

# The Philosophical Antilogy in the Rhetorical Doctrine of “Decisive Issue” at Cicero

Massimiliano Pegorari

Independent Scholar, Aosta, Italy

**Email address:**

m.pegorari@alice.it

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**Abstract:** Placed in the ontological realism of the classical age, the rhetorical doctrine of “decisive issue” is an effort to grasp the complexity of reality and to find the true state of the case in a controversial challenge. In a dispute, at first it is necessary to qualify the genre of the case (*status causae*); then, only after several confusions the point of issue emerges, and the rhetorician must choose the implicit premises (reputable opinions) and the inferential schemes (*loci*, topics) in the light of the particular case, that is relevant to the thing in question. A wrong tradition identifies genre of the case and “decisive issue”. Against this reductive approach, Cicero shows that the philosophical character of dialectic antilogy – i.e. the “refutatory completeness” taught by Plato and Aristotle – is necessary also in the judicial rhetoric and not only: I propose to call it “evidentiary insistence”. In the rhetorical domain, the complexity of reality emerges at the moment of identifying the object of the question: dialectical refutations not appropriate to the thing in question are fallacious by accident, according to Aristotle, and the doctrine of “decisive issue” avoids falling into sophistry in the field of civic discourse. This is one of many philosophical aspects of the Rhetoric of Hermagoras, and later of Cicero and of the Anonymous commentator on Hermogenes, rejected by Quintilian (*I. O.*, 3.11.20; 24).

**Keywords:** Dialectic Antilogy, Aristotle, Rhetoric of Truth, Hermagoras, Fallacy of Accident

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## 1. Introduction

A great rhetorician like Quintilian explains that “the peculiar task of the orator arises when the minds of the judges require force to move them, and their thoughts have actually to be led away from the contemplation of the truth” [1]; “for the force of eloquence is such that it not merely compels the judge to the conclusion toward which the nature of the facts lead him, but awakens emotions which either do not naturally arise from the case or are stronger than the case would suggest” [2].

On the other hand, we know that ancient philosophy strove to build a rhetoric of truth, from Plato to Stoicism. Says Aristotle: “rhetoric is useful because the true and the just are by nature stronger than their opposites” [3]. In his method for discursive reasoning, the rhetorical argumentations have the same structure as the logical demonstrations: then “it belongs to the same capacity both to see the true and what resembles the true” [4]. Therefore the study and the proper use of rhetoric “is to bring truth to light, and detect deceit and sophistry” [5]. The epistemological value of this high theory of civic discourse is that “we should be able to argue persuasively on either side of

a question (...) in order that it may not escape our notice how things really are” [6]. Because of “rhetoric is a constitutive part of dialectic and is similar to it” [7], the art of persuasion is able to light up the essence of a question.

How is this possible? And what is the role of Hermagoras' rhetoric as a mediation towards Latin culture through Cicero?

## 2. Dialectical Premise

### 2.1. The “Refutatory Completeness” According to Aristotle

The ancient dialectic practiced by the Greeks consisted in a verbal methodology formed by two movements of thought: on the one hand the descending or dividing one, on the other hand the ascending or composing one [8].

Therefore the authentic dialectic turns out to be at the same time division of unity in the multiple and reconduction of the multiple back to unity: so the Whole is preserved, otherwise it comes a partial result, not epistemic. Plato teaches this: “who has, or has not, the power of seeing things as a whole, he is, or is not, a dialectician” [9]. Aristotle teaches this: “if we have

the ability to go through the difficulties (greek verb "diaporesai") on either side, we shall more readily discern the true as well as the false in any subject" [10].

For example: from the thesis of the oneness of being, one must deduce the consequences both for being in itself and for being in relation to the manifold; at the same time, given the contrary thesis of the multiplicity of being, one must again deduce the consequences for the one and the many. In this way, both possible characteristics of the whole "being" - unique or multiple - are exhaustively investigated.

The development of the consequences arising from each of the two horns of the dilemma is intended to bring out the existence of conclusions contradictory to themselves or to other previously admitted positions. It should be pointed out, with Plato and Aristotle, that to achieve a true dialectical result it is not sufficient to develop only some consequences of a dilemma in both directions, pros and cons: instead, it is necessary to have a "refutatory completeness", i.e. "we must first survey *all* the difficulties" [11], it is necessary to exhaust all possible solutions of a problem by eliminating progressively - by means of refutations not vitiated by sophistry - the objections that turn out to be self-contradictory [12]. Only then "the solving of a difficulty is a discovery" [13] able to show the truth, because this solution offers the criterion, the rule, to choose a hypothesis by eliminating the opposite alternative as it turns out to be self-contradictory at the end of the dialectical procedure. In the example concerning the unique or multiple being, the consequences drawn from the Eleatic monism - according to the Platonic argumentation exposed in the *Parmenides* - are untenable because they are contradictory; the thesis of the multiplicity of the being is instead without contradictions: it results therefore demonstrated and such to be assumed as foundation for further philosophical reflections.

At the basis of the dialectical method is the Parmenidean intuition, according to which the "path of truth" consists in recognizing the necessity of an assertion and the contextual impossibility of the contradictory assertion; on the other hand, the "path of error" consists in equalizing assertions that are opposed to each other by contradiction, thus absurdly identifying being and non-being. In the philosophical or scientific dispute, therefore, is true that proposition whose contrary turns out to be impossible because contradictory: "contradiction is opposition which excludes an intermediate" [14].

## 2.2. Argue on Both Sides in Cicero's *Brutus*

The passages of Greek tradition now reported were well known by Roman men of culture: it is Cicero himself to testify, through the many references to *argumentatio in utramque partem* that are found in his works and orations. This is clear for the works of Cicero's maturity. Indeed, the Arpinate affirms in the *De oratore* (I 34, 158-159, Sutton): "we must argue every question on both sides, and bring out on every topic whatever points can be deemed plausible" [15].

Perhaps praising himself, Cicero concludes the same work by outlining the qualities of the perfect orator in this way: "if there has really ever been a person who was able in

Aristotelian fashion to speak on both sides about every subject and by means of knowing Aristotle's rules to reel off two speeches on opposite sides on every case, or in the manner of Arcesilas and Carneades argue against every statement put forward, and who to that method adds the experience and practice in speaking indicated, he would be the one and only true and perfect orator" [16].

Even more clearly expresses the Arpinate in *Brutus* (41.152), where the passage refers to the legal method practiced in the school of Quintus Mucio Scaevola the pontiff - part of the so-called Scipio's circle, inspired by the figure of the Stoic philosopher Panethius of Rhodes - and his disciple Servius Sulpicius Rufus. In the quoted passage Cicero summarizes what in his time was considered the dialectical method, a methodology divided into five parts: "*divisio, definitio, interpretatio, propositio, syllogismus*" [17]:

"[dialectics is the] art which teaches the analysis of a whole into its component parts, sets forth and defines the latent and implicit, interprets and makes clear the obscure; which first recognizes the ambiguous and then distinguishes; which applies in short a rule or measure (*habere regulam*) for adjudging truth and falsehood, for determining what conclusions follow from what premises, and what do not".

*Habere regulam* is a Latin expression that translates the greek verb "diaporein" of Greek philosophy [10], i.e. the complete dialectical development of the consequences drawn from a thesis and its mirror proposition, obtaining as a final result the criterion for eliminating the thesis that turns out to be untenable because it is self-contradictory and safeguarding instead the most solid thesis to be considered therefore true. In the well-known Aristotelian parallel with the judicial process, the heuristic value of the dialectical procedure is expressed with the same reference to the refutatory completeness of the elenctic method: "Further, he who has heard all the contending arguments, as if they were the parties to a case, must be in a better position for judging" [18].

## 3. The Role of Antilogy in Dialectics and Rhetoric

### 3.1. Dialectical Antilogy: Law of Correct Contradiction

Before describing the development of the methodology of the "decisive issue", as a rhetorical tool implementing the dialectical methodology, a further observation of philosophical nature should be made about the above-mentioned heuristic value of the formally regulated dialectical conflict [13].

It must be specified first of all that the dialectical conflict has an epistemic value as long as all the conditions set by the principle of correct contradiction are respected, first of which is the integral specularity between the contrary propositions object of refutation: to refute does not mean to affirm the contrary of one's interlocutor, but it means to force him to admit a proposition contradictory to the thesis supported "about the same things, in relation to the same things and in respect to the same things" [19]. This means that, compared to

the thesis, the antithesis must be specular so that the antithesis does not diverge subtly in the meaning of words (sophisms *in dictione*), in confusing the absolute aspect with the relative aspect of the propositions assumed (sophism of *secundum quid*), in neglecting the temporal and modal aspect (sophism of *ignoratio elenchi*), in carrying out circular reasoning (sophism of *petitio principii*) or formally correct reasoning but far from the object of contention (sophism of accident).

