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AN EXEGETICAL AND CRITICAL NOTE ON CIC. *INV.* 1, 10

1. Ancient (and modern) explanations of Cic. *Inv.* 1, 10

Cicero, in the first book of the treatise *De inventione*, explains the concept of *constitutio* (στάσις)¹ in a passage which I quote from Stroebel’s edition:

Cic. *Inv.* 1, 10 (=Hermag. frg. 13a Matthes) *omnis res, quae habet in se positam in dictione ac disceptatione aliquam controversiam, aut facti aut nominis aut generis aut actionis continet quaestionem. Eam igitur quaestionem, ex qua causa nascitur, constitutionem appellamus*².

In the most recent critical edition of this work, Achard explains *dictio* and *disceptatio* arguing that “Cicéron distingue là les discours du genre démonstratif (*in dictione*) et ceux du genre délibératif et du genre judiciaire (*in disceptatione*)”³. This interpretation had already been endorsed by Marius Victorinus (among other possible explanations) in his commentary on this treatise:

Mar. Victorin. *Rhet.* 1, 8 p. 179, 35–40 Halm *recte ‘in dictione ac disceptatione’; sunt enim multae controversiae non dictione, ut opificum. Verum quod ait ‘quae habet in se positam in dictione ac disceptatione ali-*

¹ The most comprehensive monograph on the subject is the one written by Calboli Montefusco (1986). A very learned introduction to the problems of the *inventio* (and, therefore, to the *status*) has recently been published by Calboli (2009). In these two works a rich bibliography on the subject can be found.

² Stroebel (1915) 9.

³ Achard (1994) 65, n. 30. This view is followed by Greco (1998) 85 who translates (or better, paraphrases): “ogni fatto che è legato a qualche controversia del genere dimostrativo o deliberativo e giudiziale contiene una questione a proposito o d’un fatto o d’un nome o della natura d’un fatto o dell’azione giudiziaria”. This interpretation of *dictio* and *disceptatio*, according to which the *genera causarum* are pointed out in *Inv.* 1, 10 as the field of the *constitutiones* (= *status*), implies a conflation of Aristotelian and Hermagorean doctrine. This sort of contamination indeed took place at a very early stage of the rhetorical tradition to which Cicero’s main source appertains, and precisely in the so-called “griechisch-rhodische Bearbeitung” of Hermagoras’ *Tékhnē* (cf. Matthes 1958, 98–99). Leaving aside some polemical attacks on Hermagoras regarding the thesis (cf. Cic. *Inv.* 1, 8), the main difference between this *Bearbeitung* and the original work of the rhetorician of Temnos was the introduction of the three Aristotelian εἶδη (συμβουλευτικόν, ἐπιδεικτικόν, δικανικόν) in the Hermagorean system (a clear example of this substitution in the field of the *status* can be found in Cic. *Inv.* 2, 12; on the three Aristotelian *genera* as the division of the *materia artis*, against Hermagoras, see Cic. *Inv.* 1, 7 and 1, 9). This innovation implied that the three Aristotelian εἶδη superseded the Hermagorean division of the πολιτικὰ ζητήματα into thesis and hypothesis, and also led to a misunderstanding of the ποιότης (cf. Cic. *Inv.* 1, 12–14; see Calboli Montefusco 1986, 96–99; Adamietz 1966, 137; Thiele 1893, 54–55).

quam controversiam, dictio potest esse demonstrativa materia, disceptatio vero deliberativa et iudicialis. Deinde dictio potest esse narratio, ut ipse ait: 'dicendo explananda sunt omnia'; disceptatio vero quaestiones; ibi enim totius controversiae pugna versatur.

This identification of *dictio* with the *materia demonstrativa* and *disceptatio* with the *materia deliberativa* and *iudicialis* has been so successful that it has altered the textual tradition. In fact, in the vulgate of *De inventione*, instead of the conjunction *ac*, the disjunction *aut* was present, which can also be read in ancient editions of this work, as e.g. those of Burman (Leiden 1761), Schütz (Leipzig 1804) and Lindemann (Leipzig 1828); this reading, moreover, is to be found, as a hidden conjecture, in some modern translations of the work, for instance in the Spanish one by Núñez⁴.

There is also a second elucidation of this passage, endorsed by Grillius and followed by Martin:

Grill. *Rhet.* p. 52, 31–46 Jakobi (p. 50, 5–18 Martin) *ille enim ait 'omnis res, quae habet in se <positam in> accusatione et defensione et disceptatione aliquam controversiam'. Unam partem subduxit, nam dicendo 'in dictione' et accusationem et defensionem complexus est. Simul ponendo coniunctivam particulam, id est 'ac', causativam iunxit disceptationem, quae ideo dicta est disceptatio, quia, si non fuerit <discenda causa>, disceptatio esse non possit. A discendo enim disceptationem dictam poeta probat [Verg. A. 6, 433]: 'vitasque et crimina discit'. Ut et in accusatore et defensore est controversia, ita et <in> ipsa disceptatione controversia est. Namque ita definitur: controversia est, quod contrarietatem recipiat, et iudex dum cogitat, absolvat an condemnet, controversia est. Nam obicit ille 'fecisti', respondet 'non feci': ecce controversia. Iudex autem secum quaerit 'fecit necne?' Ecce hic controversias.*

As we can see, according to Grillius, *dictio* embraces in *Inventio* 1, 10 the prosecution (*intentio*, 'fecisti') and the defense (*depulsio*, 'non feci'). Regarding *disceptatio*, Grillius connects it with the judge, and further on with the *quaestio* ('fecit necne?')⁵; furthermore, he exploits this explanation of *Inventio* 1, 10 in his division of the ἀσύστατα⁶ into μονομερές, ἀπερίστατον, πᾶν ἄδοξον, ἀπίθανον and ἀδύνατον, on one hand (concerning the *dictio*), and ἰσάζον, ἀντιστρέφον, ἄπορον, on the other (concerning the *disceptatio*)⁷. Martin, taking his cue from Grillius, sees in *Inventio* 1, 10 in *dictione ac dis-*

⁴ S. Núñez (1997) 97–98 gives: "todo lo que implica una controversia que deba resolverse mediante un discurso o un debate plantea una cuestión relativa a un hecho, una palabra, una calificación o un procedimiento jurídico".

