pol.* 1269a 8 ff. states that “the best is not to leave the laws unchanged”, he is referring to Plato of the *Statesman* (Bertelli 1989: 311).

<sup>55</sup> In contrast to Plato’s view that the laws and the *politeiai* change cyclically and teleologically, Aristotle offers the idea that political orders change as result of historical factors that are not predetermined cf. Bertelli 1989: 308-310; Lisi 2000: 31-36; Saxonhouse 2015: 184-203; Zizza 2016: 530-548. Laws which are the product of historically determined societies change – according to Aristotle – when the power relationships change inside the societies that they are the expression of: see Polansky 1991: 322-45; Davis 1996: 88-99; Lisi 2000: 41; Poddighe 2014: 46-66; Poddighe 2018.

<sup>56</sup> Aubenque 1965: 109-110; Moraux 1965: 131, 135, 140, 154-56; de Romilly 1971: 218 ff.;



to Bertelli – are “riddled with a veritable phobia against change”<sup>57</sup>. Similarly Saunders identifies in the same work “Plato’s ferocity about the undesirability of change”, a ferocity which he views as “stemming ultimately from a desire to produce a perfect metaphysically based society”<sup>58</sup>. One must not change the unchangeable (*kinein ta akineta*: *Laws* 684d-e) – as Bertelli again emphasizes<sup>59</sup>, because “any sort of innovation is dangerous for the State, especially in matters of educational and legal practice”. The “dangerousness of *metabole*” is high in “every sector of the state apparatus” (*Laws* 660b) and so what is needed is the “wisdom of the legislator and the power of a tyrant” in order to “control change”<sup>60</sup>. It is here, according to Bertelli, that Aristotle distances himself from Plato in that he “accepts the possibility of positive change”<sup>61</sup>. Other scholars, however, claim that in several passages of the *Laws* and the *Statesman* Plato viewed legal change as “acceptable”<sup>62</sup>. According to Camassa, the possibility of correcting the *nomoi* by the efforts of the *nomophylakes*, for example, is a sign of Aristotle’s “distance from Plato, in view of the fact that Plato considered it necessary to change positive laws, while Aristotle held that this should only be done if the benefit to be derived was great”<sup>63</sup>. This is also Pezzoli’s view who has observed that for Plato “the laws need to be changed” when “experience shows that the current general *nomos* is inadequate”<sup>64</sup>, and that in Plato’s view “changing the laws is not rejected a priori but entrusted sometimes to experts who act for the good, sometimes to magistrates or guardians of the laws who supplement the normative activity of the first legislator”<sup>65</sup>.

The aim of this brief digression is to show that Plato himself, just like Aristotle, admits the usefulness of controlled change, in other words, change that should not be “easy”. The difference is that Plato imagines this control as taking place within the framework of his entirely idealized State<sup>66</sup>, while

Brunschwig 1980: 518, 524; Bertelli 1989: 306-307; Camassa 2003: 160-161; Schwartzberg 2007: 60-63.

<sup>57</sup> Bertelli 1989: 306-307.

<sup>58</sup> Saunders 2014: 394, with regard to Plat. *Rep.* 424 a-c, and *Laws* 797a -798d.

<sup>59</sup> Bertelli 1989: 307.

<sup>60</sup> Bertelli 1989: 306-307.

<sup>61</sup> Bertelli 1989: 311.

<sup>62</sup> As Saunders 2014: 394, admits with regard to *Laws* 769a and *Polit.* 295b.

<sup>63</sup> Camassa 2003: 161-162 (on this point see also Moraux 1965: 156-157); Camassa 2005: 33-34; Camassa 2011: 174-176.

<sup>64</sup> Pezzoli 2012: 295 on Plat. *Laws* 769d-e “where the Athenian expresses a similar position: it is nonetheless likely that in this circumstance he is not thinking about repealing the law but its later adaptation”.

<sup>65</sup> Pezzoli 2017: 87-89, observes with regard to the *Laws* (769 d-e) “where Plato loses faith in finding the true statesman... change is envisaged as a perfecting of the measures introduced by the first legislator”.