Aristotle explains in *Sophistici elenchi* (V, 167a23-27, Forster) that “a refutation is a contradiction of one and the same predicate, not of a name but of a thing, and not of a synonymous name but of an identical name, based on the given premisses and following necessarily from them (the original point at issue not being included), in the same respect, relation, manner and time”.

The restrictive clauses enunciated in order to have a correct refutation, not vitiated by sophistry, repeat the Platonic teaching and are at the basis of the famous Aristotelian definition of the law of non-contradiction: “the same attribute cannot at the same time belong and not belong to the same subject and in the same respect” (*Metaph.*, IV, 3, 1005b19-20, Ross).

A concrete application of the law of non contradiction and of the great role that sophisms play in Aristotelian thought concerns the definition of correct reasoning. Studies of modern specialists show that the authentic syllogism possesses two conditions of validity; first of all, in order to avoid the *circulus in probando* and the connected *petitio principii*, it is necessary that the combination of the terms of the apodosis is different from that of the protasis, so that the conclusion of the reasoning is productive of new knowledge: “a syllogism is a form of words in which, when certain assumptions are made, something other than what has been assumed necessarily follows” (*An. Pr.* I 1, 24b18-20, Tredennick). Moreover, it must be avoided that the sophism of the false cause invalidates the choice of the premises of the reasoning: indeed, this fallacy is produced when the conclusion of the syllogism derives necessarily from the propositions chosen as premises, but these premises are greater in number than those necessary to the justification, that is, they are *elliptic* or *redundant* premises [20] (... “from the fact that the assumptions are such”, *An. Pr.*, *ivi*).

### 3.2. Heuristic Value of Dialectical Refutation

From all this, several implications follow with regard to the aforementioned heuristic value of the correct dialectical refutation.

a) First of all, the opposition of the antithesis brings to light elements implicit in the thesis that are hidden to the same supporter of the latter.

b) Moreover, the dialectical confrontation results in eliminating little by little what is extraneous and irrelevant with respect to the debated theme, illuminating what is pertinent: indeed, at every proceeding of the refutation, the result is the exclusion of one of the two contradictory hypotheses (as clearly shown in the Platonic Sophist).

c) Finally, the correctly conducted dialectical method

culminates in the discovery of the truth of a thesis through the ascertainment of the falsity - *rectius* self-contradiction - of the opposite thesis: it is that Parmenidean “way of truth” of which we have said (2.1.).

### 3.3. Rhetorical Antilogy: Difference Between Dialectical Challenge and Rhetorical Controversy

In the authentic dialectical challenge, the object of the conflict is clear and distinct from the beginning of the dispute because it is conventionally fixed by the contenders: the thesis that the single disputant chooses to support coincides with the conclusion that he wants his interlocutor to affirm at the end of the challenge.

On the other hand, in the judicial and political contest, in which a decision or deliberation must be reached, the question to be resolved is controversial from the beginning and is therefore posed by the contenders in an approximate and indefinite way: the final question towards which to direct the arguments does not necessarily coincide with the original question, since it is then necessary to clarify the terms of a dispute (latin *controversia*), i.e. of a complex problem and not limited to a simple proposition as is the case with dialectic [21]. Then, in the rhetorical-judicial field the question to which the trial parties must respond arises as a hidden question, and as such must be sought and revealed. In analogy with the method of dialectical antilogy, in which only the refutatory insistence brings to light the decisive criterion to discern the truth from the error, also in the rhetorical field the repeated and prolonged refutation allows to find the real object of contention.

Not only that. As jurists of all times know, “a case is often diverted to the consideration of some matter irrelevant to the question, and that it is on this matter that judgment is given” [22].

To avoid similar errors sometimes subtle helps the repeated dialectical-confutatory clash: a cognitive tool that in assuming the independence between real object and thinking subject expresses the ontological realism typical of the classical age. As it will be shown later, the formal method of the rhetorical dispute (“decisive issue”) allows to discover what is really controversial by illuminating the true decisive point of the dispute, clear and peaceful point at the beginning of the clash only in appearance and superficially: in fact, even in the dialectical field one can proceed to the development of the dilemma in both directions pros and cons only once the issue to be debated has been instructed [23].

In the political and judicial spheres, the heuristic value of antilogy is preached by Plato: “time, slowness and repeated probative instruction bring to light the object of the dispute” [24]. Earlier, Antiphon the rhetorician is aware of this, who hopes that in the courts of law “there must be multiple investigations: in fact, repeated debates are the allies of the truth and the worst enemies of slander” [25]. It should be remembered that every antiphonous judicial tetralogy consists of an accusation and a defense, a necessary second accusation and relative exoneration.

Finally, Aristotle teaches this when he recalls that the

usefulness of the art of rhetoric, in analogy to the art of dialectic, is to make skillful "to be able to argue persuasively on either side of a question (...) in order that it doesn't escape how things are" (Kennedy-Berti), "the actual facts may not escape unnoticed" (Grimaldi) [26]. Thanks to rhetoric, "in any particular case in which we are concerned we may know how it really stands, on which side the truth and right actually lie: (...) the study of it tends to put us on our guard against the sophistries and for detecting fallacies in others" [27].

#### 3.4. *The Role of the Object of Dispute in Dialectical and Rhetorical Antilogy According to Aristotle*

As said, the task of the dialectician is to make the adversary accept propositions which, at the end of the dispute, prove to be contradictory to the thesis he has chosen to support; in order to do this, the questioner makes use of implicit premises from which the propositions which the respondent will accept logically descend: the relation of implication is a relation between antecedent and consequent according to the logical scheme of *modus ponens vel tollens* [28]. These implicit premises, to which the interlocutor cannot disagree since they are notorious and approved by the multitude of men or at least by the experts, are the "endoxal premises" (Brunschwig), greek "endoxa" i.e. commonly held opinions (Kennedy) that Aristotle recommends to choose wisely: the "reputable opinions" (Barnes) must be so pertinent to the object of the dispute that they are chosen from the question under discussion and remain appropriate throughout the course of the dispute. The Philosopher concludes: "The man who views reputable opinions as common principles *in the light of the particular case* is a dialectician, while he who only apparently does this is a sophist" [29].

Aristotle states that a sophist is one who endeavors to change in the course of discussion the object originally fixed, not merely diverting the discussion but attempting to refute something else entirely lacking a pertinent link with the object under discussion originally stated: "One should also sometimes attack points other than the one mentioned, excluding it if one can make no attack on the position laid down" [30]. In this way the sophist achieves his goal, that is to win the dispute even at the cost of masking devious stratagems, but the only fictitious similarity between the two different problems introduced in the challenge leads to a logically invalid result, therefore called by Aristotle sophistic. More precisely, in the second book of the *Topics* (5, 111b32ff.) – dedicated to the commonplaces of the accident – the Philosopher describes the dialectical scheme by which to replace the initial problem with a different but related problem. The link of relevance between the two problems can be real – therefore logically valid –, or apparent – therefore sophistic –, or even non-existent and such that no contrary argumentation is required. The graduation of the relevance connection, to which corresponds a different decreasing epistemological value, confirms the importance of the role of the object of dispute in dialectical argumentation according to Aristotle: "The problem of method is completely determined by the object, which is a general Aristotelian principle" [31].

The importance that the object of the dispute has in

Aristotelian dialectical syllogistics, and the ease with which it can fall into error so as to affect the final logical value of the clash, is manifested by the Philosopher in the passage of the "Sophistical refutations" in which he explains that to have a correct refutation is not sufficient reasoning formally valid if it is inappropriate to the object debated. More precisely, the dialectical syllogism can be vitiated by a sophism and be fallacious either because the paralogism breaks the necessary link between premises and conclusion of the dialectical reasoning (falsehood *in forma*), or because the refutation contradicts only in appearance the opponent's thesis modifying it instead in some point (falsehood *in materia*), or finally because such dialectical reasoning, formally valid and concluding with the exact contradiction of the opponent's thesis, is however inappropriate to the object of contention. "By a sophistic refutation and deduction I mean not only a deduction or refutation which appears to be valid but is not, but also one which, though it is valid, only appears to be appropriate to the thing in question. These are those which fail to refute on respect of the object and which prove the answerer to be ignorant, which was the function of the art of examination" [32]. In short, the refuting reasoning can be fallacious because "faulty in form, or untrue in matter, or irrelevant to the purpose" [33]. A clear Aristotelian example of a refutation that is formally correct but inappropriate to the object of the dispute is to deny the medical thesis that it is healthy to walk after meals, using Zeno's arguments refuting the existence of movement [34].

Refutations inappropriate to the object are a species of the fallacy of accident: in fact, the confusion between what is essential and what is accidental does not concern the formal correctness of the reasoning but concerns the irrelevance of the conclusion with respect to the object of the dispute, as Grote had made clear.