⁵ The example given by Grillius is of doubtful utility: it is well known that the *quaestiones coniecturales* have no *iudicatio*, but only *quaestio*. If Grillius had chosen another kind of *status*, we would know if he really identifies the *disceptatio* with the *quaestio* or with the *iudicatio*. The latter is more probable, taking into account that Sopater (*Rhet. Gr.* V p. 69, 30–70, 1 Walz) writes: ἔφαμεν δὲ, ὅτι ἐν τῶν τριῶν μὴ προσόν, αἴτιον, συνέχον, κρινόμενον ποιεῖ τὰ ἀσύστατα: cf. Calboli Montefusco (1979) 270–271.

⁶ On the ἀσύστατα, see Volkmann (1885) 92–108; Martin (1927) 117–120; (1974) 18–22; Calboli Montefusco (1979) 270–286; (1986) 12–28.

⁷ Grill. *Rhet.* p. 56, 158–163 Jakobi (p. 54, 15–19 Martin) *nam asystaton thema aut dictionem in se habet, sed disceptatione eget, aut dictionem non habet. Dictionem non habent quinque: μονομερές, ἀπερίστατον, valde inonestum, incredibile, impossibile. Disceptationem non habent tres: simile, retorquens, inops* (cf. Martin 1927, 117–118: "da Cicero nach Grillius durch 'in dictione' auf *intentio* und *depulsio* zielt, beziehen sich die

ceptatione not only a “Teilung nach Personen”, but also “[die] Voraussetzungen [...] die Cicero für das Zustandekommen eines *status* angegeben hat”⁸, and therefore identifies in this passage an allusion to the ἀσύστατα. Nevertheless, we think that *dictio* and *disceptatio* in *Inv.* 1, 10 cannot be seen as an allusion either to the Aristotelian *genera*, or to a division of the ἀσύστατα; indeed, in our opinion these two terms have in this passage quite different meanings.

2. Cic. *Inv.* 1, 8 and the Hermagorean definition of *thesis* and *hypothesis*

The clue to understanding *Inv.* 1, 10 is another passage from *De inventione*, within the long section (1, 7–8) in which Cicero, following Aristotle, engages in controversy against the Hermagorean division of the *materia artis* into *θέσις* (*quaestio*) and *ὑπόθεσις* (*causa*), giving the definition of both concepts:

Cic. *Inv.* 1, 8 (= Hermag. frg. 6a Matthes) *Hermagoras [...] qui oratoris materiam in causam et in quaestionem dividat, causam esse dicat rem, quae habeat in se controversiam in dicendo positam cum personarum certarum interpositione; [...] quaestionem autem eam appellat, quae habeat in se controversiam in dicendo positam sine certarum personarum interpositione.*

There is, as we can see, a strong parallel between 1, 10 (*res, quae habet in se positam in dictione ac disceptatione aliquam controversiam*) and 1, 8 (*rem, quae habeat in se controversiam in dicendo positam*)⁹. In the latter passage Cicero reports that, according to Hermagoras, *thesis* and *hypothesis* – that is, the whole field of Rhetoric (*materia oratoris*)¹⁰ – are a subject (*res*) involving a dispute (*controversia*) which is dealt with in the rhetorical speech (*in dicendo*) and determined or not by the mention of specific individuals (*cum personarum certarum interpositione / sine certarum personarum interpositione*)¹¹. The meaning of *dicendo* in this passage, as emphasized in our para-

ersten fünf auf Kläger und Angeklagten; also liegt auch hier die vorhergennante Dreiteilung, *a parte accusatoris, a parte rei, a parte iudicis* zugrunde, nur daß die Rücksicht auf Cicero die Vereinigung der beiden ersten zu einer einzigen Gruppe hervorgerufen hat”). On Grillius’ division of the ἀσύστατα there is a recent contribution by Calboli Montefusco (2007) 59–61.

⁸ Martin (1974) 21.

⁹ This parallel has recently been emphasized by Zanatta (2004) 107, n. 21.

¹⁰ On *thesis* and *hypothesis*, see Volkmann (1885) 34–37; Martin (1974) 15–18; Calboli Montefusco (1986) 42–50.

¹¹ Cicero alludes here to the so-called *circumstantia* or περιστάσεις; they were the specific, determined elements lacking in the thesis but present in the hypothesis (see Volkmann 1885, 36–37; Martin 1974, 17–18; Calboli Montefusco 1986, 34 n. 17). From Cicero’s definition of thesis and hypothesis in *Inv.* 1, 8, Barwick (1963) 52 deduced that, according to Hermagoras, the μορῶν περιστάσεων were only the *personae* (cf. Granatelli 1983, 208–209); nevertheless, according to Calboli (1965) 24–25; (1969) 232; and Calboli Montefusco (1986) 34 n. 17, Barwick is not right in reducing to only one element the μορῶν περιστάσεων, commonly attributed to the rhetorician of Temnos as being seven: *persona, res, causa, tempus, locus, modus, materia* (cf. Strilker 1886, 27–31); see Gutiérrez (2010) 158–159, where further bibliography can be found.

phrase, is very narrow, and shows the particular use of this verb in Cicero's rhetorical works¹².

