

Hermogenes' *On Staseis*: rhetoric as legal philosophy

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The aim of this article is to shed some light on certain points of Hermogenes' work *On Staseis*. These points, in my opinion, show that behind the practical orientation of the rhetorical theory of this work, rhetoric emerges as a philosophy of law.

The most basic new feature in Hermogenes' treatment of the subject of *stasis* is the full-scale adoption of the method of division¹ which pertains to the whole system. Through a series of dichotomies he connects the different *staseis* and creates a subordinating system in which 12 *staseis* derive from their previous ones and ultimately from the first *stasis* of conjecture.² Hermagoras' system was, as far as we can tell, a coordinating system, and his four main *staseis* were placed on the same level.³ Hermogenes also proceeds to the division of each *stasis* into *kephalaia*, heads of arguments, which constitute the basis for a full exposition of legal arguments in a dispute. This method of division, via which Hermogenes moves downwards step by step until he pinpoints the relevant *stasis* for any given case, is regarded as bearing traces of a Stoic influence, while the general approach to the basic four traditional *staseis* is considered as following Aristotle's list of four judgments.⁴ At the

1 See the remark (at the very beginning of the first chapter of his work *On Staseis*) that there are many important elements which constitute rhetoric, and that the most important of them is what has to do with division and demonstration. Hermogenes seems to imply that demonstration without division is unthinkable. He explains that he does not mean either the division of rhetoric into its genres or the division of a speech into its parts, and continues: 'The present discussion deals with the division of political questions (*politika zetemata*) into what are known as heads (*kephalaia*). This subject is almost identical with the theory of invention, except that it does not include all the elements of invention'. The translation is that of Heath. See Heath 1995. If I do not mention the origin of the translation, then the translation is my own. That the method of division must be carefully applied so that it will result in correct divisions is clearly stated (see 68. 2–4). At the same time, when Hermogenes proceeds to a wider explanatory discussion, he feels the need to clarify that at this point he does not follow the principle of division: 'We have made these comments not as a division... but just so as to indicate the nature of the heads' (67. 20–1); see also 81. 15–16; 86. 15–17.

2 See Lindberg 1997, 1979–2021, cf. 1991. See also Heath 1995, 71; Kennedy 1994, 209–11; Kennedy 1983, 83.

3 Hermagoras is generally regarded as the father of the system; see Lindberg 1997, 1991; Nadeau 1959, 52–71, cf. 67. Mathes 1958, 58–204, cf. 165. The basic four-part system of *staseis* attributed to Hermagoras (which Hermogenes incorporated into his own) included: *stochasmos*, conjecture (about the facts: did it happen in fact?), *horos*, definition (there is an agreement that something happened, but how can we define the act?), *poiotes*, quality (the examination is about the quality of the act: is it just, good, etc?), *metalepsis*, objection (objections of a procedural character: is the case judged by the right person, at the right time, etc?).

4 See Aristotle, *Topics* 100a20–02b26. See also Jaeneke 1904, 27–78; Nadeau 1959, 67; Nadeau 1959a, 248–54; Lindberg 1997, 1991.

same time, however, one cannot deny that above all Hermogenes' system 'represents a practical approach, useful for the student who has just chosen a case on which to produce a declamation', as Lindberg has put it.⁵

Hermogenes makes clear from the beginning of his introduction that his discussion is concerned with the division of 'political questions' into 'heads of arguments'. It is obvious from the definition of 'political question', as well as from the explanations he gives and the nature of the examples he adduces, that his thoughts are focused on judicial rhetoric, while the deliberative rhetoric – which is supposed to be also covered by this theory – has only a very limited role in the system. The first step is to explain what a 'political question' is: 'It is a logical dispute on a particular matter which is arising under the established laws or customs of any given society and is concerned with what is considered to be just, with what is honourable, what is advantageous, or all of these together or some of them' (29. 1–4). Immediately after this he points out that 'it is not the function of rhetoric to investigate what is in reality and universally honourable or advantageous or things like these'.

