

ATHENAION POLITEIA 56.6 AND THE PROTECTION OF THE WEAK¹

In Athenian law the term *kakosis* was applied to certain forms of maltreatment of some weaker members of Athenian society. Several actions are named in the sources for the prosecution of these forms of maltreatment: *graphe*, *eisangelia*, *phasis*, *apagoge*, and *dike*. In this article I propose a distribution of these actions among the four *kakoseis* that differs from that generally accepted in scholarship.

The fullest single treatment in the sources of these *kakoseis* is found in the *Athenaion Politeia*, a work traditionally ascribed to Aristotle.² In 56.6 the author refers to the actions in this section as *graphai* and *dikai*. I agree with the majority of scholars that the four *kakoseis* were meant by Aristotle to be prosecuted by the *graphai*.³ This is the Greek text:

¹ I wish to thank the editors and the anonymous readers for valuable suggestions.

² It is still in dispute whether this work was composed by Aristotle himself or by someone in his entourage. The authorship of Aristotle is defended by J. J. Kearney, *The Composition of Aristotle's Athenaion Politeia. Observation and Explanation* (New York and Oxford, 1992), 12–14 and by M. Chambers, *Aristoteles. Staat der Athener* (Berlin, 1990), 75–82. Aristotle's authorship is doubted by P. J. Rhodes, (n. 3), 61–3, and, more recently, *The Oxford Classical Dictionary* (Oxford, 1996³), 203. For convenience I refer to the author as Aristotle. The text used is the Teubner text of Mortimer Chambers, 1986.

³ It is generally believed that Aristotle meant the four *kakoseis* to be prosecuted by the *graphai* rather than by the *dikai*. This is the opinion of J. H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig, 1905–15), 340, n. 4. and of A. R. W. Harrison, *The Law of Athens. The Family and Property* (Oxford, 1968), 80, n. 2, and, it appears, of P. J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford, 1993), 629–30, who, however, equates the *graphai* for *kakosis* to the *eisangeliai* for *kakosis*. Chambers ([n. 2], 391), on the other hand, is not convinced that the *graphai* in *Ath. Pol.* 56.6 all precede the *dikai*, though he does not state what his arrangement would be. It is unlikely, however, that any *kakosis* action was a *dike*. As the reader can see in the text that follows this section of *Ath. Pol.* on pp. 462–3, the contemporary sources—Isaeus, Demosthenes, and Menander—mention only public suits in connection with these *kakoseis*, sc. *graphai*, *eisangeliai*, and a *phasis*. Apparently the only fourth-century occurrence of the term *dike* in reference to a *kakosis* is found in Isaeus 3.46 where he uses *dike* conjointly with *eisangellein* and *eisangelia*. In his commentary W. Wyse, *The Speeches of Isaeus* (Cambridge, 1904), 330 demonstrates with parallels that *dike* is used there in its largest sense, a sense that subsumes public actions, adducing, for example, the *δίκαι δημοσίου* in Dem. 18.210. In consequence, there is no evidence from contemporary authors for the use of an ordinary *dike* in the prosecution of *kakoseis*.

The term *dike* also occurs a number of times in the lexicographers in connection with the prosecution of *kakoseis*, e.g. in Harpocration, s.v. *kakoseos*, in Pollux 3.47, 8.31, and 8.89, in the *Lexeis Rhetoricae* (Bekker, *Anecdota Graeca*, v. 1), 199 and 269, and in the *Suda* (Adler, 5.2), 535, no. 222. None of these examples can be safely used, however, to establish the existence of a private suit, a *dike*, for the prosecution of *kakoseis*, both because it is not certain that in these examples the term *dike* does not refer to a public suit and because in other instances, too, the lexicographers apply the term *dike* to public suits. The interchanging of *graphe* and *dike* is well illustrated in Pollux 8.40–1, where s.v. *graphe* he enumerates over thirty public suits. In the next sentence, however, he refers to them as *dikai* and states explicitly that *graphai* can be called *dikai*: Ταύτας τὰς δίκας . . . ἐκαλοῦντο γὰρ αἱ γραφαὶ καὶ δίκαι, οὐ μέντοι καὶ αἱ δίκαι γραφαί—ἐξ ἧν τῷ βουλευμένῳ γράφεσθαι . . . ('those *dikai* . . .—for *graphai* were also called *dikai* but not, however, *dikai* [sc. were called] *graphai*—could be prosecuted by one who so wished . . .'). Clear examples of the use of *dike* for a public action are found also in other

Γραφαὶ δ[ἐ] κ[αὶ] δίκαι λαγχάνονται πρὸς αὐτόν, ἃς ἀνακρίνας εἰς τὸ δικαστήριον εἰσάγει, [γ]ονέων κακώσεως, αὐται δ' εἰσὶν ἀζήμιοι τῷ βουλομένῳ διώκειν, ὀρφανῶν κακώσεως, αὐται δ' εἰσὶ κατὰ τῶν ἐπιτρόπων, ἐπικλήρου κακώσε[ω]ς, [α]ὑ[τ]αὶ δ' εἰσὶ κ[ατὰ τῶν] ἐπιτρόπων καὶ τῶν συνοικούντων, οἴκου ὀρφανικοῦ κακώσεως, εἰσὶ δὲ καὶ αὐταὶ κ[ατὰ τῶν] ἐπιτρό[π]ων . . .