<sup>66</sup> Cf. Moraux 1965: 131, 135, on the fact that in the ideal State the legislator’s *techné* solves the problem. Cf. Camassa 2005: 33-34, on Plato in the *Statesman* theorizing that in order to overcome the limitations in positive law an intervention is required by whoever possesses *techné*, by the legislator and that written and changeable laws are needed in the real world but that the Philosopher-king

Aristotle is concerned with institutional practice inside the polis and, thus, he deals with concrete examples. Hence, once Aristotle recognized the usefulness of controlled change<sup>67</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 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<sup>68</sup>.

### Controlling legal change in institutional practice within the polis: Aristotle's views

Controlling change when it has become necessary: this is the main problem Aristotle is concerned with<sup>69</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>70</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>71</sup>. The topic, in fact, appears to be taken up again in Book III of the *Politics* 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

legislator is far removed from that lower world. Cf. also Ober 2005: 406, and Pezzoli 2017: 87-89.

<sup>67</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 A. 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.

<sup>68</sup> Cf. Maffi 2007: 197-199.

<sup>69</sup> Cf. Contogiorgis 1978: 248-250.

<sup>70</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.* VII 325) and Antiphon (*Tetr.* III.1.1). Cf. Bordes 1982: 363, 367.

<sup>71</sup> Which is the view of de Romilly 1971: 220-225, and Swanson 1997: 158. *Contra*: Contogiorgis 1978: 244; Brunschwig 1980: 534; Ober 2005: 398. See also Pezzoli 2017: 83.

to the laws and *ad hoc* adjustments to suit particular cases which Aristotle already admitted in Book II in his critical examination of the views expressed by Hippodamus<sup>72</sup> (and Plato<sup>73</sup>). 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.

In the case of the kind of change which passes for legal reform<sup>74</sup> control is exercised through the “wisdom” of the legislator<sup>75</sup>. This is the change that scholars tend to identify as “reform” and describe as a larger scale intervention<sup>76</sup>, even though Aristotle makes no reference to the quantitative aspects of change<sup>77</sup>.

Then there is the control of change brought about by the need to adapt<sup>78</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>79</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 Book II of the *Politics* (1268b 26-31) – is admissible when it is undertaken in the name of the common good and when the benefit is great<sup>80</sup>. For this type of change intervention on the part of the legislator – in Aristotle’s view – is indispensable<sup>81</sup>. The most explicit statement of this we find in Book III of the *Politics* 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>82</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>83</sup> The reforming action is, however, judged to be indispensable if

<sup>72</sup> Collins 1997: 216 “Hippodamus proposed legislation that would encourage innovation by giving public honors for inventions and allowing juries to qualify their verdicts to fit particular cases”.

<sup>73</sup> Cf. Aubenque 1965: 111ss; Bertelli 1989: 310-311.

<sup>74</sup> Cf. Schwartzberg 2007: 3, on this specific aspect of legal change “as deliberate and legislative, rather than interpretive and judicial”.

<sup>75</sup> Leszl 1989: 124-126; Miller 2007: 85-90; Horn 2013: 243; Bertelli 2015; Pezzoli 2017: 84.

<sup>76</sup> Schwartzberg 2007: 6-7; Swanson – Corbin 2009: 42; Bates 2013: 62ss; Canevaro 2015: 9-17.

<sup>77</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; Wormuth 1978: 16; Brunschwig 1980: 538.

<sup>78</sup> Schwartzberg 2007: 72, 198.

<sup>79</sup> Aubenque 1965: 109-113; Harris 2013: 177-182; Cf. Bertelli 1989: 311.

<sup>80</sup> *Supra* 188-189.

<sup>81</sup> Cf. Camassa 2005: 34; Pezzoli 2017: 84.

<sup>82</sup> Cf. Micallella 1988: 88-110; Bertelli 1989: 309; Saxonhouse 2015: 196-203.

<sup>83</sup> Voegelin 1957: 324, 358-359; Contogiorgis 1978: 246ss; Wormuth 1978: 16; Collins 1997: 217-

the benefit appears to be significant. The legislator must intervene with suitable measures “in order to rectify critical situations in real regimes”<sup>84</sup>. The value of legislative reforms made in the common interest appears to be recognized by Aristotle when he looks at the history of the polis. For example, in the *Athenaion Politeia* we have his approval of the reforms made by Athenian legislators. Describing the reforms of the *politeia* undertaken by Cleisthenes, Aristotle states that Cleisthenes “established new laws that were of benefit to the people” (*Ath. Pol.* 21.1-6). He expresses the same view with regard to the “equal” laws written for the Athenians by Solon (cf. *Ath. Pol.* 12.4) who “saved” the city (*Ath. Pol.* 6.3). 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 extent 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>85</sup>. Nor should we underestimate the interaction that existed between the discussion of the problem of legal change and the attention Aristotle devotes to the question of improving deviant regimes<sup>86</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” (1283b 38-42)<sup>87</sup>.