Hermogenes does not mention philosophy here, but when he makes the distinction between the particular and the general, the specific and the universal, in connection with his discussion of rhetoric, he implicitly differentiates philosophy from rhetoric. Philosophy addresses theoretical issues and seeks what is just, honourable, and advantageous in a universal sense. Rhetoric obviously deals with the particular case at hand; but what does it mean when Hermogenes says that it is not rhetoric's function to investigate these (or other similar) topics in general terms? Hermogenes, in my opinion, does not attribute this function to philosophy alone in this statement. Rhetoric also deals with theoretical and general questions in various cases and one such case appears in the course rhetoric follows when educating young orators. The most advanced preliminary exercises (*progymnasmata*)⁶ included the *thesis*, where one had to support or refute a general position, e.g. whether one should teach rhetoric or whether there are many worlds. The next step for the student was to deal with a *hypothesis*,⁷ in which concrete circumstances were specified (e.g. whether Aristotle should teach rhetoric in the Academy) and which, for that reason, was regarded as more difficult. Moreover, in his discussion on the *staseis* later on, Hermogenes includes *thesis* as a head of an argument in which the particular case is supported on the basis of a general principle.⁸ Thus, it seems that what Hermogenes means is that rhetoric does

5 Lindberg 1997, 1991 and n. 91.

6 See Kennedy 1994, 202–07; Kennedy 2003; Heath 2003, 129–60.

7 On thesis and its relation to hypothesis see Thorm 1932; Matthes 1958, 123–32; Heath 1995, 18.

8 See e.g. *On Staseis* 49. 15–19; 67. 13–17.

not regard the theoretical discussions on general subjects as its main task, as an end in itself, but that it deals with them as far as they are practically useful for defending a particular case either in education or in actual disputes.

This well-known focus of rhetoric on the particular cases is stressed here in connection with special reference to law and justice. The specific dispute that rhetoric has to settle arises in the context of a certain society which functions on the basis of its own laws and customs. This dispute is about what is considered just, about what is honourable, etc. Hermogenes does not speak of 'what is just' (as he does in the case of the honourable and the advantageous), but of 'what is considered to be just', which is equivalent to 'what the enacted laws regard as just', as some of his scholiasts also assert.⁹ At the same time, Hermogenes does not explicitly include 'the just' in the list of topics that are not investigated in general terms by rhetoric.¹⁰ It is obvious that, when mentioning 'what is regarded as just', Hermogenes makes a distinction between law and 'what is really just'. He also seems to accept that, when we speak of the honourable and the advantageous, the general background against which they are judged in each particular case is that of the society's laws and customs, whilst in the case of 'the just' this general background appears to be threefold: that of the customs, that of the enacted laws and that of a more general investigation about justice, i.e. the one that allows the orator to refer to universal law or the law of nature. Since Aristotle himself had left open the possibility that an orator could take refuge in the notion of universal law, given that the laws of the city were against his case,¹¹ we are entitled to suppose that Hermogenes' intention here was not to deprive the orators of such a possibility, as his scholiast seems to believe.¹² Besides, some of the *nomikai staseis*, e.g. (see *rheton kai dianoia*, letter and intent or *sylogismos*, assimilation) are possible exactly because a more general interpretation of law is possible.

If we accept the previous interpretation of Hermogenes' words in his definition of 'political question', then the interplay between the general and the particular becomes more prominent in the case of judicial rhetoric, because it may seek its arguments (*pro et contra*) outside the field of established laws

9 Walz, 1833; see 74 for the scholia of Syrianus and 80 for the similar ones of Sopatrus.

10 One could argue that *ta toiauta*, things like these, include also 'the just', but we cannot ignore the fact that Hermogenes avoids mentioning it explicitly.

11 See Aristotle *Rhetoric* I 13, 1373b2–18.

12 In his scholia to Hermogenes' *On Staseis* Sopatrus writes that what is just in a city is defined on the basis of law and asserts that 'the orators do not follow what is just by nature, but the just enacted by law; but philosophers deal with the former; for what has prevailed by law (in a given city) is not necessarily in accord with what is just by nature'. See Walz 1833, 80. Sopatrus accepts that Hermogenes makes the distinction between what is just by nature (law of nature) and what is just by convention (enacted law). This distinction (in a political context) goes back to Aristotle; on this distinction and the possibly different meaning of 'natural right' in Aristotle from the meaning the term took later in the Stoics see Johnston 2011, 78 ff.

or customs, where the dispute arose, in the more general sphere of what is universally right. In rhetoric, however, as Hermogenes seems to accept in his discussion about persons and acts, the probative value of an argument is directly proportional to its degree of concreteness and specificity. This is the reason why determinate proper names, for example, have greater argumentative force than simple appellative terms, such as general, politician, etc.¹³ This means that the rhetorical arguments gradually lose their force as they become more and more general, and they move away from the particular case under investigation. At the same time, however, Hermogenes does not fail to add that one ‘should assess the force of each and use it as occasion allows’. By this position he confirms that particular instances govern rhetorical argumentation, and that the particular case is the beginning and the end of any rhetorical theory. At the same time he mitigates the rigidity of his own rule and appears to advocate the rather relativist position that the probative value of the general and/or the particular cannot be absolutely fixed by any rule and that it ultimately depends on the occasion. But, if this is the case, then, what is the place of *stasis theory* in this interplay between the general and the specific, the universal and the particular? Besides, what is the place of law in this *stasis* system, given that the application of the law encounters similar problems (see e.g. the connection between a general law and a particular case)?