Rhetoric, as correlative of dialectic, presents in Aristotle the same attention to the object of controversy. It should be recalled in fact that the analogy between dialectical antilogy and rhetoric posed by the Philosopher [35] – and accepted by Cicero (2.2.) – is based not only on the faculty of both disciplines to argue the opposites [36], but also on the construction of reasoning based on endoxal premises, i.e. common conceptions on the subject (Owen). It follows that, just as the true dialectician is the one who derives the endoxal premises in the light of the particular case [29], so too the true rhetorician is the one who finds the relevant *status* and appropriate argumentative patterns in accordance with the subject of the dispute.

Indeed, in the search for the arguments to be placed as a premise of the rhetorical entimeme Aristotle advises to make a selection among the notable opinions by choosing those "closer to the question", i.e. "proper, specific" to the debated subject [37]. For each of the three rhetorical genres, the argumentative material must be specific to the subject under discussion: "it is necessary to be acquainted with everything that belongs to the subject on which we are to speak and reason" [38].

The same concepts will be expressed by Cicero. Defined a

topic (*locus*) as “the seat of an argument” (*Topica* II 8), the rhetorical inferential schemes (*loci*) are “all the sources of everything that concerned (*pertinent*) oratory” (*De orat.*, I 21, 94, Sutton). The Arpinate affirms: “Having thus explained all the topics serviceable for arguing, the first thing to be understood is, that there is no discussion whatever to which some topic or other is not applicable; and on the other hand, that it is not every topic which is applicable to every discussion, but that some topics are better suited (*aptiores*, relevant) to some inquiries than to others” [39].

## 4. The Rhetorical Doctrine of “Decisive Issue”

### 4.1. Introduction: An Equal and Biphasic Dialectical Judgment

After the time of Aristotle and then of Chrysippus, the rhetorician Hermagoras of Temnos perfected a formal method capable of ensuring the identification of the real decisive point of the dispute: it is the rhetorical doctrine of “decisive issue”, based on the ontological assumption that reality is something much more complex than the linguistic and conceptual tools that human beings use to describe it [40].

This doctrine consists in a judicial confrontation divided into two phases, carried out between trial parties of equal level, directed first of all to identify the kind of *status causae* and the related patterns of argumentation that the dispute requires (topics - *loci*) - thus specifying at first the frame of the dispute - and only then directed to discover the decisive point of the case [41].

This method is more easily understood in criminal cases and is conceived as follows: from the accusation of the prosecution and the defense of the accused, the pertinent status of the case (*quaestio*) is derived: for example the *status qualitat* when the accused admits to having committed the fact but claims to have acted in self-defense.

Once defined the *status* and the argumentative schemes that follow (*loci*), the dialectical clash does not stop but resumes through the exposition of defensive reasons and their refutation by the prosecution in order to discover the decisive point of the dispute (“decisive issue”- *iudicatio*), point still hidden in the first conflict and therefore different from the *quaestio*. Only at this time the Greek logographer will be able to prepare the rhetorical discourse, discourse all oriented towards the decisive point dialectically identified and fixed definitely by the first judge [42].

### 4.2. First Conflict: *Intentio* – *Depulsio* – *Quaestio*; the Example of Orestes

In the first dialectical clash, from the conflict between the propositions of the criminal prosecution or the civil plaintiff (*intentio*) and those of the defense (*depulsio*) arises the controversy (*quaestio*).

It should be noted immediately that it is not the simple opposition of accusation and defense to provide the object of judgment, but it is only what arises from the dialectical

conflict of the two opposing propositions to determine the gender of the issue and therefore the relevant *status causae*. With a philosophical look, it is here manifested the heuristic role of the dialectical antithesis, a role that the young Cicero makes so: “the «question» is the dispute which arises from the conflict of the two statements” [43].

For the identification of the *status*, Hermagoras exalts the role of the first defense, linked to the accusation but of much greater effectiveness [44]. The *Auctor ad Herennium* and Cicero agree that the *status causae* originates only from the defensive refutation of the accusatory proposition, rather than from the repetition of mutual refutations, because for the identification of the *genus quaestionis* is sufficient to understand the mere contours of the dispute: it is another thing to search for the real object of contention. Perhaps the most complete Hermagorean definition of *status causae* can be read in Quintilian: “Hermagoras calls issue that which enables the matter in question to be understood and to which the proofs of the parties concerned will also be directed” [45].

The school example of the method of “decisive issue” is taken from the cruel affair of the Atrides - brought to the stage first by Aeschylus in the *Eumenides* - and concerns the killing of Clytemnestra by her son Orestes, thus consummating his revenge for the killing of his father Agamemnon by his mother.

*Intentio*: 'Orestes, you killed your mother Clytemnestra' - '*fecisti*'

*Depulsio*: 'Granted, but I killed her justly' - '*iure feci*'

*Quaestio*: 'Did you kill her justly?' - '*iurene fecerit ?*'

In the case at hand, the *quaestio* thus obtained indicates to the judge and to the trial parties that the *status causae*, the nature of the dispute, is neither circumstantial (*coniectura*) nor concerns the exact definition of the crime contested (*definitio*), but relates to the legitimacy of the action, since it is then necessary to determine the *qualitas*, i.e. "the nature, the intention, the culpability of that action" [46].

In the Hermagorean system, the judicial *qualitas* - *status iuridicialis* in Roman oratory - is bipartite in *absoluta* "when the defense rests on the demonstration that the fact is honest", legitimate, not contrary to law (*qualitas facti*), and *absumptiva* "when instead the defense rests on dubious arguments, external to the fact" (*qualitas causae*) [46]. Of the four assumptive forms [47], the case of Orestes falls into the third, *translatio* or *relatio criminis*, claiming to have acted forced by the crimes of others (see below).

From this first phase it is clear that the *quaestio*, thus unveiled, indicates the tasks and limits within which the judge and the trial parties must remain. If the conflict between the contenders' theses were to stop here, the question toward which logographers and lawyers would have to commit themselves in constructing their respective persuasive discourses would be the following: «Whether the conduct of the son who kills his mother, in contravention of the customary rule incriminating matricide, is excusable».

### 4.3. Second Conflict: *Ratio* – *Infirmatio Rationis* – *Iudicatio*

The clash between the propositions of the contenders

continues instead in the *secunda conflictio*, with the declared intention of discovering, revealing, the decisive point of the dispute. To emphasize once again the essential value of the dialectical antithesis embodied in the *defensio*, the *Auctor ad Herennium* and even more Cicero make their own the oratorical scheme that begins with the reasons of the defense (*ratio defensoris*) [48], followed by the reply of the accusation (*infirmatio rationis*) [49], to conclude with the discovery of the final and decisive question of the case ("decisive issue"-*iudicatio*) [50]. The example taken from the Oresteia, though subtle in showing the different crucial question finally reached, continues as follows:

*Ratio*: 'Rightly I killed her, because she killed my father.'

*Infirmatio rationis*: 'But it was not to be you who killed your mother, nor to punish her before she was found guilty: she could be punished without your committing a crime'.

*Iudicatio*-“decisive issue”: 'Is it right that Clytemnestra should have been killed by her son without judgment, after she had killed his father?' [51].

In the Oresteian example, the defensive replies (*ratio*) bring out the relevance of another rule - here antinomian to the prohibition of matricide - as a solution to the dispute: Greek customary laws, dating back to ancestral times, imposed in fact to "avenge the killing of one's relative; in particular, they imposed on the son to avenge the death of his father by killing the murderer or his descendants, under penalty of otherwise dishonor and disqualification by the ethnic group to which he belongs" [52]. Thus, «whether it is appropriate for the son to kill the murderous mother without prior judgment, thereby complying with the customary norm that requires the son to kill the parricide».

In short, the *thema probandum vel decidendum* does not concern the fact that Clytemnestra was killed legitimately (*iure*), as she was in turn the murderer of her husband, but on the right of Orestes and not others to execute the sentence [53]. In fact, in the first case Orestes is guilty of matricide, instead his fate will be benevolent thanks to his right to execute the sentence represented scenically by the intervention of Athena who – besides guaranteeing a fair trial – will make her favorable vote prevail within the jury equally divided in the judgment.

#### 4.4. The Definition of “Decisive Issue” in Cicero’s “The Divisions of Oratory” and “On The Topics”

The meaning of the entire methodology is expressed in its essence and function by Cicero in “The divisions of oratory” (XXX, 104) [54]: “But the discrepancy and repeated collision [55] between the reason and the corroboration gives rise to an inquiry which I call “the thing being decided” [56] – a section in which it is usual to inquire what is the point at issue in the suit and what is the subject under discussion. For the first encounter between the opponents raises some wide question (*diffusam*) (...) These questions which comprise the first encounter, based on argument and counter-argument, are as I said of a wide and loose form (*lata et diffusa*); but the repeated encounter [57] that employs reasons and corroborations brings the discussion into a narrow field (*angusta disceptatio*: crucial

point of dispute)”.

In commenting on the passage, Bayer-Bayer confirm that "Cicero shows on the basis of examples how the problem, initially recognized only in a vague way, is clarified in the contrast of the debate, so that the crucial point of the case can be arrived at" [58].