The following public and private lawsuits fall to him and he holds the preliminary inquiry and introduces them into the jury-court: maltreatment of parents (on this charge anyone who wishes may prosecute without risk of penalty); maltreatment of orphans (where the suit is against the guardians); maltreatment of an heiress (where the suit is against the guardians or the husband; maltreatment of an orphan's estate (against the guardians again) . . .

(Rhodes's Penguin translation)

A *graphe* for *kakosis* is also mentioned by Menander in a fragment of his *Misogynes*:⁴

ὄμνυμί σοι τὸν Ἥλιον,
ἢ μὴν ἀποῖσιν σοι γραφὴν κακώσεως

I swear to you by the Sun
that I shall indeed bring a *graphe* of maltreatment against you

The context is insufficient to establish the precise *kakosis*. Further examples of *graphai* for *kakosis* are found in Demosthenes and Isaeus. Dem. 58.32 mentions a *graphe* for the *kakosis* of an orphan: Theocrines . . . τὴν γραφὴν ἀνείλετο προδοὺς τὸν ὀρφανόν ('betraying the interest of the orphan Theocrines withdrew the *graphe*'); so does Isaeus in Or. 11. 28, 31, 32, and 35. However, in this speech the same action is also called *eisangelia* in 6 and 15. I shall argue below that it should not be inferred from this alternation of the terms *eisangelia* and *graphe* that when mentioned elsewhere in connection with *kakosis* actions the term *graphe* is meant to be an alternative name for *eisangelia*. The *kakosis* actions are called *eisangeliai* also in other sources. Harpocration appears to state s.v. *eisangelia* that *eisangeliai* were available for all *kakoseis*: ἑτέρα δὲ εἰσαγγελία λέγεται ἐπὶ ταῖς κακώσεσιν ('another *eisangelia* is mentioned in connection with the cases of maltreatment'). *Eisangelia* for *kakosis epiklerou* is reported in Isaeus 3.46: καὶ οὐκ [ἂν] εἰσῆγγεῖλας πρὸς τὸν ἄρχοντα κακοῦσθαι τὴν ἐπικληρον ὑπὸ τοῦ εἰσποιήτου . . .⁵ ('and would you not have brought an *eisangelia* before the archon charging that the heiress was being maltreated by the adopted son . . .') as well as in 3.48 and 3.62. *Eisangelia* for *kakosis epiklerou* is attested also in Dem. 37.46 and Pollux 8.53. To sum up, both *graphai* and *eisangeliai* are attested for all four *kakoseis*. For the *κάκωσις οἴκου ὀρφανικοῦ φάσις*,

lexicographers. In the *Lexicon Sabbaiticum* (A. Papadopoulos-Kerameus in K. Latte and H. Erbse [edd.], *Lexica Graeca Minora* [Hildesheim, 1965]) we read on p. 46 s.v. *γραφὴ καὶ γράψασθαι*: δίκης ἐστὶν ὄνομα . . . ('it is the name of a *dike* . . .'). On p. 54, lines 12–13, s.v. *eisangelia*, this action is called a *dike*: κυρίως ἢ περὶ καινῶν καὶ δημοσίων ἀδικημάτων εἰσαγομένη δίκη . . . ('*eisangelia* is properly a *dike* that is brought in the case of new and public wrongs . . .').

In the *Lexicon Rhetoricum Cantabrigiense*, too (E. O. Houtsma [diss. Leiden, 1870] in K. Latte and H. Erbse [edd.], *Lexica Graeca Minora* [Hildesheim, 1965]), we read on p. 73, lines 22–3: *γραφὴ, ὄνομα δίκης* . . . ('*graphe* [sc. is] the name of a *dike* . . .').

To sum up, the employment of an ordinary *dike* for the prosecution of the *kakoseis* cannot be established from our sources. Therefore, it is more plausible that in *Ath. Pol.* 56.6 the four *kakoseis* were meant to be prosecuted by the *graphai* rather than by the *dikai*.

⁴ PCG VII.2 F 239 (279).