It is with this aim that the legislative *phronesis* must necessarily and dialectically measure itself against the principle of political stability<sup>88</sup>. The legislator whose task it is to frame laws is therefore the only figure who may intervene to improve them – provided that the improvement is “useful for the entire city”<sup>89</sup>. 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 it is to apply the laws<sup>90</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

18; Swanson 1997: 157-159, 177-178 n. 10; Destrée 2015: 204-223; Saxonhouse 2015: 196-203.

<sup>84</sup> Bertelli 2015: 24. Cf. Kraut 2002: 375; Destrée 2015: 204-223.

<sup>85</sup> This according Swanson 1997: 178 n.11, with regard to Solon’s laws and the attempt to defend the idea that Aristotle was against legal change (157-159).

<sup>86</sup> Cf. Voegelin 1957: 324, 334 ff., 359 “the nomothetic therapy seems to have no other purpose than to make the perverse form as durable as possible”. See also Collins 1997: 221, and Swanson 1997: 157, 177 n. 10. *Contra*: Keyt 2005: 209-215; Horn 2013: 229; Destrée 2015: 204-223; Saxonhouse 2015: 196-203.

<sup>87</sup> Cf. Miller 1995: 211-213; Keyt 2005: 210; Cooper 2005: 70.

<sup>88</sup> Correct are the considerations found in Saxonhouse 2015: 198. Cf. also Bertelli 1989: 309.

<sup>89</sup> Micalèlla 1988: 94-96.

<sup>90</sup> Leszl 1989: 75-134; Yack 1993: 190-193; Bullen 1997: 229-241; Mayhew 2009: 531-535; Bertelli 1989: 21-23.

reserved for the few, while the many may act to decide the single cases of the *praxis*<sup>91</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. Consequently, he appears to want to exclude the ordinary people from making legal reforms while allowing them to apply the law in particular cases. 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; cfr. 1282b 2-10).

Once again Book III of the *Politics* takes up questions that have already been raised in Book II. Aristotle has already considered of the generality of written laws that must be adapted to meet particular cases (1269a 9-13) he draws the conclusion that “obviously the laws, or at least some of them, in some cases, need to be changed”. Book III discusses this topic with regard to the question of which institutional figures should be entrusted with the task of controlling this “adaptation” (1286a 10-31; 1287a 19-28). Here too Aristotle observes that “laws provide only general indications and do not contain directions for single cases” and “for this reason, admittedly, the best constitution will not be that which adheres to the letter of the law” and the laws cannot be “sovereign in cases that go astray from the norm” (1286a 10-24). Here Aristotle deals with the problem of the responsibility of those who must make decisions and he asks “But in matters in which the law is unable to make any decision or to decide well, should only one man govern or all the citizens?” (1286a 24-25). Aristotle’s solution is not surprising. He cites the example of collective bodies whose decisions *always* have to do with particular cases and he seems to identify these with the assembly, the council and the courts (1286a 26-28)<sup>92</sup>. The citizens gathered together in the assembly or the law courts – who have been entrusted with the task of administering the *praxis* – will have to exercise their control over change in those venues. But how are they to do this? Aristotle explains that their intervention should be reserved for cases in which the law is unable to decide, in other words, in “matters in which the law is unable to make any decision or to decide well” (1286a 24-25), “in cases in which the law is unable to provide a solution” (1287a 24) and on questions on which it is “not possible to legislate” (1287b 22-23)<sup>93</sup>. The decisions of the many “*all* regard particular cases” (1286a 27-28) and only in such cases should the many

<sup>91</sup> *Rhet.* 1354a 31-b16; *NE* 1141b 21-29; *Pol.* 1292a 32-37. For an analytical discussion see Bullen 1997: 229-241. Cf. also Wormuth 1978: 17-19; Simpson 1998: 308-309; Mayhew 2009: 533-534; Harris 2013: 177-182; Bertelli 1989: 21-26.