Hermogenes believes that the method of division can answer these questions. It is his conviction that division can solve the problem of rhetoric’s scientific approach to its subject. I think that this conviction of his (irrespective of the influences one can discern in his practical application of the method) could be the result of a rather direct Platonic influence. Plato believes that it is only through dialectic, and especially through its branch of division, that the person who aspires to become an orator can proceed in an artful way and become a successful orator.¹⁴ The fact that division is the sole method used in *On Staseis*, as well as some explicit relevant statements of Hermogenes make it clear, in my opinion, that he shares this Platonic conviction.¹⁵

Hermogenes does not apply division to the greatest matter of rhetoric, i.e.

13 See *On Staseis*, 29. 17–30, 9.

14 See Pl. *Phaedrus* 271C–72B.

15 See n. 1 above. Compare also, for example, *Phaedrus* 266B ‘Believe me, Phaedrus, I am myself a lover of these divisions and collections, that I may gain the power to speak and to think...’ and *On Staseis* 35. 2–5 ‘but it is of course impossible for anyone who has not yet studied the pure division of questions into the so-called heads, or who is unfamiliar with what are known as the issues of problems (i.e. *staseis*, which are again a product of divisions) to have a sound grasp of the things I have just mentioned’ (Heath’s translation). Or, again Plato’s warning against unnatural or incorrect divisions which is also found in Hermogenes; see *Phaedrus* 265E and *On Staseis* 35. 15–17. For Platonic influence on Hermogenes more generally see Wooten 1987, 131; North 1991, 201–19, cf. 216–18.

soul, as Plato demands, but he follows the tradition of rhetoric in this respect. In this tradition the orator used to form only a rough empirical idea about the 'type or types of soul' in the audience and was mainly concerned with the content of the speech and the way of presentation which were regarded as the main producers of persuasion. Moreover, in judicial oratory of the 2nd century AD, when the law system imposed stronger limitations on the members of a jury than in Classical times, discerning types of soul in this body of judges was not essential and what counted most was undoubtedly the quality of the legal arguments – under the condition of course that the judges were allowed to decide according to the law without any external pressure. Thus, Hermogenes had to use the method of division in order to construct a system that could help the orators pinpoint the subject with precision and find out the most relevant, strong and persuasive arguments in a given political and legal context.

The problem Hermogenes encountered was related to the nature of rhetorical subjects. He had to deal with a vast number of particular (practically uncountable) instances which could possibly become subjects of rhetorical investigation and declamation. First, he gathers all these particulars under the general term *politikon zetema*, political question. The division, however, which follows, cannot lead to a certain particular that is practically unknown in a theoretical examination of this kind. But even if it were known, a division that could lead to a full definition of the particular case by enumerating all the inherent characteristics that connect it to the general category would be of little practical use, since it could lack reference to the wider social, political, and legal contexts, and, besides, it would require a new theory of pinpointing particular arguments for or against. The solution to this problem was twofold. First, various criteria related to social context were used as a basis for the divisions employed and, secondly, the divisions did not end in a particular case, but in what was called *kephalaia*, or heads of arguments. The heads of arguments are also general notions with a certain degree of abstractness, but Hermogenes tries to show that dividing a 'political question' into its *staseis*, and each *stasis* into *kephalaia*, is the best way to approach theoretically a particular case and relate the heads of arguments to the specific demands of this case.

Before proceeding to the division of a 'political question' into *staseis*, Hermogenes makes some preliminary clarifications which he regards as necessary for a clear understanding of the divisions of questions into heads. One such preliminary but basic division is that of 'political questions' into *synestota*, those that are capable of *stasis* (they have an issue) and can be divided into heads, and *asystata*, asystatic questions, those that are not capable of *stasis* (they do not have issue). To these basic groups he also adds a third