⁵ Taken in isolation the text in Isaeus 3.46 appears to emphasize the penalty-free nature specifically of the *eisangelia kakoseos epiklerou*. However, in the next section (3.47) all the *eisangeliai* brought before the archon are said to be penalty-free. Moreover, no other source singles out the *eisangelia kakoseos epiklerou* as the only penalty-free *eisangelia*.

too, is found in Dem. 38.23, against Nausimachus and Xenopeithes: οὐκ ἐμίσθωσαν ἡμῶν τὸν οἶκον, ἴσως ἐρούσιν. Οὐ γὰρ ἐβούλεθ' ὁ θεῖος ὑμῶν Ξενοπεΐθης, ἀλλὰ φήναντος Νικίδου τοὺς δικαστὰς ἔπεισεν ἑᾶσαι αὐτὸν διοικεῖν⁶ ('They did not rent out our property they will perhaps say. For our uncle Xenopeithes did not want to but when Nicidas brought a *phasis* they persuaded the jurors to allow him to administer it'). A further suit, sc. *apagoge*, has been surmised from Aeschines 1.158, where it is said of an orphan that he τὸν ξένον πρὸς τὸν ἄρχοντα ἀπήγαγεν . . . τοὺς νόμους λέγων, οἱ κελεύουσι τὸν ἄρχοντα τῶν ὀρφανῶν ἐπιμελεῖσθαι . . . ('arresting the foreigner he brought him before the archon citing the laws that order the archon to care for the orphans . . .') Hansen argues that this passage is not sufficient evidence to support the idea of an *apagoge* to the archon for maltreatment of orphans.⁷

The term *δίκη*, too, is sometimes applied to *kakosis* suits, for example in Isaeus 3.46 and in Harpocration, s.v. *κακώσεως*: *δίκης ὄνομά ἐστιν* ('maltreatment: it is the name of a *dike*'). It is generally agreed that *dike* in these cases is not a specific *kakosis* suit but is used in its larger sense, a sense that included public actions.⁸

If we lend equal credence to all of this evidence, we obtain the following distribution of *kakosis* suits:

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| 1. | <i>Kakosis goneon</i> : | (a) <i>graphe</i> | (b) <i>eisangelia</i> |
| 2. | <i>Kakosis epiklerou</i> : | (a) <i>graphe</i> | (b) <i>eisangelia</i> |
| 3. | <i>Kakosis orphanon</i> : | (a) <i>graphe</i> | (b) <i>eisangelia</i> (c) possibly <i>apagoge</i> |
| 4. | <i>Kakosis oikou orphanikou</i> : | (a) <i>graphe</i> | (b) <i>eisangelia</i> (c) <i>phasis</i> |

There is nothing intrinsically wrong with this distribution. The availability of more than one remedy for an offence is well attested in Athenian law.⁹ Nevertheless, no scholar to my knowledge has advocated complete acceptance of this evidence. In this article I argue in favour of its credibility.

The principal discussions of the *kakosis* actions have been those of Lipsius,¹⁰ Harrison,¹¹ and Rhodes.¹² All of them reject some of the actions for *kakosis* attested in the sources. It seems to me that this rejection is not justified. Both Lipsius and Harrison distribute the actions thus:

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| 1. | <i>Kakosis goneon</i> : | <i>graphe</i> |
| 2. | <i>Kakosis epiklerou</i> : | <i>eisangelia</i> |
| 3. | <i>Kakosis orphanon</i> : | <i>eisangelia</i> |
| 4. | <i>Kakosis oikou orphanikou</i> : | <i>phasis</i> |

It will be noticed that several of the actions offered in the sources have not been included by Lipsius and Harrison in their classification. For *kakosis goneon* and *kakosis oikou orphanikou* they omit *eisangelia*; for the latter *kakosis* they also omit

⁶ On *phasis*, see D. M. MacDowell, 'The Athenian procedure of *Phasis*', in M. Gagarin (ed.), *Symposium 1990, Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Köln, Weimar, Wien, 1991), 197–8.

⁷ M. H. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense, 1976), 29.

⁸ W. Wyse (n. 3), 330, and Lipsius (n. 3), 239–40 and 352. See also n. 3.

⁹ S.C. Todd, *The Shape of Athenian Law* (Oxford, 1993), 160–3.

¹⁰ Lipsius (n. 3), 351–3.

¹¹ Harrison (n. 3), 60, 77–8, 115–18.

¹² Rhodes (n. 3), 57 and 629–31.

graphe. For *kakosis epiklerou* and *kakosis orphanon* they omit *graphe*. I shall now argue that they fail to offer good reasons for these omissions.