Even if only Cicero expressly ascribes a definition of *thesis* and *hypothesis* to Hermagoras, there are similar ones in "Hermagorean" authors like Augustinus (*Rhet.* 5 p. 140, 1–3 Halm), Sulpicius Victor (*Rhet.* 2 p. 314, 9–11 Halm) and Theon (*Rh. Gr.* II p. 120, 13–15 Spengel). Taking the last as a basis, Striller reconstructed the Hermagorean definition of θέσις and υπόθεσις in the following terms¹³:

θέσις ἐστὶ πρᾶγμα ἀμφισβήτησιν λογικὴν ἔχον (vel ἐπιδεχόμενον) ἄνευ ὀρισμένων προσώπων περιστάσεως – υπόθεσις ἐστὶ πρᾶγμα ἀμφισβήτησιν λογικὴν ἔχον (vel ἐπιδεχόμενον) μεθ' ὀρισμένων προσώπων περιστάσεως.

Parallel to the Ciceronian *quaestionem in dicendo positam*, we read here ἀμφισβήτησιν λογικὴν; according to Thiele, "[Cicero hat] λογικὴν richtiger mit *dicendo positam* wiedergegeben als Augustin mit *rationalem*"¹⁴; in fact, both Augustine and Sulpicius Victor give the Hermagorean definition of thesis and hypothesis, but with an astonishing difference: they translate λογικός as *rationalis*¹⁵:

August. *Rhet.* 5 p. 140, 1–3 Halm *thesis est res, quae admittit rationalem considerationem sine definitione personae: hypothesis est seu controversia, ut improprio nomine utamur, res, quae admittit rationalem contentionem cum definitione personae.*

Sulp. Vict. *Rhet.* 2 p. 314, 9–11 Halm *thesis est, ut quidam volunt, res rationalem disputationem recipiens sine definitarum personarum circumstantia: hypothesis res rationalem disputationem recipiens cum definitarum personarum circumstantia.*

Thiele justifies the translation of λογικός present in *Inu.* 1, 8 by quoting Dion. Hal. *Comp.* 11, 22 and Diog. Laert. 5, 85, two passages in which this adjective is linked with λόγος with the meaning "verbal expression or utterance" (see LSJ 1058 § VI s. v. "λόγος"; 1056 § I s. v. λογικός)¹⁶. The rendering for λογικός present in *Inu.* 1, 8 is in

¹² In fact, Ernesti (1797) 123 s. v. "dicere" already stated that "*hoc verbo ita accurate et caute utitur Cicero in omnibus fere scriptis rhetoricis, ut proprium esse oratoris solius declarare voluisse videatur*", an assertion which is also found in ThL V. 1 970, 31.

¹³ Striller (1886) 28 (*aliter* G. Jaeneke 1904, 105). Both reconstructions are based on the definition of thesis offered by Theon (*Rh. Gr.* II p. 120, 13–15 Spengel), in which nevertheless λογική (following August. *Rhet.* 5 p. 140, 1–3 Halm and Sulp. Vict. *Rhet.* 2 p. 314, 9–11 Halm) has to be corrected in λογική<v> and consequently referred not to ἐπίσκεψις, but to ἀμφισβήτησιν (cf. Thiele 1893, 28; according to Throm 1932, 106 "die Korrektur [λογική<v>] ... ist sachlich vielleicht richtiger [als λογική], aber nicht notwendig"). This is Theon's definition, as corrected by Jaeneke: θέσις ἐστὶν ἐπίσκεψις λογική<v> ἀμφισβήτησιν ἐπιδεχομένη ἄνευ προσώπων ὀρισμένων [καὶ πάσης] περιστάσεως.

¹⁴ Thiele (1893) 28.

¹⁵ On the rendering of λογικός as *rationalis*, cf. August. *Rhet.* 9 p. 142, 15–18 Halm *rationales quaestiones sunt, quas Hermagoras logicas vocat. Melius enim putant sic eas cognominari quam verbales, quia logicae non ex verbi, sed ex rationis significatione appellatae sunt a technicis, cum alioquin λόγος interdum verbum significet, interdum rationem.*

¹⁶ Thiele (1893) 28.