group consisting of questions that are *close to being asystata*, near *asystatic*, (they are *almost* lacking issue).¹⁶ Hermogenes enumerates the conditions that a ‘political question’ must satisfy in order to be capable of *stasis*, i.e. in order to be a possible subject of a rhetorical investigation/declamation.¹⁷ In this connection it is important to note the new points which Hermogenes seems to have introduced into the system. He brings forward eight types of *asystatic* questions: *one-sided*, *wholly equivalent*, *reversible*, *insoluble*, *implausible*, *impossible*, *disreputable*, *uncircumstantial*. If the reconstruction of Hermagoras’ system is correct,¹⁸ then he had provided four *asystatic* questions: *deficient*, *one-sided*, *wholly equivalent*, *insoluble*. Hermogenes’ innovation includes not only the addition of four more types, but also the enrichment of the criteria employed in this division. He changed the first part of the list of *asystatic* questions by adding the *reversible* and taking away the *deficient* (*one-sided*, *wholly equivalent*, *reversible*, *insoluble*). Then he formed the second part of the list by adding the rest of them (*implausible*, *impossible*, *disreputable*, *uncircumstantial*) and absorbing the *deficient* into what he called *aperistaton*, *uncircumstantial*. It is true that the first half of the list includes *asystatic* questions which can be easily justified by reference to their lack of compliance with the conditions prescribed.¹⁹ The addition of the new four types, however, created some problems with classification and this is the main reason why Hermogenes’ treatment of *asystatic* questions has been regarded as an unsatisfactory ‘body of theory’.²⁰ What is a problem from a clearly theoretical point of view, however, becomes an advantage when seen from the point of view of a practically oriented classification. Hermogenes’ criteria are in fact concerned in part with the resources offered for argumentation and in part with the potential conclusion.²¹ The first four types, however, seem to focus more on the lack of arguments that results from the specific circumstances of the case at hand, while in the four last *asystatic* questions the focus is more on the wider social context, which plays a significant role in the invalidation of the argumentation. In Hermogenes’ examples, the *implausible* question (Aristides acts unjustly), for example, is invalid not because Aristides

16 *On Staseis* 31. 19–34, 15.

17 See the relevant discussion in Heath 1995, 66–70. The conditions mentioned (31, 19–32, 9) are the following: (i) The questions include person and act or one of them, (ii) There are persuasive arguments on both sides that (a) are different from those of the other party, and (b) have probative force, and (iii) the verdict (which is to be pronounced by the jury) is (a) not self evident, (b) not prejudiced, and (c) not unreachable.

18 Nadeau 1959, 66–71.

19 See n. 17 above.

20 See the discussion in Heath 1995, 67.

21 Heath 1995, *ibid.*

could not have proceeded to an unjust act under certain circumstances, but because people cannot be persuaded that such a man proceeded to such an act.²² The term used for the last *asystatic* question, *uncircumstantial*, denotes the absence not only of more general circumstances but also of necessary particular circumstances that could give rise to relevant arguments and result in a resolution being reached. The fact that Hermogenes abandons the term *deficient* and uses the broader term, *aperistaton*, *uncircumstantial* (if he was the one who originally introduced the term) illustrates, I think, the point of view from which he approached the matter of *asystatic* questions. He seems to point out the power of society's convictions as to what is implausible, impossible, or disreputable and the impact of these convictions on the validation or invalidation of relevant arguments. Moreover, the introduction of these new *asystatic* questions (as well as that of the near *asystatic* ones) in this period, when law literature was increasing²³ and a systematic exposition of the elements of Roman law appeared,²⁴ could probably be the rhetorician's reaction to the new developments in the field of law.²⁵ It would be catastrophic for a professional orator, an *advocatus*, if he did not recognize the *asystatic* nature of a question and tried to build arguments, for or against the case at hand, which would ignore the peculiarity of the situation.

Hermogenes' major division is of course that which discerns the *staseis* and their relation to each other. He applies the method of division, as it was introduced by Plato, as faithfully as he can.²⁶ He starts from the general class *politikon zetema* and then, taking as his basis the possible nature of the *krinomenon*, the subject which is being examined, he devises a division of the whole class into two mutually exclusive sub-classes; these sub-classes are distinguished by the fact that one possesses a certain characteristic while the other lacks it. Then he repeats the procedure by dividing the sub-class which possesses the characteristic (in a tree-like representation it would be on the right) in the same way into two parts, and so on. The sub-class or any subdivision which does not permit further division (in principle the ones to the

22 The difference between *implausible* and *impossible* is clear I think. The *impossible* refers to cases which simply, according to reason or common belief, do not exist. For a rather different view see Heath 1995, 67.

23 Emmett 2008, 114–62, cf. 118–19.

24 See Muirhead 1880.

25 This point obviously needs further investigation, but there is evidence for other changes in rhetorical theory which seem to have been introduced as a consequence of the rhetoricians' need to adapt their theory to contemporary court practice. See Heath 2003a, 1–91, cf. 19–23.