The “decisive issue” is therefore the decisive question that arises from the repeated argumentative conflict between the essential point argued by the defense and that illustrated by the prosecution once identified the relevant *status causae*: it is expressed here, by the mouth of Cicero, that necessary refutatory completeness typical of the philosophical-dialectical dispute mentioned above (2.1., 3.4.) and that in the rhetorical-judicial field can be called "evidentiary insistence". The decisive question of the dispute is presented as a gnoseological result, consisting the “decisive issue” in what emerges from the exhaustive clash between the reasons of the defense and the refutations addressed to it by the prosecution, both not vitiated by sophistry.

When Cicero wanted to illustrate to his friend Trebatius - excellent jurist - what the topico-dialectical art consists of and in particular the doctrine of the “decisive issue”, he expressed himself in this way: “The dispute which arises from the *status* the Greeks call «krinomenon»; I prefer to call it, because I am writing to you, «the issue before the court» (*qua de re agitur*). The arguments by which this «issue before the court» is supported are called supports (*continentia*); they are, as it were, the foundation of the defence (*firmamenta defensionis*), for if these are removed, there is no defence” [59]. As if to say: without the tight defensive arguments, in continuous refutation of the counter-arguments of the prosecution, the defense is null and void and the case remains without grounds for dispute [60].

Note that Cicero replaces the usual Aristotelian bipartition between rhetorically technical topics and atechanical topics with the distinction between arguments extrinsic to the question and arguments drawn from the object of the controversy (calling them *loci ex rebus adfectis ad id de quo agitur*, cf. *Topica*, 8, 11, 38ff.): the intrinsic inferential schemes are mostly logical in nature and are instruments of reason through which to investigate reality in order to understand it. In fact, even if we don't know if the Ciceronian quadripartition of seat of arguments corresponds to the four Aristotelian predicables (the three seats of arguments concerning the definition, the genus and species, the proper, would render the substance of the object investigated, while the fourth seat of arguments – *ex rebus adfectis* – would concern the accident because of its mere affinity, connection, with the point in question) [61], it is sure that it is the seat of arguments related to the subject at issue to be the richest in tools from which to extract arguments.

Summing up on the “decisive issue”: if the refutation of the defensive argument (*infirmatio rationis*) is the proper matter of the accuser, while the foundation of the defense (*ratio*) is of the defender, "the «decisive issue» is the common task of both opponents" (Agost., *Rhet.* 14); indeed, “once the decisive point has been fixed, the whole plan of the entire discourse

must be directed towards it: (...) it is what both parties involved must aim for" [62].

#### 4.5. *Complex Causes: Hierarchy Among Several Status Causae and Criteria of Relevance*

"Aiming at the decisive point" is a technical expression [63]: in fact, if the controversy arises from a single accusation but the defendant defends himself in a complex way such a case will contain more questions and therefore more *status*, which necessarily correspond to as many "decisive issues" (*iudicationes*) [64]. Quintilian explains (III 11, 1-4) that in forensic matters the *quaestio* is not only concretized in the faculty to support in a persuasive way a thesis and its contrary, but it has a more precise meaning as well as double: "one consists in saying that the controversy contains many questions including all the minor ones; the other in stating the fundamental question, supreme, in which the cause concerns (...) and from which the status is born" [65]. Therefore, from the coexistence of several issues and corresponding "decisive issues" within a single case arises the problem of establishing a hierarchy between the various *status* [66], so that the one revealed as the most important has the function of guide throughout the treatment of the case because it coincides with what must be demonstrated: the most important issue determines the *status 'principalis'* - as late rhetoricians will say - or *status causae* (Quintilian), and this main status constitutes what the judge must rule on.

If the main status is what the trial parties must demonstrate during the entire judicial process - directing all their arguments to it - and is also what must be judged, the incidental status (*status incidentis*) derive from those other accessory questions that arise from the arguments of the contenders and of which the orator uses to support with more force what is the object of the judgment, so much so that they are dependent and subordinate questions. The same judicial event of Orestes is a complex case in which the only accusation of matricide directed against the accused - whose first defense, having acted according to law, constitutes the *status qualitatis principalis* - is counterbalanced by the defensive counter-accusation of Orestes, according to which his mother killed his father: on this secondary question - *status coniecturalis incidens* - the judge must pronounce incidentally in order to arrive at a correct judgment [67].

Before illustrating the criteria for establishing which is the main status among several *status*, it should be noted that the same discriminating role of defense also belongs to the defensive *rationes* argued in the second conflict. Indeed, "there are cases which, although they belong to the same *status causae*, admit multiple defensive theses (*plures rationes*) and consequently multiple points to be judged (*plures iudicationes*): this happens when the fact that has been committed or that is defended may seem just or probable for various reasons" [68].

L. Calboli Montefusco explains that "the multiple defensive theses correspond each to the specification of different *status* of the starting question thanks to the exposition of a defense instead of another [69]. The specification in various *status*

takes place through the opposition of the different defenses; the task of the rhetor is to highlight, of multiple *status*, the more useful one: also here, therefore, the problem of the main status with respect to more incidentals arises, because the defensive *ratio* that proves to be more effective will belong to the main status, while the others will be referred to incidental status". The criterion for determining the relevance of the multiple status obtained is thus placed primarily in the role of the defense: it is "the content of the strongest defense (...) that determines the choice of the principal state" [69].

What is the criterion for establishing, in turn, the greater importance of one of the more defenses is a problem to be investigated; however, it remains clear that it is from the dialectical conflict that emerges what is essential to the judgment.

#### 4.6. *"Intellection": Conclusions on the Doctrine of "Decisive Issue"*

In summarizing what has been said so far about the ancient judicial dialectic and rhetoric, the competent words that A. E. Chaignet wrote are instructive [70]: "the first task of the forensic orator is to research and determine with precision the true essence, the capital point of the cause he is about to plead (the "decisive issue")." In the ancient civilization "this research was imposed not only on the lawyer but on every orator; (...) it was, following the Stoics, the first part of eloquence, the first duty of the orator, which they called «intellection» (greek «noesis», latin «intellectio», understanding)" [71].

In the treatises of the Roman imperial age it became common to divide the task of the speaker in *intellectio*, *inventio* and *dispositio*: the doctrine of «intellection» aimed to identify the issue well formed privileging a detailed precept on the issue poorly formed and therefore without status. According to the testimony of Fortunatianus [72], Hermagoras indicates four ways - not genres (M. Zanatta, [50], 72ff.) - in which a procedural matter lacks the sufficient foundation to constitute a cause (greek "asystata"): "when from the peristatic elements something is missing that allows to establish the matter: the matter of cause is lacking; when the arguments of a trial party are the same that the other party adduces or could adduce: equalizing matter; when only one trial party is able to contribute certain elements: matter with only one part, or by bending of one part, or without color; when the judge does not find which decision to pronounce: matter without solution". Therefore, the purpose of the «intellection» is to make the procedural matter to be instructed sufficiently clear so that the speaker does not digress and the judge can well judge: this presupposes the dialectical confrontation of the trial parties and the in-depth examination of the defensive thesis, which is what Augustine says consists of the method of the "decisive issue".

The purpose of the doctrine of the "decisive issue" is then to make clear to the trial parties and the judge the real object of contention in order to facilitate the judgment. "For the individual judge, the greater the ability to grasp what does and does not belong to the thing in dispute, the further the dispute is and the clearer the judgment" [73].

The method of the "decisive issue" is capable of revealing the true decisive point of the dispute, but in order for it to guarantee true knowledge it is necessary that the arguments of the parties in both phases of the conflict are not vitiated by sophistry: above all, it is indispensable that the refutations are relevant to the object debated, otherwise one falls into fallacious refutations because inappropriate to the thing in question (3.4).

The "decisive issue" is thus "the putting to the test what the accused has brought to his defense" [74], "nothing else but the *contentio causae*", i.e. the dispute, the contention.

As we have seen (2, 3), in dialectical confrontation properly understood – especially in the judicial sphere in which the exchange of arguments is regulated – every proposition of a party is necessarily followed by a counter-proposition, or at least the possibility of reply. As emerges from Augustine's Rhetoric (12, fr. 18C Matthes), "first, he points out that the status is the first question, since in it resides «both the beginning and the gist of the question»; then – presenting the process as a gradual proceeding from an initial simple opposition of the causes put forward by the trial parties towards a real verbal clash in which the *quaestio* acts as a mediation – he notes that «in it the one and the other parties, leaving aside what he said before, assumes its position» and that «from here, to this question was imposed the name of *status*»" [75].

Once the *status* has been generated by the introductory conflict of the judgement, the argumentative clash resumes with the reasons of the defence and the accusatory refutation of them; to clarify the question debated, it is epistemologically opportune that the refutation of the defence (*infirmitio rationis*) is followed by a further defensive argumentation (*con-firmitio rationis*) as a definitive illustration of the defensive position [76].