fact possible; but also possible is the translation in Augustine and Sulpicius Victor, in which the adjective appears this time linked with λόγος with the meaning “thinking, reasoning” (cf. LSJ 1058 § IV. 1 s.v. “λόγος”), and therefore “dialectical, argumentative” (cf. LSJ 1056 § I. 2 s.v. “λογικός”)¹⁷. In fact, each translation underlines a different aspect of the τέχνη ῥητορική: the noun *dictio*, on one hand, alludes to the *elocutio*; the adjective *rationalis*, on the other, points to the *inventio*. Regarding the *elocutio*, it is quite difficult, in our opinion, to accept that Hermagoras is aiming here to give such weight to the stylistic part of Rhetoric, as far as “das Grundprinzip der Lehre des Hermagoras stand [...] mit einer gesunden künstlerischen Auffassung der Beredsamkeit in direktem Widerspruch”¹⁸; moreover, if Hermagoras is dealing with the *materia artis*, it seems more reasonable to see a link between λογικός / *rationalis* and the *inventio*, because this part of Rhetoric is concerned with the *materia artis*. In fact, to say that the *materia* of Rhetoric is those subjects whose controversial aspects can be dealt with in rhetorical speech (*dictio*) is redundant; conversely, to say that Rhetoric can only have as *materia* those subjects which can produce dialectical controversy, is an assertion that has profound consequences. In short, we think that Augustine’s and Sulpicius Victor’s rendering of λογικός as *rationalis* is closer to Hermagoras’ doctrine than that given by Cicero in *Inv.* 1, 8. Such an affirmation can be surprising, because – quoting Barwick’s words – “das ist höchst merkwürdig und berechtigt zu der Frage, wie man im ausgehenden Altertum dazu kam, auf ein rhetorisches System zurückzugreifen, das vor mehr als 500 Jahren entstanden war”¹⁹. Nevertheless, according to Barwick, it is sure that Augustine, “wenn [...] er auch im wesentlichen das Diktat seines Lehrers wiedergibt, d.h. die mit allerlei Zusätzen versehene Lehre des Hermagoras, so ist doch die Möglichkeit nicht ausgeschlossen, daß er daneben auch eine lateinische Bearbeitung des Hermagoras gekannt hat”²⁰. This ‘Bearbeitung’ was, of course, different from that one (or those ones) used by the young Cicero: and, in fact, following Reuter, we can suppose the existence in Late Antiquity of a Latin adaptation of Hermagoras’ *Tékhnē* which was different from those known to Cicero and Quintilian (and also closer in some points to the Greek original), and also influenced, direct or indirectly, Fortunatianus, Julius Victor, Martianus Capella and Sulpicius Victor²¹.

Let us now return to *Inv.* 1, 10. As already stated, *Inv.* 1, 10 *omnis res, quae habet in se positam in dictione ac disceptatione aliquam controversiam* is a parallel of *Inv.* 1, 8 *rem, quae habeat in se controversiam in dicendo positam*. Cicero’s source (which

¹⁷ We may add that, according to Throm (1932) 106 n. 1, the meaning of λογικός in Theon (*Rh. Gr.* II p. 120, 13–15 Spengel) is “rational”: perhaps this is too wide, and for this reason we prefer “dialectical, argumentative”. On the various meanings of λόγος and its philosophical usage, there is a useful article by Cassin *et al.* (2004).

¹⁸ Thiele (1893) 26–27.

¹⁹ Barwick (1961) 97.

²⁰ Barwick (1961) 103.

²¹ Reuter (1893) 133.

surely goes back to Hermagoras) certainly aims to point out, with this sort of quotation, that the *materia artis* (that is, every subject susceptible of raising an ἀμφισβήτησις λογική) may – but not necessarily shall – produce a status²². Nevertheless, as we can see, in 1, 10 the alleged parallel to 1, 8 is not literal: Cicero (or his source) introduces *disceptatio* side by side with *dictio*, not only modifying (or at least making clear) the meaning of the latter, but also bringing it nearer to the rendering of the Greek λογικός present in Augustine and Sulpicius Victor. The idea that *dictio* and *disceptatio* translate the Greek λογικός by a sort of hendiadys (“in a speech involving debate” or “in a speech for the purpose of debating”) can be argued by pointing out that both terms are connected by *ac*, which implies (unlike *et*) a strong union between the terms that it connects²³. This interpretation is encouraged by *Clu.* 79 and *De Or.* 2, 291, in which the iunctura *disceptatio dicendi* is present²⁴, and also by other instances in which Cicero, aiming to render the polysemy of this adjective, translates the Greek λογικός by a periphrasis containing two terms connected by *ac* (*Fin.* 1, 22 *in altera philosophiae parte, quae est quaerendi ac disserendi, quae λογική dicitur*) or by *et* (*Acad.* 1, 30 *tertia ... philosophiae pars, quae erat in ratione et in disserendo*), or by a substantive modified by a genitive (as in *disceptatio dicendi: Fat.* 1 λογική *quam rationem disserendi voco*)²⁵.

For all these reasons, it is difficult to accept Achard’s (and Victorinus’) interpretation of *dictio* and *disceptatio* as denoting respectively the *genus demonstrativum* and the *genus iudiciale* and *deliberativum*; in fact, leaving aside that *dictio* (“utterance”) cannot be peculiar only to the *genus demonstrativum*, and *disceptatio* (“debate”) only to the *genus deliberativum* and *genus iudiciale*, it is not easy to understand why Cicero, aiming to say that a *status* is present in all the three Aristotelian *genera*

²² We shall explain this point later, in section 3.

²³ It is clear that *ac/atque* and *-que* have an intensive value, in contrast to *et*. Regarding the difference between *ac/atque* and *-que*, Krebs-Schmalz (1905) 61 (s. v. “ac”) write: “die Bedeutung von *ac* betreffend, ist bekannt, dass es in Gegensatz zu *et* und *-que* etwas Wichtigeres, Auffallendes hervorhebt”. This view is also held by Kühner-Stegmann (1955) 16 § 153. 2 “denn beide [*atque/ac* und *-que*] werden zur Verbindung innerlich zusammengehöriger Begriffe oder Gedanken zu einem Ganzen gebraucht; aber *atque* drückt diese Verbindung nicht nur nachdrücklicher als *-que* aus, sondern bezeichnet zugleich auch eine Gleichstellung der verbundenen Begriffe oder Gedanken”. Nevertheless, Rubio (1976) 183, following Cosseriu, states that “en una primera oposición *et*, como término negativo, se opone al complejo (*ac/-que*), como término positivo; y, dentro del término positivo se establece una segunda oposición en la que *ac* es término negativo frente al positivo *-que*”; therefore, Rubio gives to *et* the value “adición”; to *ac*, “adición + unidad”; to *-que*, “adición + unidad + equivalencia” (cf. Calboli 1983, 134). The presence in *ac* of the value “unity”, but not of that of “equivalence” encourages, in our opinion, the hypothesis of a hendiadys.