26 Plato elaborates on his method of division in the *Sophist* and the *Statesman*. See cf. the *Sophist* 218D–237A.

left) constitutes the *staseis* of a *politikon zetema*.²⁷ In this way he distinguishes 13 *staseis*.²⁸

The whole system of *staseis* represents the structure of social reality and the place of law within it, as it is understood by a rhetorician. Above everything there is the level of existence (*stochasmos*) and then the rest (of the levels) dependent on it follow: that of placing something that exists in a class (*horos*) in order for men to understand it and be certain that they speak of the same thing; that of the qualities of the thing under discussion (*poiotes*), which are understood as either inherent to it in some way (*logike*) or as imposed on it by a legal provision (*nomike*). From that point onwards, reality becomes the very concrete one of the law courts. With the exception of *pragmatike*,²⁹ all the divisions and subdivisions of *logike* try to put the complex net of intentions and subjective understanding that covers the human acts into some order. They bring together into one system various manifestations of a basic human tendency that gives rise to various argument strategies or, from another point of view, a tendency that sheds more light on the acts that are under legal investigation. It is the psychological tendency which tries to give moral content to a bad act through the belief that the victim deserved the punishment, that somebody else bears the responsibility for one's deeds, or that the wrong act was a departure point for great benefit. The final point of this course is the *stasis* of *syngnome*, where the accused asks for forgiveness and practically employs his last argument by addressing his fellow man's feelings of pity and expecting the punishment to be mitigated. On the other hand, the division of *nomike* does not follow the pattern of successive subdivisions into two parts anymore, but is directly divided into four *staseis* (or five if we also count the *metalepsis* here, which is first added at the end as if it is outside the system,

27 The lack of space does not allow me to present a diagram here. For an excellent diagram showing the whole system of Hermogenes' division with the branches leading to the right see Kennedy 1983, 83. *Phanes*, however (in the first division) and *teles* (in the second one) should be corrected to *phaneron* and *teleion* respectively.

28 Kennedy counts 14 *staseis* in his diagram. In the same way many later Greek commentators count 14 *staseis* in Hermogenes' system. Marcellinus, however, in his *Prolegomena* counts 13, because of the double meaning of *metalepsis*, objection (documentary and non documentary). See also Kennedy 1994, 210, n.

14. Hermogenes keeps the four basic *staseis* (*stochasmos*, *horos*, *poiotes*, *metalepsis*, see n. 3 above), but divides *poiotes* into two parts: *logike*, rational, and *nomike*, legal, and by subdividing both successively he brings forward the following *staseis* (in the order he treats them): *antilepsis*, *antistasis*, *antenglema*, *metastasis*, *syngnome*, *pragmatike*, *rheton and dianoia*, *sylogismos*, *antinomia*, *amphibolia*.

29 The only exception is the mention of *pragmatike*. *Logike* is divided into two branches on the basis of whether the subject which it deals with refers to the future or the past: if it refers to the future, the *stasis* is the *pragmatike* which is related to the deliberative genre; if it refers to the past, then we have *dikaialogia*, related to judicial rhetoric, which is not a *stasis*, since it is further subdivided.

and then treated separately).³⁰ The *nomikai staseis* actually comprise a rather exhaustive list of cases of legal argumentation, which is practically nothing but various cases of law interpretation. For the rhetoricians, law could not be simply applied without further discussion. Aristotle had already observed that the laws are necessarily expressed in general terms and because of that they apply to broad classes of deeds and wide groups of individuals.³¹ It is the judge, according to Aristotle, who will link the general provisions of law with the particular case at hand. But the rhetoricians never left this role to the official judges alone, and the interpretation of law was always a useful weapon when trying to defend their cases or when helping the judge dispense justice.

Through the system of *staseis* rhetoric recognizes that nothing can be certain or known beyond any doubt in social reality, that change predominates, and that everything has to be established in each case from the beginning, irrespective of the existing legal system. The laws which are an established and stable point of reference cannot be the point of departure in the process of administering justice. Moreover, the *stasis* system allows rhetoric to move effectively between the general and the particular, and helps justice administration to bridge the gap between the general law and the particular case. Consequently, Hermogenes' hierarchical system illustrates the steps which should be followed not only by the student of rhetoric who wants to be successful in his declamation, but also by the orator or judge who in practice tries to find out the truth behind a particular case and dispense justice.

³⁰ See on *metalepsis* *On Staseis* 42. 10–43, 7 and 79. 19–82, 3. The four *staseis* mentioned here are: *rheton* and *dianoia*, *sylogismos*, *antinomia*, *amphibolia*. See also n. 3 above about *metalepsis*.

³¹ Aristotle *Rhetoric* I 1, 1354a12–b22.

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