The result is the discovery of the decisive point or points of the dispute as defined after many confusions, which aim to bring to light the true object of contention initially clear only in appearance: and it is precisely the process of finding the true object of contention – whose arrival is slow because it is made of several mutual refutations, therefore not at all constrained by rigid chronological schematics except for the bipartition *quaestio-iudicatio* – what the young Arpinate strives to define in *de Inventione* I, 18: "the point for the judge's decision is that issue which arises from the denial and tight assertion of the excuse" [77].

## 5. Elements of Aristotelian Philosophy in the Hermagorean Doctrine of the "Decisive Issue"

We owe to the study of M. Zanatta [78], a deep connoisseur of the philosophy of the Stagirite, the precise identification of a dual Aristotelian matrix rather than Stoic in the rhetoric of Hermagoras: the debt relates to the ontological notion of «homonymy in relation to the One» and the classification of *status* in *genus* and *species*.

### 5.1. "Homonymy In Relation To The One"

Zanatta takes his cue from the Quintilian passage in which the rhetorician deals with the *quaestio* in order to unravel the homonymy that gives rise, in the judicial field, to the same word [79]. Indeed, the rhetorician shows that in a first sense *quaestio* is "any point on which the trial parties disagree"; "it is the sense for which we say that the controversy presents many issues" Quintilian states and specifies that "with this meaning we embrace all minor issues". In another sense, the word indicates "the central controversy, i.e. the question on which (...) the judicial process depends and that for this reason some authors, including Hermagoras, have indicated with the simple name of «question (*quaestio*)» to mean that it is the question par excellence or the question «in its own sense (*proprie quaestio*)»" [80].

Unlike the other semantic valences that indicate in *quaestio* "its resulting from a conflict", the meaning of *propria/summa quaestio* "underlines the decisive character of the question" [80]: with this expression Hermagoras, Apollodorus and many other technographers conceive the decisiveness of the question in relation to the relevance it assumes in the formation of the judgment. In particular, Hermagoras "conceives the decisiveness of the question in a key, so to speak, intensional" [80]: in fact, unlike Theodore of Gadara, who posits a hierarchy between *quaestiones* distinguishing the "general heads" from the "special heads" linked to each other "in the way in which a species is divided into subspecies", the "questions in the proper sense" are placed in Hermagoras as "points of reference in relation to which the «minor» questions... find themselves a unity" [80]. More precisely, in order to regulate the relations between matters Hermagoras adopts "that nexus which Aristotle determines as «homonymy in relation to the one» (...) since for the Temnite matters do not relate to each other in terms of *genus*, *species* and *subspecies*. The homonymy of the term *quaestio* is not absolute, since all meanings refer to each other" [80].

The analysis carried out by the Italian Scholar of the three different meanings with which the greek word «synechon» is presented clarifies the reference to Aristotelian ontology. «Synechon» is in fact a polyvalent word that includes three different judicial elements, each of which is a part of the general concept. First, *continens*, as a Latin cast of «synechon», "is that argument which holds united in itself the others that have gradually been formulated by a trial part: the *causativum*, any other causative if the other trial subject has reiterated. Conversely, in *firmamentum* the idea of steadfastness is expressed, whereby the «synechon» is thought of as the most solid argument of the prosecution or defense. Finally, in *ratio causae* that idea of ultimacy is manifested whereby the «synechon» is by that very fact conceived as that definitive argument beyond which the trial party has no other to propose" [81].

In short, none of the three elements that form the «synechon» is to be understood as a synonym indicating the same reality, because the «synechon» is "the term in which



each of the three aforementioned determinations relates unitarily to each other" according to the Aristotelian nexus of the "homonymy in relation to the one" [81]. The «synechon» "is not a unitary notion, definable by proximate gender and specific difference," because it "has no conceptual consistency other than that of constituting the unit of reference of the [three] aforementioned relations" [81]. The Scholar clarifies that the three elements that make up the «synechon» are not synonymous either in the Aristotelian sense, because the three above-mentioned determinations would represent the species of the genus «synechon», "whence the absurdity that the genus is defined by the species, while the inverse applies" -, or in a derived sense - for example Boetian, according to whom are "polyonymous or multivocal the things that have different names but identical definition" -, because "to hold together" (*continens*) and "to be firm" (*firmamentum*) and "to be the last" (*ratio causae*) are different notions, that is they are "different names attributed to realities that do not have the same definition" [81].

In conclusion, the study of the word «synechon» is indirect evidence of an early Aristotelian matrix in Hermagorean rhetoric for the reasons stated.

### 5.2. Classification by Genus et Species; Poorly Formed Court Cases

The rhetorical doctrine of the *status* shows a further connection with the philosophy of the Stagirite in making use of the classification by genus and species. Zanatta [82] points out that the innovative hermagorean division between legal genus and rational genus "clearly follows the logic of the division by genus and species. This criterion is evident where one speaks of legal genus and rational genus as two partitions of the more general *genus statuum* (fr. 12b Matthes)". Indeed, "a careful examination of the sources leads to argue that Hermagoras articulated his doctrine of *status causae* (or *status quaestionis*) in a classification pertaining to the object and one pertaining to the type of discourse" [82]: the division of rhetorical matter into a legal and a rational genus is part of the *status causae* "according to the object". In the legal genus, Aristotelian classificatory logic finds application in that: each of the four elements that make up that genus "constitutes a species of it in the Aristotelian sense in that it is a portion generated by a difference" [83].

A negative example of Aristotelian philosophical influence is recognized by Zanatta in the Hermagorean classification of the hypotheses in which the procedural matter "lacks the foundation" to constitute a *status causae*: it is the doctrine of the "court case without status" (greek "asystaton"), that is, of causes that "do not give rise to a refutation of the defense and as such do not subsist as the object of the trial" [84].

Some scholars have considered the four hermagorean "court cases without status" to be a subspecies of the genus of "logical question" (greek "zetemata logika"), with the unacceptable result of dividing a genus with a difference constituted by a negation, "since in such a case the species would predicate the genus": "«court case without status» is an undefined name, because constituted by a negation, and as

such it cannot denote a species" [84]. Therefore, in Aristotelian terms, such a modern reconstruction according to which the "court cases without status" would be species generated by the division of a genus through a negation, involves a "gross error" that cannot be attributed to the Themnite "acquainted with the [multiple] argumentative procedures taught by the Stagirite" [84].

The "court cases without status" are not a species but instead "modes" - that is, a measure, a criterion - with which the Themnite has exhibited in a positive way the conditions of possibility for a well-formed court case.

### 5.3. Substance and Accident

Another link between Aristotle and Hermagoras highlighted by Zanatta comes from the testimony of Quintilian and Augustine [85] according to whom, respectively, Hermagoras indicated the third species of the rational genus, i.e. *qualitas* or *constitutio generalis*, with the latin expression *per accidentia*, while Theodore indicated the first species of the rational genus, i.e. *coniectura*, with the greek expression "peri ousias", i.e. «on the substance». With all evidence, this is the division between substance and accident, so relevant in Aristotelian ontology.

In particular, in the Rhetorical books the Philosopher had specified that "we deliberate only on issues that are clearly susceptible to receiving two opposing solutions" [36]. The greek expression «endechesthai echein» "is parallel to «endechesthai allos echein», with which contingent things are indicated, i.e. those «which can be otherwise», in opposition to necessary things, which instead «cannot be otherwise»" [86].

### 5.4. "Refutatory Completeness" and "Evidentiary Insistence"

To the above-mentioned links with the philosophical thought of the Stagirite, highlighted by Prof. Zanatta and resulting from an exhaustive terminological analysis of the testimonies referred to the Themnite, we can add another philosophical matrix of Aristotelian origin concerning the method of dialectical antilogy [87]. Indeed, the "refutatory completeness" preached by Plato and Aristotle (2.1) to achieve the certain knowledge (greek "episteme", science) even in the dialectical field and not only apodictic is the basis of the only rigid rule of the method of the "decisive issue": the bipartition of the judgment into two conflicts, in which the contenders have the faculty to counter-argue exhaustively.

If this were not so, and the conflict between the interventions of the trial parties would stop at the first conflict, Quintilian would be right to diminish the importance of the doctrine under consideration, stating he: "there is hardly anyone, unless he be a born fool without the least acquaintance with the practice of speaking, who does not know what is the main issue of a dispute (or as they call it the cause or central argument, *continens*) and what is the question between the parties and the point on which the judge has to decide, these three being identical" (III, 11, 24, Butler).

On the other hand, Cicero and later the Anonymous Scoliast of Hermogenes (*de Statibus*) exalt the role of the argued reply typical of the procedural conflict of all times.