<sup>92</sup> “Currently it is the latter who, gathered together in the assembly (*suniontes*), administer justice (*dikazousin*), decide (*bouleountai*) and deliberate (*krinousin*), but all these deliberations (*kriseis*) concern individual cases”. Cf. Accattino 2013: 225. Lane 2013: 262-263, suggests that the passage is a specific reference to the political role of popular judges.

<sup>93</sup> Aubenque 1965: 111 ff. Cf. also *Pol.* 1282b 3-5 on the *archai* who must exercise their authority only in those cases in which the laws cannot be formulated with precision.

be allowed to decide because “a multitude judges better than a single man by himself (1286a 30-31) who in these cases “cannot decide” (1287a 24-25)<sup>94</sup>.

In this context, the action of the many expresses itself through those “instruments” that are best suited to regulate the particular cases of the *praxis*: the assembly and the courts.

In the assembly citizens’ political action is expressed through decrees that are different from laws in the strict sense because they are particular while the laws are general. This distinction between laws (*nomoi*) and decrees (*psephismata*) – one that recurs in Aristotle’s political works<sup>95</sup> – is based, as we have already seen, on the “unbridgeable” difference between legislation “which is the task of special persons acting in special circumstances and who perform a job that cannot be and must not be changed” and administration “which is part of the daily affairs of the *polis*”<sup>96</sup>. In this sense control over legal change should be understood literally as a check on activities involved in correcting the laws : wherever the law is unable to regulate a particular case, the decree intervenes which, as it is more supple and flexible<sup>97</sup> than the law, “adapts itself to the facts” (*NE* 1137 12-33)<sup>98</sup>.

With regard to the courts, Aristotle states that the law delegates to “those who are in charge” (*tous archontas*) the task of “deciding cases which it does not foresee itself according to the most just opinion” and entrusts “to the judgement of expert persons, the task of improving those laws that would appear to need changing from their current form” (1287a 25-28). Here Aristotle makes no mention of the “most just opinion” – the *gnome dikaiotate* – in order to illustrate his theoretical reasoning with a concrete example, that of Athens, even if commentators of the passage<sup>99</sup> rightly draw attention to this phrase in the Heliastic oath. In Athens, in fact, jurors swore that they would “vote in consonance with the law in matters where laws exist and, in matters where they do not exist, by the most just opinion” (*Poll.* VIII 122. 5-7)<sup>100</sup>. But the discussion

<sup>94</sup> Cf. also *Pol.* 1281a 42-1281b 2: the many, each of whom is not a good man, may nonetheless, if taken together, be better than the few, not as single individuals but in their totality. Aristotle’s assertion that the group is superior to the individual when the decisions are concerned with particular cases, once again shows his distance from the Plato of the *Statesman* (294a – 297b and the *Laws* (VI 769d-e; 875d-876a). Cf. Aubenque 1965: 109-113; Moraux 1965: 140-157; Bertelli 1989: 311; Schüttrumpf 2001: 279; Camassa 2003: 162; Pezzoli 2012: 295ss; Accattino 2013: 224 ff.

<sup>95</sup> *Rhet.* 1354a 31-b16; *NE* 1137b 12-33 and 1141b 21-29; *Pol.* 1292a 4-8, 13-37. Cf. Aubenque 1965: 109-113; Brunschwig 1980: 518, 524 ff.; Bullen 1997: 229-241; Kraut 2002: 105-106; Frank 2005: 115-126; Wexler – Irvine 2006: 116-138; Accattino 2013: 225; Pezzoli 2014: 169-170; Bertelli 2015: 21; Bearzot 2016: 95-98.

<sup>96</sup> Canevaro 2014: 287.

<sup>97</sup> Cf. Frank 2005: 114 n. 10 on the immobility of laws that prevent them from adapting themselves to concrete situations. See also Campeggiani 2009: 293-300.

<sup>98</sup> *NE* 1137b 12-33. Cf. Aubenque 1965: 111-112, 156; Moraux 1965: 136-140, 141ff., 156-57; Wormuth 1978: 19; Yack 1993: 198-199; Vergnières 1995: 215; Bullen 1997: 231-237; Wexler – Irvine 2006: 116-134; Campeggiani 2009: 293-300; Bearzot 2016: 95-98.