²⁴ *Clu.* 79 C. *Iunium [...] iniectum esse memini, et illum hominem aedilicium iam praetorem opinionibus omnium constitutum non disceptatione dicendi sed clamore hominum de foro atque adeo de civitate esse sublatum. De Or.* 2, 291 *nulla enim fere potest res in dicendi disceptationem aut controversiam vocari, quae non habeat utrumque.*

²⁵ These examples are quoted by Cassin *et al.* (2004) 735. Here the authors also point out a similar method for translating Anaxagoras’ διακόσμησις in *Nat. D.* 1, 26 *Anaxagoras [...] primus omnium rerum discriptionem et modum mentis infinitae vi ac ratione dissignari et confici voluit.*

(as Achard and Victorinus suppose), should not have preferred the most regular terms for them (like in *Inv.* 2, 12)²⁶, instead of such an obscure expression like *in dictione ac disceptatione*. Regarding Martin's (and Victorinus') elucidation, we may say that the connection of *dictio* and *disceptatio* with the ἀσύστατα is more than doubtful, first of all because such doctrine is absent from Cicero's rhetorical works²⁷. Furthermore, if Cicero knew this doctrine, the source would have been Hermagoras; in any case, Grillius' division of the ἀσύστατα cannot be applied to the rhetorician of Temnos, who only knew four of them (ἀντίστρεφον, ἀδύνατον, ἀπίθανον and ἄδοξον), among which it seems impossible to make a clear distinction between ἀσύστατα *a parte iudicis* and ἀσύστατα *a parte accusatoris / a parte rei*²⁸. Finally, we may say that, although Martin is right about the generic link between *dictio* and the speakers, that between *disceptatio* and the judge is not so clear: according to the ThL (V. 1 1290, 35–1292, 68 s.v.), this word in Cicero is always related to the plaintiffs, not to the judge (a subsequent semantic development, from Livy onwards: cf. *ibid.* 1290, 78).

The reason for the contrast between *Inv.* 1, 8 and 1, 10 in the translation of the same Greek expression is not clear, but it can be explained in many ways, all of them uncertain: perhaps this difference was present in the same main source; or perhaps Cicero followed a different source for each of those sections. The only thing that seems almost clear is that the young Cicero very probably did not read Hermagoras' original work, even if he criticizes his style in *Inv.* 1, 8²⁹.

3. The problem of the *quaestiones legales*

Even if we think that the term λογικός present in Hermagoras' definition of thesis and hypothesis has to be understood in the way which Augustine and Sulpicius did (and not like Cicero in *Inv.* 1, 8), we admit that both interpretations are doubtful. The difficulty resides in the name given by Hermagoras to those *quaestiones* which are widely known in Latin as *quaestiones rationales*. According to the widespread reconstruction of Hermagoras' *Tékhnē*, the ζητήματα ὠρισμένα (ὑποθέσεις) were divided into a γένος λογικόν (with four στάσεις: στοχασμός, ὄρος, ποιότης, μετάληψις) and a γένος νομικόν (with four ζητήματα: ῥητὸν καὶ ὑπεξαίρεσις, ἀντινομία, ἀμφιβολία, συλλογισμός)³⁰. If we translate λογικός in Hermagoras' definition of thesis and hypo-

²⁶ Cic. *Inv.* 2, 12 *omnis et demonstrativa et deliberativa et iudicialis causa necesse est in aliquo eorum, quae ante exposita sunt, constitutionis genere uno pluribusve versetur*.

²⁷ As well as from the *Rhetorica ad Herennium*, Quintilian and Martianus Capella: cf. Calboli Montefusco (1979) 271.

²⁸ Cf. Calboli Montefusco (1986) 12–28; Matthes (1958) 178–182.

²⁹ Jaenecke (1904) 80; Matthes (1958) 74 n. 3; Volkman (1885) 30; Thiele (1893) 16. Regarding Cicero's criticism of Hermagoras' style, cf. Matthes (1958) 74 n. 3: "selbst wenn sie sich auf den Stil des Lehrbuches bezieht, sind wir nicht gezwungen anzunehmen, daß Cicero dieses Buch selbst benutzt hat, da die Kritik in *De inv.* nicht von ihm stammt, sondern seine Quelle zugewiesen werden muß".

³⁰ Matthes (1958) 133 ff.; Calboli Montefusco (1986) 34–35.

thesis as Cicero did (*Inv.* 1, 8 *in dicendo*), the fact that the same adjective appears in the denomination ζήτηματα λογικά with a different meaning (*rationalis*) is really disturbing; on the other hand, if λογικός means “logical”, and the whole *materia artis*, according to Hermagoras, contains an ἀμφισβήτησις λογική, it is not easy to explain why the *quaestiones rationales* would be more “logical” (as its name seems to emphasize) than the *quaestiones legales*³¹. Kroll tried to explain this distinction between λογικόν and νομικόν in the ζήτηματα ὠρισμένα by arguing that in the γένος λογικόν the λόγος was responsible for the search for arguments, while in the γένος νομικόν the argumentation was based on the laws (νόμοι)³². Regarding the name of the γένος νομικόν Kroll is certainly right; however, concerning the name of the γένος λογικόν, Barwick rightly objected to Kroll’s interpretation that also in the γένος νομικόν the arguments were searched for by the λόγος (given that, we may add, the ἀμφισβήτησις λογική is present in the whole *materia artis*)³³. From both denominations, as we can see, the only really characterizing one is that given to the γένος νομικόν: Hermagoras, therefore, has formulated here a sort of privative opposition between “*in scripto*” and “*in non scripto*”, even if such an opposition regarding the subject of these questions should be more properly formulated as an equipollent opposition between “*in scripto*” (or “*in legibus*”) and “*in re*”³⁴. Finally, we may add that, if the *quaestiones rationales* were λογικά par excellence, that was due to the fact that they were (as it seems) Hermagoras’ main interest in the section of his *Tékhnē* devoted to the *inventio*.