Cicero, in the valuable early work imbued with the rhetorical precepts of the time, defines the "decisive issue" or "crucial point of the case" that controversial issue subsequent to the discovery of the question of the case and that arises not only from the refutation conducted by the accuser against the defense of the accused, but also from subsequent arguments that the defense considers the main, thus giving prominence to the phenomenon of dialectical antilogy as the philosophy of the time taught [88]. The Arpinate will highlight in his maturity the distinction between first and second conflict, exalting the role of the repetition of the dialectical clash in the court: in fact, a clash limited to a single exchange of jokes identifies a question merely vague and indefinite, while the repetition of counter-arguments - that "evidentiary insistence" of both sides - leads to the *summa quaestio*, i.e. "decisive issue" (*Part. or.*, 104).

Much later, the Anonymous Scholiast - in commenting on the Hermagorean definition of *στάσις* reported by Hermogenes of Tarsus - will insist on the value of dialectical conflict already in the first phase of the method: indeed, Hermagoras uses the greek verb "anti-lambano" to describe the operation of finding the decisive issue, and "with that «we understand» (antilambanometha) showed that the people [who are counted among those who dispute in the judicial process (M. Planude)] are two: that is, we pull, each on his side, in the opposite direction" [89].

## 6. Conclusion

Ancient philosophy dealt with the complexity of reality through the instrument of dialectics: by breaking down and reassembling the elements of reality through the method of dialectical refutation, humans are able to determine which of two opposing theses is the one that best corresponds to reality, i.e. truth. In order to achieve this result, a continuous refutation is necessary, which modern scholars of Aristotle call "refutatory completeness" [12].

When the subject of knowledge is not a prefixed thesis, as it is for the dialectical clash, but a dispute that asks to be understood and decided, the art of rhetoric comes into play, which concerns first of all the legal and political domain, but not only. Antiphon the rhetorician, Plato and Aristotle recommend "repeated debates" even in rhetoric, because "repeated probative instruction bring to light the object of the dispute" [24].

In the Hellenistic age is Hermagoras of Temnos to collect the legacy of classical thought by introducing a novelty that caused a stir among his contemporaries: the union of the two traditions, philosophy and rhetoric, in a single school, the rhetorical one [90] as part of "an educational program that aims to prepare students for the general practice of speech" [91]. The novelty that enabled the union of the two disciplines was precisely the creation of a formal method of the rhetorical dispute, "the decisive issue", which imposed itself on men of higher

learning and social importance. Cicero describes it in the early work *De inventione* (4.2., [77]) and illustrates its power in the mature work *Partitiones oratoriae* [54], where he "shows on the basis of examples how the problem, initially recognized only in a vague way, is clarified in the contrast of the debate, so that the crucial point of the case can be arrived at" [58].

The late rhetoricians of the Roman imperial age clarify for us what the method of the "definitive issue" consisted of: first of all, one must understand the essence of the debated question, initially clear only on superficial examination [71]. As the Anonymous Scoliast of Hermogenes of Tarsus explains, "Hermagoras defined issue as «a proposition in accordance with which we grasp the underlying act in which there is a question in reference to which the dispute arises»" [92].

Late rhetoricians constructed a taxonomy of ill-formed questions [4.6.] in order not to fall into those "refutations inappropriate to the object of contention" that Aristotle had warned against in order not to fall into the epistemological fallacy of accident and a consequent wrong decision (3.4., [32]).

The proper tool for avoiding erroneous questions and decisions is that prolonged and exhaustive refutatory conflict, that dialectical "refutatory completeness" taught by Plato and Aristotle, made his own by Hermagoras in the rhetorical doctrine of the "decisive issue", and which I propose to call "evidentiary insistence."

What the method of the "decisive issue" requires is not to stop at the first confutatory clashes intended to frame the matter in its juridical and argumentative aspects (*genus causae* and *loci*), but to continue prolongedly and exhaustively until identifying by elimination which are - of the various points relevant to the final decision - the decisive point or points of the question to which only subsequently orientate the psychagogical discourses (4).

The methodology of the "decisive issue" allows to discover the crucial knot of a controversy, often different from the one originally posed. In the well-known example of Orestes, the decisive issue does not concern the fact that Clytemnestra was killed legitimately, as she was in turn the murderer of her husband, but on the right of Orestes and not others to execute the sentence (4.3.).

In conclusion, the doctrine of the "decisive issue" fulfills the teaching that philosophy has manifested since its inception beyond the mythical intuition. Following the teaching of the philosopher E. Severino, in the relationship between human knowledge and man's action on reality, it is the myth to impose on things "a sense alien to them", since it consists in a production of sense that, like poetry, is creation of the sense of the world [93].

Philosophy, on the other hand, is a knowledge so strong as to impose itself on everything that pretends to revoke it in doubt (certain knowledge – greek "episteme", science) and considers "necessary to know the truth about the world, and this is possible by letting the things of the world speak without imposing on them a sense made by man, but letting them impose themselves for their truth. (...) *Logos* is the Greek word

that, since the beginning of the philosophical thought, names that letting things speak without imposing them an extraneous sense, but letting them, by manifesting themselves, impose themselves" [93].

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## References

- [1] Quint., *Institutio Oratoria*, 6.2.5, Butler; see also Demosthenes, *Olinth.* 3.19.
- [2] Quint., *Institutio Oratoria*, 6.2.24, Butler.
- [3] *Rhet.*, I 1, 12, 1355a21-22, Kennedy. W. M. A. Grimaldi (Aristotle, *Rhetoric 1: a commentary*, New York, Fordham University Press, 1980, 23) remembers Arist., *Eth. Eud.* I 6, 1216b31: "every man has some contribution to make to the truth".
- [4] *Rhet.*, I 1, 11, 1355a14-15, Kennedy; *logicae peritus ad rhetoricam aptior est*, cf. Grimaldi [3] 24.
- [5] E. M. Cope, *The rhetoric of Aristotle: With a commentary*, 3 voll., rev. and edited for the syndics of the University Press by John Edwin Sandys, Cambridge, 1877, I, 22. Cf. Arist., *Rhet.*, II 24.
- [6] Arist., *Rhet.*, I 1, 12, 1355a29-32 Kennedy-Cope. See below 3.3.
- [7] Arist., *Rhet.*, I 2, 7, 1356a30, Grimaldi, with slight modification.
- [8] Plato, *Phaedr.*, 265c-266c, 277b. In the present work, dialectics is understood as a method of refutation (greek "elenchos") or as an examining technique (greek "peirastike").
- [9] *De Resp.*, VII, 537C7.
- [10] *Top.*, I 2, 101a35-36, transl. R. Smith. "Aporia" means puzzle, a problem that admits two opposite solutions apparently of equal value.
- [11] *Metaph.* III 1, 995a 33-34.
- [12] The dialectical requirement of refutatory "completeness" in Aristotle is highlighted by E. Berti, *Le ragioni di Aristotele*, Roma-Bari, Laterza, 1989, 78, 127. Cf. Plato, *Parm.*, 136e1-3; *Resp.* VII, 533c-534c.
- [13] Arist., *Eth. Nic.* VII, 4, 1146b6-7.
- [14] Arist., *An. Post.* I 2, 72a12-13.
- [15] *Disputandum de omni re in contrarias partis et quicquid erit quaquam re, quod probabile videri possit, eliciendum atque dicendum.*
- [16] *De or.*, III 21, 80, Rackham. Cf. *Tusculanae disputationes*, II, 3, 9.
- [17] Cf. P. Ercole, *M. Tullio Cicerone, Il Bruto, testo riveduto ed illustrato da P. Ercole*, Torino, Loescher 1891, to illustrate the passage, transl. Hendrickson. Cf. *Orator* IV 16; *De oratore* II 38, 157; *Partitiones oratoriae* 1, 3; *Tusculanae disp.* V 25, 72.
- [18] Arist., *Metaph.* III 1, 995b 2-4, Ross.
- [19] Plato, *Soph.*, 230b4-8; *Alcib. I*, 114d8ff.
- [20] *Top.* VIII 11, 161b19ff.; *Soph. El.* VI. *Amplius* M. Mignucci, Il sillogismo aristotelico, M. Migliori, A. Fermani (eds.), Platone e Aristotele: dialettica e logica, Brescia, Morcelliana, 2008, 243-264, 255, who names the second validity clause a condition of "appropriate relevance/pertinenza adeguata" of the premises to the conclusion.
- [21] The word common to the two disciplines, philosophy and rhetoric, is the greek "pragma", the origin of which is to be found in judicial rhetoric: cf. P. Hadot, Sur divers sens du mot pragma dans la tradition philosophique grecque, in *Concepts et catégories dans la pensée antique*, P. Aubenque (ed.), Paris, Vrin, 1980, 309-320.
- [22] Quint., *Institutio oratoria*, III, XI, 16, Butler.
- [23] We read in the *Index Aristotelicus* of Bonitz, entry "diaporein": *ex quaestione in utramque partem instituta explorare*. The peripatetic teaching is made his own by Cicero in the *Orator*, XXXIII, 116.
- [24] Plato, *Laws* VI, 766e, transl. Butti de Lima with slight modification.
- [25] On the murder of Herodes, 86. Cf. P. Butti de Lima, *Platone: esercizi di filosofia per il giovane Teeteto*, Venezia, Marsilio, 2002, 140 and note 12.
- [26] Arist., *Rhet.*, I 1, 12, 1355a29-33. Grimaldi [3] 29: "the true situation".
- [27] E. M. Cope, *An introduction to Aristotle's rhetoric: with analysis notes and appendices*, Dubuque: Brown Reprint Library, 1970, London, 1867, 146.
- [28] Cf. J. Brunschwig, *Aristotele, Topiques; texte établi et traduit par Jacques Brunschwig*, vol. 1, Paris, Les belles lettres, 1967, XLI.
- [29] Arist., *Soph. El.*, XI, 171b6-7, Forster-Berti, Italics added.
- [30] Arist., *Soph. El.* XV, 174b30-32, Forster. In *Soph. El.* XII, 172b25-28 (Pickard-Cambridge) the Philosopher explains: "A rule specially appropriate for showing up a falsity is the sophistic rule that one should draw the answerer on the kind of statements against which one is well supplied with arguments: this can be done both properly and improperly, as was said before [*Top.* 5, 111b32]".
- [31] H. G. Gadamer, *Verità e metodo*, Bompiani, Milano 1983 [1960], 365.
- [32] Arist., *Soph. El.* VIII, 169b20-25, Pickard-Cambridge.
- [33] G. Grote, *Aristotle*, edited by A. Bain and G. C. Robertson, II voll., London, John Murray, Albemarle Street, 1872, 385. Italics added.
- [34] Arist., *Soph. El.* XI, 172a8ff.
- [35] Arist., *Rhet.*, I 1, 1354a1: "Rhetoric is the counterpart of dialectic"; cf. L. D. Green, *Aristotelian Rhetoric, Dialectic, and the Tradition of ντίστροφος*, *Rhetorica*, VIII, 1990, 5-27.