<sup>99</sup> Cf. Wexler – Irvine 2006: 133; Accattino 2013: 231; Horn 2013: 242; Lord 2013: 93.

<sup>100</sup> A survey of sources and studies in Bearzot 2013: 85-98; Harris 2013: 274-301; Poddighe 2014: 272-298.

in this section is not about the Heliastic oath. Aristotle's reference to the "most just" opinion appears to be aimed at closing out his arguments on the question of legal change understood as an *ad hoc* adaptation, in other words, as a non permanent correction of the letter of the law<sup>101</sup>. It is precisely in connection with the *archai* being entrusted with giving a judgement most in consonance with the law that Aristotle goes on to explain his (second) model for improving the laws: when the particular cases are not covered by the general law the judges may decide according to the opinion "most consonant with justice"<sup>102</sup>. This is what Brunschwig defined as "un modèle pertinent pour comprendre le mécanisme du perfectionnement des lois tel qu'Aristote l'envisage"<sup>103</sup> and which reveals the "vision aristotélicienne du changement législatif"<sup>104</sup>. Also in Saunders view, Aristotle may here be "hinting about something crucial for the *development* of law": this is the principle that "once laws have been formulated in writing they would need no further change" though "they still need the flexibility of 'customary' laws, in that their strict letter will need to be modified when they are applied in particular circumstances"<sup>105</sup>. This is a way of managing the need to adapt the law to the special cases that arise in the *praxis* without running the risks of a permanent change<sup>106</sup> because the correction only acts while it is being applied<sup>107</sup>.

This adaptation allows for the exercise of a "controlled" change of the law and the responsibility for this appears to be assigned to citizens who have been "instructed in the law"<sup>108</sup>, those who just above (1287a 20) Aristotle identified as the guardians of the law<sup>109</sup>.

Underlying Aristotle's discussion of this type of change – the *ad hoc* adjustment of laws in cases they cannot decide – are a set of basic principles that characterize his political thinking and which are worth a quick review. The first of these is the idea that a *politeia* must educate its citizens to conform to its principles and that they should therefore be able to make judgements using good sense (*epieikeia*), both in cases in which the written law does not apply and in cases, which though covered by the written law, require an exercise of good sense that "goes beyond the written law" (*Rhet.* 1374a 28-29). In all these cases, an education in keeping with the *ethos* of the *politeia*, as well as a knowledge of the polis' *nomoi* will allow the citizens to exercise the best

<sup>101</sup> A reference directly connected to the problem of change (*pace* de Romilly 1971: 221). Cf. Hamburger 1951: 89-99; Aubenque 1965: 111 ff. 156; Moraux 1965: 140-142; Wormuth 1978: 16; Brunschwig 1980: 524 ff.; Bertelli 1989: 310-311; Swanson 1997: 155-159.

<sup>102</sup> Cf. Accattino 2013: 231; Pezzoli 2017: 81.

<sup>103</sup> Brunschwig 1980: 526.

<sup>104</sup> Brunschwig 1980: 527 n. 41.

<sup>105</sup> Saunders 2014: 391-393.

<sup>106</sup> It is the *aporia* resolved according to Saunders 2014: 391-393.

<sup>107</sup> Cf. Wexler – Irvine 2006: 133: "applying the law...is to correct it". Cf. also Horn 2013: 226.

<sup>108</sup> 1287a 25, with Accattino 2013: 231.

<sup>109</sup> Cf. Canevaro 2014: 315.

faculty of judgment (*Rhet.* 1365b 21-1366a 21)<sup>110</sup>, that is, to understand the “spirit of the law” even when its formulation is general<sup>111</sup>. It is in the practical work of coming to terms with the limitations of the law – in other words, dealing with the critical issues that arise because of written law’s generic nature – that defines the space for the exercise of good judgment or *gnome* which ought to operate according to the principles of the *epieikeia* (that is, without abusing it)<sup>112</sup>. As the *epieikeia* operates in synergy with the law and has the aim of adapting positive law’s universality to particular cases, citizens, through the exercise of their best faculty of judgment, interpret what the legislator did not make clear for a particular circumstance. It is, thus, their judgment that defines the *dikaion* of the polis (*Rhet.* 1374a 28 ff.)<sup>113</sup>. In performing this role, the citizens will *also* have to consider unwritten laws as the basis for their judgment<sup>114</sup>, provided these laws are in harmony with the *politeia*<sup>115</sup> and express the constitutional *ethos* which the verdict in particular cases will have to respect<sup>116</sup>. Scholars of Athenian institutions<sup>117</sup> have been right to consider the possibility that unwritten laws may constitute the basis for the jurors’ judgments and it is this same interaction that Aristotle evokes when discussing the “best judgment” founded on good sense<sup>118</sup>. It is within this space of interaction between the general *nomos* to be adapted to particularities and *epieikeia*, that Aristotle defines the task to be given to the citizenry: to interpret the law and assert with their best judgment the notion of the “politically just” (*dikaion*). The politically just incorporates the legally just (its essential component), but its scope is broader and it allows for a certain degree of leeway between written and unwritten laws<sup>119</sup>. Through best judgment – as Aristotle understands it – citizens in court perform the function he assigns to them in matters of legal