Now we think that it is worth considering the relationship between the *quaestiones finitae* and the *status*, insofar as this doctrine is the more “logical” feature in Hermagoras’ system, and will help us to explain and emend Cic. *Inv.* 1, 10.

It is generally accepted (on the basis of Cicero himself)³⁵ that, according to Hermagoras, the *status* have no application in the field of the *quaestiones legales*³⁶. This assertion, nevertheless, is denied by Barwick, who tries to prove that in the *quaestio-*

³¹ Barwick (1964) 81 already stated that “was Hermagoras veranlaßte, die *quaestiones* der in eine Gruppe als *rationales*, die der anderen als *legales* zu bezeichnen, ist nicht ohne weiteres klar”.

³² Kroll (1940) 1091.

³³ Barwick (1964) 82.

³⁴ This interpretation and reformulation of the Hermagorean opposition underlies Quint. *Inst.* 3, 5, 4–5 *illud iam omnes fatentur esse quaestiones in scripto aut in non scripto. In scripto sunt de iure, in non scripto de re: illud rationale, hoc legale genus Hermagoras atque eum secuti vocant, id est νομικόν et λογικόν. Idem sentiunt qui omnem quaestionem ponunt in rebus et in verbis.*

³⁵ Cic. *Inv.* 1, 17 *deinde considerandum est in ratione an in scripto sit controversia: nam scripti controversia est ea quae ex scriptionis genere nascitur. Eius autem genera, quae separata sunt a constitutionibus, quinque sunt, eqs.* There is also the fact that, in the section in which Cicero deals with the *quaestiones legales*, he does not speak of *intentio*, *depulsio*, *quaestio*, *ratio*, *infirmatio rationis* and *iudicium*, as he does when analyzing the examples of different types of *status* (cf. Thiele 1893, 81; Adamietz 1966, 140; Calboli 1972, 132; Calboli Montefusco 1986, 199 n. 7).

³⁶ Jaeneke (1904) 80; Adamietz (1966) 140; Calboli (1972) 131–133; Calboli Montefusco (1979) 300; (1986) 37–38. 41. 153–154. 199–200.

nes legales the κρινόμενον-doctrine can be applied, and that it is possible to find in them a *iudicatio*³⁷. Barwick, in fact, thinks that the authors from Late Antiquity who list the *quaestiones legales* among the *status* (Agust. *Rhet.* 11 p. 143, 18–24; 12 p. 144, 11–12 Halm; Fortun. *Rhet.* 1, 12 p. 81, 12–14 Calboli Montefusco; Sulp. Vict. *Rhet.* 24 p. 325, 6–16 Halm; Iul. Vict. *Rhet.* 3, 3 p. 6, 14–17 Giomini-Celentano; Cassiod. *Inst.* 2, 2, 4; and Isid. *Orig.* 2, 5, 2) have preserved the true Hermagorean doctrine, while Cicero deviates in *De inventione* from the rhetorician of Temnos³⁸. Barwick thinks that Cicero might have omitted in *De inventione* a part of his source in which the application of the κρινόμενον to the *quaestiones legales* was present. He also supposes that in this source such application had been already removed in order to avoid the difficulty which arose from the fact that, while in the *genus rationale* the *iudicatio* is always, with the exception of the *status coniecturalis*, formulated as a thesis³⁹, the same is not possible in the *genus legale*, because here the discussion deals with particulars⁴⁰. Barwick's argumentation, based on the testimony of the above mentioned rhetoricians, has been convincingly refuted by Calboli, who argues "1) il fatto che non si hanno, a quanto sembra, esempi di applicazione della dottrina del κρινόμενον a *status legales* come si ha invece per gli altri *status* negli autori che servono a ricostruire Ermagora [...] 2) fra i tardi retori che non separano le *quaestiones legales* dagli *status*, dei due che si rifanno certamente ad Ermagora, Agostino parla di *quaestiones*, non di *status*, certo non distinguendo fra *questiones rationales* e *quaestiones legales*, ma non presenta l'esplicita denominazione di *status legales*; a sua volta, Fortunaziano può essere stato influenzato da Ermogene che inserisce le στάσεις νομικάί sotto la ποιότης, ritenendole quindi senz'altro στάσεις [...], considerando che Fortunaziano è stato certo sotto l'influenza di Ermogene nella dottrina degli ἀσύστατα [...]; notevole è anche il rapporto fra Ermogene e Sulpicio Vittore"⁴¹. For all these reasons it is better to suppose that the assimilation of the *questiones legales* into the *status* took place after Hermagoras, at any rate quite early, as it is already present in the followers of Antonius (Quint. *Inst.* 3, 6, 45), and among them, in Cornificius' *doctor* (*Rhet. Her.* 1, 11, 18–20)⁴².