- [36] “None of the other arts reasons in opposite directions; dialectic and rhetoric alone do this, for both are equally concerned with opposites” (Arist., *Rhet.* I 1, 1355a33, Kennedy); “We deliberate about things contingent and probable, which appear to admit the possibility of opposite conclusions views and results” (E. M. Cope [27] 156, about Arist., *Rhet.*, I 2, 1357a4; *adde* I 4, 1359a34ff.; *amplius Eth. Nic.*, VI 3, 1139b18-35).
- [37] Arist. *Rhet.*, II 22, 1396a33-b15.
- [38] Arist., *Rhet.*, II 22, 1396a27, Cope-Jebb; in a22-23 Aristotle says: “And in like manner also, plaintiff and defendant derive their (arguments in) accusation and defence from the circumstances of the case, which they have to consider” (E. M. Cope [5] II, 227; Grimaldi, Kennedy: “relevant facts”).
- [39] Cicero, *Top.* XXI, 79, Yonge-Hubbel). The time gap between Aristotle and Cicero is filled by the Stoic school, which reduced the thirteen Aristotelian sophisms to four inconclusive arguments; cf. J. Barnes, Proof Destroyed, in M. Schofield, M. Burnyeat, J. Barnes, (Eds.), *Doubt and dogmatism. Studies in Hellenistic Epistemology*, Oxford, Clarendon Press, 161-181).
- [40] Today's epistemological debate has come to the same result: “the conception of reality requires conceptual elements that do not necessarily correspond to elements of reality” (M. Ferrari, *Categorie e a priori*, Bologna, Il Mulino, 2003, 310). About Hermagoras, cf. recently F. Woerther, *Hermagoras, Fragments et témoignages*, Textes édités, traduits et commentés par F. Woerther, Paris, Les Belles Lettres, 2012.
- [41] The main *status causae* are three: the *constitutio coniecturalis*, concerns cases in which the crime is without the identification of the culprit and therefore we proceed by conjecture. On the other hand, if the accused does not deny having committed the fact, but affirms that the fact committed does not constitute the crime of which he is accused as rubricated, there is *constitutio definitiva*. Finally, when one admits the fact and its definition, but inquires whether it was committed justly or illegitimately, one is in the *status qualitatis* (cf. *Auctor ad Herennium*, I, XIV, 24).
- [42] Cic., *de Inv.*, II, XVII, 52; see 4.4. [62].
- [43] Cf. Cic., *de Inventione*, I, XIII, 18, Yonge. Quintilian repeats here Cicero: *I. O.*, III 6, 5.
- [44] Cf. *Auctor ad Her.* I, 18; Cicero, *De inv.*, I, 13; *Top.* 93.
- [45] Quint. *I. O.* III 6, 21, Butler, with a slight modification. On the value of the second part of the definition, cf. L. Calboli Montefusco, *La dottrina degli status nella retorica greca e romana*, Hildesheim (etc.), Olms-Weidmann, 1986, 7-8; about the latin verb “intelligere” see below 4.6. About the Hermagorean definition of *status* reported by the Anonymous Scoliaist of Hermogenes, see below 5.4.
- [46] G. Curcio, *Le Opere Retoriche di M. Tullio Cicerone: studio critico*, Acireale, Tipografia dell’Etna, 1900, ristampa anastatica Roma, L’Erma di Bretschneider, 1972, 34, 35.
- [47] Admission, exclusion of responsibility, reversal of guilt and comparison between two necessary actions. The third, *relatio criminis*, is also a psychological mechanism studied today in particular by psychoanalysis and goes by the name of “projection” (“identification projective”, M. Klein).
- [48] Synonyms: greek *aition atiou*, latin *continens defensionem, firmamentum defensionis*.
- [49] *Causa, firmamentum accusationis*.
- [50] *Id de quo iudicandum est, quaestio iudicii*, and various other periphrases. In general, it should be noted that terminological variations among technographers, which are very frequent, do not invalidate but rather confirm the dialectical matrix of the methodology: see the passages listed in L. Calboli Montefusco, *La dottrina del κρινώμενον*, Athenaeum: studi periodici di letteratura e storia, Pavia, Mattei, 1972, 276-293. A detailed linguistic and conceptual analysis is conducted by M. Zanatta, *Ermagora, testimonianze e frammenti*, Milano, Unicopli 2004, 33ff. See below 5.1.
- [51] *Rectumne fuerit sine iudicio a filio Clytemestram occidi (ad Her.*, I, XVI, 26) *cum illa Orestis patrem occidisset? (de Inv.*, I, XIV, 18). Concise Quint., *I. O.*, III, 11, 4: *An oportuerit vel nocentem matrem a filio occidi*; 11: *an debuerit*.
- [52] F. Cavalla, *All’origine del diritto, al tramonto della legge*, Napoli, Jovene, 2011, 108.
- [53] The remark is of M. T. Luzzatto, in private form.
- [54] transl. Rackham, with modifications.
- [55] *Concursus* “speciatim significat progressionem pugnantium, conflictio”: E. Forcellini, *Totius latinitatis lexicon, consilio et cura Jacobi Facciolati, opera et studio Aegidii Forcellini, alumni Seminarii patavini, lucubratum*, IV voll., Patavii, typis Seminarii, apud Joannem Manfrè, 1771.
- [56] *Discepto, -as* is a compound of *capto, -as* (iterative verb of *capio*) and indicates the “trying to take by discarding,” “deciding to,” “debating” (A. Ernout, A. Meillet, *Dictionnaire étymologique de la langue latine: histoire des mots*, IV. ed., Paris, Klincksieck 2001). In Cicero, *disceptatio* is “synonymous with *disputatio*”, “nothing but *contentio causae*” (B. Riposati, *Studi sui ‘Topica’ di Cicerone*; Milano, Vita e pensiero, 1947, 179), and is therefore synonymous with *iudicatio*.
- [57] *Contentio* is here *conflictatio et quasi concursus*.
- [58] K. und G. Bayer, *M. Tullius Cicero, Partitiones oratoriae, Rhetorik in Frage und Antwort*, Lateinisch und deutsch, Herausgegeben, übersetzt und erläutert von K. und G. Bayer, Wissenschaftliche buchgesellschaft, Darmstadt, 1994 “Cicero führt anhand von Beispielen vor, wie sich das zunächst nur verschwommen erkannte Problem in der Auseinandersetzung klärt, so dass man es auf den Punkt bringen kann: *rationum et firmamentorum contentio adducit in angustam disceptationem*”.
- [59] Cicero, *Top.* XXV, 95, transl Hubbel-Reinhardt, with modifications. In short, the *conflictio causarum* generates the *status*, and the progression of the contradictory generates the “decisive issue”: therefore this “descends” from the *status*, being posterior to it.
- [60] *Id de quo agitur* is an expression borrowed from the *intentio* of the Roman process by formulas, that is the ordinary judicial procedure from the 2nd century B. C. to the 3rd century A. D.: through the formula drafted in front of the praetor, the reference to the thing in dispute has the purpose of limiting the judgement of the private judge to the legal relationship or to the material thing to which the litigants wanted to refer arguing before the magistrate (cf. P. Voci, *Manuale di diritto romano*, Milano, Giuffrè, 1984, reprint 1998, 440, nt. 33).
- [61] Cf. B. Riposati [56], 31ff., 89ff. *Contra* S. Rubinelli (*Ars Topica. The Classical Technique of Constructing Arguments from Aristotle to Cicero*, Riedel, Springer 2009, 128): “From the way Cicero treats the *loci*, it does not appear that he was aware of the fact that Aristotle’s *topoi*, as presented in the *Topics*, focus on the subject-predicate structure of propositions”.