<sup>110</sup> Poddighe 2014: 265-266.

<sup>111</sup> Cf. Brunschwig 1996: 139.

<sup>112</sup> Aristotle admits this possibility in *Rhet.* 1375a 27-b 25. On this “captious interpretation” cf. Bertelli 2015: 30-31. That this abuse was very common in Athenian courts has been much discussed: cf. Harris 2013: 274-301; Poddighe 2014: 275-303.

<sup>113</sup> See Maffi 1983: 254. Cf. also Brunschwig 1996: 150; Hamburger 1951: 89-105; Aubenque 1965: 112, 156; Moraux 1965: 156-157; Wormuth 1978: 18-19; Vergnières 1995: 214-215; Frank 2005: 114-115; Miller 2007: 101; Schwartzberg 2007: 63; Accattino 2013: 231; Harris 2013: 274-301; Bertelli 2015: 27-28.

<sup>114</sup> Cf. Brunschwig 1996: 140; Prado 2003: 207; Campeggiani 2009: 291-312; Poddighe 2014: 265-274; Bertelli 2015: 28.

<sup>115</sup> Cf. Brunschwig 1996: 140; Prado 2003: 207; Campeggiani 2009: 293-300; Harris 2013: 276-285; Poddighe 2014: 265-274; Bertelli 2015: 28.

<sup>116</sup> Cfr. Brunschwig 1996: 151; Harris 2013: 274-301; Poddighe 2014: 59, 273-274, 297; Bertelli 2015: 27-31.

<sup>117</sup> Cf. Maffi 1990: 71-77, who holds that, given the inability of the set of written laws “to constitute a code”, custom was “recognized as the normative standard” and came to be “applied at a legal level both directly and indirectly as tool for the interpretation of written law” (77).

<sup>118</sup> See Maffi 1990: 77; Maffi 2007: 197-9; Bearzot 2013: 85-98; Harris 2013: 276-285; Poddighe 2014: 275-303.

<sup>119</sup> Cf. Bertelli 2015: 27-28 on *NE* 1137b 12-33. On the interaction between the legally and politically just in the *Nicomachean Ethics* cf. Poddighe 2014: 47-53; Poddighe 2016.



change. Unlike the improving action of the legislator, who “makes the laws better” with a view to what is good for the entire city, the action of the entire citizenry is aimed at improving the laws whenever their general nature does not regulate particular cases.

In conclusion, how much does Aristotle’s discussion of legal change owe to the Athenian model? Aristotle certainly had in mind fourth century Athenian democracy<sup>120</sup>. However, he does not refer to the case of Athens as an example when discussing the problem of legal change. In fact, both in the *Politics* and in the *Athenaion Politeia* he completely ignores the various ways the fourth century Athenian democracy was dealing with the problem of altering laws.

Nowhere does Aristotle mention the procedure of *nomothesia* created to give new laws to the city by the *nomothetai* who were introduced in Athens in 403 after the return of the exiles from Phyle and the Piraeus (Andoc. 1. 80-89)<sup>121</sup> Through this procedure, the people *formally* assumed the power of changing the law and they constituted committees of *nomothetai* who met – possibly during special sessions of the assembly – in order to decide on the promulgation of new laws, on changing existing laws and on repealing contradictory laws<sup>122</sup>. Aristotle is also silent about the hierarchic distinction between law (*nomos*) and decree (*psephisma*) which was also adopted after 403<sup>123</sup> just as he fails to say anything about the mechanisms that were set up to protect this distinction and prevent a decree from contradicting a law (*graphe paranomon*) or one law contradicting an earlier one (*graphe-nomon me epitedeion theinai*)<sup>124</sup>. Athens is not even clearly named as one of the radical democracies in which “the decrees are sovereign instead of the law” (1292a 4-8)<sup>125</sup>.