³⁷ Barwick (1964) 85 applies the κρινόμενον-doctrine to the example of *controversia ex ambiguo* offered by Cic. *Inv.* 2, 116. Thiele (1893) 81–82 examined the same example in such a way, pointing out the interesting fact that "das κρινόμενον wird nun in Wirklichkeit ja auf die Amphibolie zugespißt, während theoretisch die eigentliche στάσις der Sache die ποιότης παραματική bleibt"; similarly, he thinks that the *status* of the example of ἀντινομία in *Inv.* 2, 144 is *qualitas iuridicialis assumptiva*; and that one of the example of συλλογισμός in 2, 148 is *coniectura*. Nevertheless, he admits (ibid. 82) that "Hermagoras [hat] die vier Gesetzfragen [...] aus dem System herausgelöst und besonders gestellt".

³⁸ Barwick (1964) 82.

³⁹ But that is not true: in fact, we find the *iudicatio* formulated as an hypothesis in the examples of the *constitutio iuridicialis absoluta* (*Inv.* 2, 70) and *constitutio iuridicialis assumptiva* (*Inv.* 2, 73 [*comparatio*], 2, 79 [*relatio*] and 2, 87 [*remotio*]).

⁴⁰ Barwick (1964) 86.

⁴¹ Calboli (1972) 132.

⁴² Cf. Calboli (1972) 131; Calboli Montefusco (1986) 200–204.

4. An emendation to Cic. *Inv.* 1, 10

Inv. 1, 10 contains a syntactical ambiguity: the series of four genitives *aut facti aut nominis aut generis aut actionis* (which respectively allude to the *constitutio* (= *status*) *coniecturalis, definitiva, generalis* and *translativa*) can refer both to *controversiam* and to *quaestionem*. The position of the editors in this regard is not always easy to understand. It is only clear that those who insert a comma only after *controversiam* (like Stroebel and Friederich⁴³) are linking the four genitives with *quaestionem*. The interpretation of this passage is, of course, clearer in the translations. So Hubbel writes:

“every subject which contains in itself a controversy to be resolved by speech and debate involves a question about fact, or about a definition, or about the nature of an act, or about legal processes”⁴⁴.

This translation, in regard to the interpretation of the genitives discussed, is not very different from those offered by Bornecque⁴⁵, Achard⁴⁶, Nüßlein⁴⁷, Núñez or Greco⁴⁸. Nevertheless, its implications are quite disturbing. In fact, if “every subject which contains in itself a controversy to be resolved by speech and debate” (that is, the whole *materia artis*) “involves a question about fact, or about a definition, or about the nature of an act, or about legal processes”, that means that every *controversia* has a *status*. And that is not true, because, remaining in the field of the hypothesis⁴⁹, the *quaestiones legales* contain also “a controversy to be resolved by speech and debate” (that is, an ἀμφισβήτησις λογική) but, as we have already seen, according to the doctrine reconstructed from Hermagoras and, what is more important, according to Cicero himself (*Inv.* 1, 17), they do not generate a *status*⁵⁰. We think therefore that the four genitives must refer to *controversiam*, and that the translation of the passage should consequently be:

“A question is involved in every subject containing in itself a controversy which is placed in speech and debate and which refers to facts, label, nature or procedure.”

⁴³ Friederich (1890) 123; Stroebel (1915) 9.

⁴⁴ Hubbell (1949) 21.

⁴⁵ Bornecque (s. a.) 15 “tout ce que implique controverse à propos d’un avis et d’une contestation renferme une question portant sur un fait, sur un mot, sur la qualification, sur le procès”.

⁴⁶ Achard (1994) 65: “tout sujet qui, dans un discours ou dans un débat, implique une controverse, contient une question à propos d’un fait, d’une dénomination, de la qualification d’un fait ou de l’action judiciaire”.

⁴⁷ Nüßlein (1998) 25: “Jeder Gegenstand, der in sich einen gewissen Gegensatz im Vortrag und in der Erörterung birgt, enthält die Frage nach der Tat oder der Benennung oder der Gattung oder der Klage”.

⁴⁸ For Núñez’s and Greco’s translations, see nn. 3 and 4.

⁴⁹ Regarding the thesis, we think that Calboli Montefusco (1986) 42–50 is right when asserting that Hermagoras had not dealt with them in his treatise.

⁵⁰ Nevertheless, Adamietz (1966) 140 writes: “Problematisch ist das Verhältniss der *quaest. leg.* zu den Staseis: auf der einen Seite besitzen die Staseis einen gewissen Vorrang (vgl. *De inv.* I 10b: in jeder *causa* eine Stasis; 17: die Stasis zuerst zu finden), auf der anderen sind die *quaest. leg.* ihnen gleichgeordnet”.

or perhaps, more freely:

“Any inherently controversial subject, whether that controversy be over facts, wording, its type or due process, and which occasions speech and debate, involves a question”.