- [62] *Ad Her.*, I XVI, 26, 25, trad. Calboli; *adde* Cicero, *de Inv.*, II, 52.
- [63] Instead, Quintilian merely considers it an exhortative expression (III 11, 26). On the aversion of the Latin rhetorician towards philosophy cf. M. Winterbottom (introduzione a Quintiliano, *La formazione dell'oratore*, vol. I, a cura di S. Corsi, Milano, Rizzoli 1997, 16, 24-25).
- [64] Quintilian warns that it is a mistake to believe that in a case the *quaestio* belongs to one *status* and the *iudicatio* to another *status* (III 11, 15-16; cf. L. Calboli Montefusco [45], 59). Most cases are composed of several issues, and within the same *status* there are several defensive arguments, so it is necessary to determine which, of the several *rationes*, is the main one (*hoc est continens, firmamentum defensionis*) and therefore which is the resulting *iudicatio*. Cf. Cicero, *Part. orat.* 103.
- [65] Quintilian, III, 6, 6-8, Butler: "But this trivial mistake has given rise to a very serious error in the minds of those who have not understood what was meant: for on reading that the essential *status* was the first conflict, they immediately concluded that the *status* was always to be taken from the first question, which is a grave mistake. (...) 8 Of these questions it is often the most trivial which occupies the first place".
- [66] Lawsuits based on multiple distinct allegations do not pose problems of hierarchy among multiple *status*, since they are independent and not subordinate to each other: "since they correspond to the various *quaestiones* provoked by the multiple allegations, they all have the same importance" (L. Calboli Montefusco, *Status principales e status incidentes* nella dottrina retorica antica, Athenaeum, studi periodici di letteratura e storia, LXI (1983), 534-545, Pavia, Mattei, 537, 540; Eadem [45], 56).
- [67] Cf. Quintilian, III, 11, 20; Cicero, *de Inv.*, II, XXVI, 78ff.
- [68] Cicero, *de Inventione*, II, 63; cf. Calboli Montefusco [66], 539; Ead. [45], 54. In *de Inv.*, II, 62-64 Cicero exemplifies the method of the "decisive issue" by showing how *iudicatio* changes as defenses change, and he takes his cue from a civil rather than criminal dispute of a hereditary nature similar to the famous *causa Curiana* (cf. Cic. *ivi*, II 122-3; *de Orat.*, II 139-141).
- [69] L. Calboli Montefusco [66], 539ff.; [45], 54ff.; adapted quotation.
- [70] A. E. Chaignet, *La rhétorique et son histoire*, Frankfurt-Main, Minerva 1982, reprint of Paris, 1888, 320 and note 1.
- [71] On the rhetorical doctrine of *intellectio* see P. R. Diaz y Diaz, *La posición de la 'intellectio' en el sistema clásico*, Humanitas (Coimbra), LI [1998], 61-85; with particular regard to Sulpicius Vittore see Id., 'Intellectio', 'iudicium', 'consilium' y 'officia oratoris' en el sistema retórico de Sulpicio Victor, Humanitas (Coimbra), LII [2000], 123-154.
- [72] *Ars rhetorica* 1, 2, fr. 19a Matthes; cf. L. Calboli Montefusco [45], 12-28.
- [73] Arist., *Rhet.* III, 1414a12ss., transl. P. Butti de Lima, *La delimitazione della parola nei tribunali ateniesi*, *Rhetorica*, 1997, 2, 159-176, 176, with slight modification.
- [74] Augustine, *De rhet.*, 14. Cf. Riposati [56], 179.
- [75] M. Zanatta, Ermagora, testimonianze e frammenti, Milano, Unicopli 2004, 57.
- [76] In the judicial domain, the correspondence between dialectical "refutatory completeness" and rhetorical "evidentiary insistence" is certain.
- [77] Cf. M. Pegorari, Cicerone, *de Inventione*, 1.18: *Iudicatio est, quae ex infirmatione et confirmatione rationis nascitur controversia*, *Rhetorica*, 2018, Vol. XXXVI, Issue 1, 1-23.
- [78] M. Zanatta, Ermagora, testimonianze e frammenti, Milano, Unicopli 2004, 7-24.
- [79] Quint., III, 11, 1-4, fr. 18a Matthes. Cf. M. Zanatta [50], 33ff.
- [80] M. Zanatta, Ermagora, testimonianze e frammenti, Milano, Unicopli 2004, 40-41.
- [81] M. Zanatta, Ermagora, testimonianze e frammenti, Milano, Unicopli 2004, 53.
- [82] M. Zanatta, Ermagora, testimonianze e frammenti, Milano, Unicopli 2004, 54-61.
- [83] For example, "*leges contrariae* defines the legal *quaestio* (genus) that concerns the contrast, true or apparent, between two laws (specific difference), since 'it seems that two or more laws are in disagreement with each other' (fr. 20c M)": M. Zanatta, [50], 62. The four elements of the legal genus are: *scriptum et sententia, leges contrariae, ambiguitas, conlectio*.
- [84] M. Zanatta, Ermagora, testimonianze e frammenti, Milano, Unicopli 2004, 71-77.
- [85] M. Zanatta, Ermagora, testimonianze e frammenti, Milano, Unicopli 2004, 64; Quintilian, *I. O.*, III, 6, 56; fr. 13b Matthes; Augustine, *Rhet.* 9; fr. 13c M.
- [86] M. Zanatta, Aristotele, *Retorica e Poetica*, a cura di M. Zanatta, Torino, Utet, 2006, 150 nt. 21; Arist., *Rhet.* I 2, 1357 a4-5, Dufour. *Amplius Eth. Nic.*, VI 3, 1139b18-35.
- [87] "After the studies of G. Thiele and D. Matthes, Hermagoras is plausibly linked to Aristotelianism, with an important correction from the earlier Stoic thesis": M. T. Luzzatto, *L'oratoria, la retorica e la critica letteraria dalle origini ad Ermogene*, in "Da Omero agli Alessandrini, problemi e figure della letteratura greca", a cura di Franco Montanari, Roma, La Nuova Italia Scientifica, 1988, 223, 226ff. Cf. F. Woerther, *La materia de la rhétorique d'après Hermagoras de Temnos*, *Greek, Roman, and Byzantine Studies*, 51, 2011, 435-460.
- [88] "As the Neo-Academics had done, Cicero adopts the method of discussing the pros and cons on each issue" (G. Reale, *Il pensiero antico*, Milano, Vita e Pensiero, 2001, 370). On the influence of the "fourth Academy", led by Philo of Larissa, on the philosophical thought of Cicero, cf. C. Brittain, *Philo of Larissa, the last of the academic sceptics*, Oxford University Press, 2001, 296, 328ff.
- [89] Incert. Auct. in Hermog. *Stat.*, *Rhet. Gr.* VII 173, 9-13 Walz, Matthes 10c, transl. Zanatta [50], 106. The "antilogical implications of Hermagoras' antilambanomete" made explicit by the Anonymous are considered by M. Heath: *The substructure of stasis-theory from Hermagoras to Hermogenes*, *Classical Quarterly*, 44 (1994), 114-129 (free download at [www.core.ac.uk](http://www.core.ac.uk), 4 note 9): "For this commentator *stasis* is not the *zêtêma*, but produces it (...) *Rhet. Gr.* VII 172, 2-4".
- [90] M. T. Luzzatto, Ermagora di Temno e la "tesi", in *La cultura ellenistica. L'opera letteraria e l'esegesi antica*. Atti del Convegno COFIN 2001, Università di Roma Tor Vergata, a cura di R. Pretagostini ed E. Dettori, Roma, Quasar, 2004, 245-259, 255ff.

- [91] M. Patillon – G. Bolognesi, Aelius Théon, *Progymnasmata*, Texte établi et traduit par M. Patillon avec l'assistance, pour l'Arménien, de G. Bolognesi, Paris, Les Belles Lettres, LXXXIV. Matthes, transl. M. Heath: *Hermogenes, On Issues, Strategies of Argument in Later Greek Rhetoric*, Oxford, Clarendon Press, 1995, 76.
- [92] Incert. Auct. in Hermog. Stat., *Rhet. Gr.* XIV 329, 10 Rabe, 10b
- [93] E. Severino, *La filosofia dai Greci al nostro tempo: La filosofia antica e medioevale*, Milano, Rizzoli, 1996, 37.