This silence is surprising given that Aristotle deals with the theme of legal change precisely in relation to those problems Athenian legal and political institutions were grappling with in the fourth century<sup>126</sup>, the foremost being the distinction between laws and decrees. It is a silence that is all the more problematic when we consider the lengths the Athenians went to in order to make their system efficient as they sought to control “easy” change<sup>127</sup> and come

<sup>120</sup> Moraux 1965: 131-136; Yack 1993: 198-199; Wexler-Irvine 2006: 116-134; Lane 2013: 262-263; Poddighe 2014: 269-270; Bertelli 2015: 30; Bearzot 2016: 95-98.

<sup>121</sup> On the procedure see now Canevaro 2013: 1-22 and Canevaro 2016: 39-58.

<sup>122</sup> Canevaro 2013.

<sup>123</sup> And. 1. 86-87. Cf. Hyp. 5. 10 and 20-22; Dem. 20. 91-92; 23. 87 and 218; 24. 30-31. Cf. Hansen 1978: 315-330, and for up-to-date discussions of the problems and the bibliography see Canevaro 2015: 17-30.

<sup>124</sup> Cf. Canevaro 2015: 13 ff. 24-25-; Pezzoli 2017: 81-91.

<sup>125</sup> Canevaro 2014, 294 and 299, is right with regard to the fact that the model refers to democracies found throughout the Greek world, rather than just to Athens.

<sup>126</sup> Moraux 1965: 131-136.

<sup>127</sup> It wasn’t easy to make new laws in Athens, as may be seen in the numeric proportion between laws and decrees: Schwartzberg 2007: 67; Canevaro 2015: 26-30.

up with a set of rules that could mediate between recognizing the role of the people in legislative matters and a democratic ideology that insisted on the stability of the *nomoi*<sup>128</sup> and the continuity of their fathers' laws<sup>129</sup>. So why does Aristotle have nothing to say about the solutions adopted in Athens? The reasons for his silence are still a matter of debate<sup>130</sup>, but some aspects appear to be clear. Aristotle assigns to distinct institutional figures the task of controlling legal change and he speculates about a variety of instruments that could be used to restrain legal change. On the one hand, we have the improving action of the legislator who "makes the laws better" with a view to what is good for the *entire* city, on the other, the actions of all the citizens, of those who exercise the sovereign *archai* and whose task it is to decide wherever the law, because of its general nature, does not regulate particularities. According to Aristotle, the legislator must not intervene when the law is too general to suit special circumstances, nor should the civic body be allowed to frame new laws or alter existing ones<sup>131</sup>. Compared to this model what was going on in Athens was impossibly remote: the fourth-century *nomothetai* have nothing to do with Aristotle's "true" *nomothetes*<sup>132</sup> and Athenian decision-making bodies – to which the *nomothetai* belonged – went beyond the task of applying and interpreting the laws. What is most important, the Athenian model must have looked to Aristotle as something definitive which could not be improved. The democracy that was restored in 403 is, in fact, represented as static and unchanged even at the time he was writing the *Athenaion Politeia*. Aristotle seems not to recognize that this *politeia* could ever change.

<sup>128</sup> Canevaro 2015: 1-35, is right in pointing to the efficiency of the Athenian system and its coherence within the framework of an ideology that was hostile to change. See also Boegehold 1996: 203-214; Frank 2005: 123 n. 37.

<sup>129</sup> For the Athenian concern to represent the *nomothesia* as part of the action to rectify the corpus of ancient legislators cf. Thomas 1994: 128ss; Canevaro 2015: 3-30.

<sup>130</sup> The point made in the paper by Canevaro- Esu 2018: 105-145.

<sup>131</sup> Cf. Bullen 1997: 229-241, and especially p. 230 where discussing Aristotle's position he makes the observation that "he expects lawmakers to be more prudent than average people. We, in turn, can expect that Aristotle would not want the popular assembly to make the laws".

<sup>132</sup> Cf. Thomas 1994: 133.

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