To support this proposal we may add some linguistic considerations. *Disceptatio* (a neologism first found in Cicero)⁵¹ is a *nomen actionis*, formed from the stem of *disceptare* adding the suffix *-tio*. This suffix has an “objective value”, opposed to the “subjective value” added by the suffix *-tus*⁵²; indeed, the suffix *-tio* (in the words of G. Calboli) “contribuiva a togliere il più possibile a questi deverbativi in *-tio* ogni riferimento alla cosa”⁵³. On the other hand, *controversia* is also a derivative, formed from the stem of the adjective *controversus*; nevertheless, its nature is quite different from that shared by *disceptatio*, insofar as *controversia* belongs to the category of the “Eigenschaftsabstrakta”⁵⁴. Therefore, it would be more likely to find *disceptatio* connected with the agents of the discussion, and *controversia* with its object. And, in fact, in Cicero’s rhetorical works *controversia* is often modified by genitives such as *facti* (*Inv.* 1, 10, 1, 11), *generis* (*Inv.* 1, 12), *nominis* (*Inv.* 1, 11, 1, 12, 2, 52, *Part. or.* 102), *scripti* (*Inv.* 1, 17, 2, 102), *scripti an rationis* (*Inv.* 1, 17), *actionis* (*Inv.* 2, 62), *iuris civilis* (*Inv.* 2, 62), *hereditatis* (*de Or.* 2, 104); and also prepositional complements such as *de vi et de genere negotii* (*Inv.* 1, 10), *de tabulis et perscriptionibus* (*de Or.* 1, 250), *in ratione aut in scripto* (*Inv.* 1, 17), *de testamento* (*Inv.* 2, 127), *ex ambiguo* (*de Or.* 2, 110), *inter hominum sententias* (*de Or.* 2, 335), *de finibus* (*Top.* 43). A very convincing parallel in this regard is the following, which deals also with the doctrine of *status*:

Cic. *Fin.* 4, 6 *nam, quicquid quaeritur, id habet aut generis ipsius sine personis temporibusque aut his adiunctis facti aut iuris aut nominis controversiam.*

Even if here *genus* refers to the thesis, and the number of *status* is reduced from four to three (*coniectura, qualitas, definitio*)⁵⁵, the genitives *aut generis [...] aut [...] facti aut iuris aut nominis* are clearly modifying *controversiam*⁵⁶.

⁵¹ In this sense it is rather surprising that the *Rhetorica ad Herennium*, so rich in such formations in *-tio*, does not register this word (cf. Calboli 1962, 228–231).

⁵² Benveniste (1948) 96–104.

⁵³ Calboli (1962) 228–229.

⁵⁴ Cf. Leumann (1977) 291 (§ 274 A 1).

⁵⁵ Here, in fact, Cicero alludes to the more restrained status-system used by the Peripatetics and the Academicians, which consisted only of three status, *coniectura, finis* and *qualitas*; Hermagoras added a fourth to them, the *translatio*. Cicero, after writing *De inventione*, rejected Hermagoras’ system of four status and adopted the “philosophical” one: cf. Calboli Montefusco (1986) 36–37; Madvig (1876) 488 ad loc.

⁵⁶ The punctuation proposed for *Inv.* 1, 10 can perhaps give rise to some perplexity, insofar as the defining genitive normally comes before the noun which it modifies; nevertheless, other examples of groups of genitives coordinated by *aut* and coming after the modified noun can be found in Cicero’s works. We are not trying to find here an explanation of this phenomenon, but only list some of its occurrences: *Inv.* 2, 99 *deinde*

Cicero, as we can see, is simply pointing out in *Inv.* 1, 10 that not all *quaestiones* generate a *status*, but only those that take place in a *controversia* dealing with the four topics above mentioned: *factum, nomen, genus, actio*; there is no need therefore to see in *dictio* and *disceptatio* an allusion to the *genera dicendi* or to the ἀσύστατα. On the other hand, the proposed punctuation is, in our opinion, a clear example of how a text “can be much amended, without the change of a letter or the introduction of any novelty”⁵⁷ by new punctuation: *uno pro puncto caruit Martinus Asello*.

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inducere definitionem necessitudinis aut casus aut imprudentiae. Part. or. 132 nihil habere aut captionis aut vitii. Top. 11 alia ex comparatione maiorum aut parium aut minorum. 94 status aut iuris aut nominis. Lig. 11 externi sunt isti mores aut levium Graecorum aut inmanium barbarorum. Pis. 19 ab hoc eiecto cadavere quicquam mihi aut opis aut ornamenti expetebam. Acad. 2, 20 quid de tactu et eo quidem quem philosophi interiorum vocant aut doloris aut voluptatis. 2, 113 haec duo de quibus agitur quis umquam dixit aut veteris Academiae aut Peripateticorum. Tusc. 1, 45 propter vim frigoris aut caloris. Nat. D. 3, 64 istam autem intelligentiam aut maris aut terrae non modo comprehendere animo sed ne suspicione quidem possum attingere. Fam. 6, 6, 5 quid ego praetermisi aut monitorum aut querelarum, cum vel iniquissimam pacem iustissimo bello anteferrem? 14, 1, 2 neque apud nos tantum valisset sermo aut stultorum amicorum aut improborum. Att. 1, 17, 5 quas facultates aut provincialium aut urbanorum commodorum et alius temporibus et me ipso consule praetermiseris.

⁵⁷ Housman (1927²) VI.

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Abstract

In this paper we examine Cic. *Inv.* 1, 10 in order to reject the propositions which consist of interpreting *in dictione ac disceptatione* as an allusion to the *genera dicendi* (Achar, Marius Victorinus) or to the ἀσύστατα (Martin, Grillius). These words are a sort of hendiadys (“a speech involving debate”), which translates the Greek adjective λογικήν, present in Hermagoras’ definition of thesis and hypothesis, as reconstructed by Striller and Jaeneke. We also provide new punctuation for this passage, in order to avoid a contradiction with Cic. *Inv.* 1, 17 (regarding the non-application of *status* to the *quaestiones legales*); according to which, the four genitives *aut facti aut nominis aut generis aut actionis* present in *Inv.* 1, 10 have to refer to *controversiam*, not to *quaestionem*.

Keywords: Cicero, *De inventione*, Rhetoric, doctrine of *status*, textual criticism.