With respect to *eisangeliai*, Harpocration states s.v. *eisangelia* that *eisangeliai* are available for all *kakoseis*: ἑτέρα δὲ εἰσαγγελία λέγεται ἐπὶ ταῖς κακώσεσιν. Despite this passage of Harpocration, Lipsius states that there is no evidence for the use of *eisangelia* in the *kakosis goneon*.¹³ He asserts that no support for such an *eisangelia* can be derived from the non-specific—'allgemeinen'—statement from Harpocration, sc. from this passage of Harpocration. Presumably for the same reason he also does not deduce the existence of an *eisangelia* for the *kakosis oikou orphanikou* from this statement of Harpocration; he states that *phasis* only was available for this *kakosis*. Harrison does not use or mention this evidence from Harpocration either in connection with the *kakosis goneon* or with the *kakosis oikou orphanikou*.¹⁴

Lipsius's interpretation of Harpocration is not plausible. When he refers to the *eisangelia* statement of Harpocration as being non-specific he must mean that when Harpocration wrote that there was *eisangelia epi tais kakosesin* he may not have intended to include the *kakosis goneon*—nor presumably the *kakosis oikou orphanikou*—among the *kakoseis* that could be prosecuted by *eisangelia* (that Harpocration was familiar with these two *kakoseis* follows from his entries *kakoseos* and *phasis*). The Greek of Harpocration does not at all favour the interpretation of Lipsius. No reader would have guessed that when Harpocration wrote ἐπὶ ταῖς κακώσεσιν he intended this to mean ἐπὶ τισι κακώσεσιν rather than ἐπὶ πᾶσι κακώσεσιν. Rhodes rightly accepts the evidence of Harpocration as indicating that all four *kakosis* suits could be prosecuted by *eisangeliai*.¹⁵ To sum up, the rejection by Lipsius, and implicitly by Harrison, of the *eisangelia kakoseos goneon* and of the *eisangelia kakoseos oikou orphanikou* is without foundation.

In regard to the *graphai* for *kakosis*, Lipsius and Harrison accept only one *graphe*, the *graphe kakoseos goneon*.¹⁶ (They fail to adduce the source for this *graphe* although it is attested in *Ath. Pol.* 56.6.) The sources, however, mention *graphai* for all four *kakoseis*. Demosthenes 58.32 mentions a *graphe kakoseos orphanon* and in *Ath. Pol.* 56.6 *graphai* are attested for all four *kakoseis*. (For the existence of these *graphai* in *Ath. Pol.* 56.6, see n. 3.) These four *graphai* are acknowledged by Lipsius himself. He states that the actions in *Ath. Pol.* 56.6 that precede *paranoias* are *graphai*.¹⁷ He fails to mention them, however, in his discussion of the separate *kakoseis*. He does give a reason for his rejection of the Demosthenic *graphe kakoseos orphanon*. He assumes that just like the term *graphe* in Isaeus 11. 28, 31, 32, and 35, this *graphe* is merely an alternative name for the technically more correct *eisangelia*. I shall be arguing that this double terminology present in a single speech of Isaeus does not prove that the other attested κακώσεως γραφαί were not independent *graphai*. For the same reason he also rejects the *graphe kakoseos epiklerou*, an action which he apparently infers from the context in Menander's *Misogynes* (see n. 4). The term *epiklerou*, however, is not present in this fragment. He does not as much as mention that these two *graphai* are attested in *Ath. Pol.* 56.6 as well.

He is silent also about the *graphe kakoseos oikou orphanikou*, even though this *graphe*, too, appears in *Ath. Pol.* 56.6.

¹³ Lipsius (n. 3), 351–2.

¹⁴ Harrison (n. 3), 77–8, and 115–18.

¹⁵ Rhodes (n. 3), 629.

¹⁶ Lipsius (n.3), 351–3 and Harrison (n. 3), 77–8 and 115–18.

¹⁷ Lipsius (n. 3), 340, n. 4

Unlike Lipsius, Harrison does mention (n. 3) that the *graphe kakoseos epiklerou* and the *graphe kakoseos orphanon* are attested in *Ath. Pol.* 56.6. He asserts, however, that they probably did not exist. He states that because *eisangeliai* were available for these two *kakoseis* it is not at all probable that a *graphe*, too, could have been available for them. His argument is that since *eisangeliai* but not *graphai* were penalty-free, no prosecutor in his senses would have used a *graphe* here. I shall argue that despite Harrison the availability of *eisangeliai* for these *kakoseis* need not exclude the existence of *graphai* as alternative actions. Harrison should also have dealt with the question of why *Ath. Pol.* 56.6 has presented us with these two *graphai* if in his view they probably did not exist. Like Lipsius, Harrison, too, fails to acknowledge the existence of the *graphe kakoseos oikou orphanikou* although it is adduced in *AP* 56.6. To sum up, in their classification of the actions for *kakosis* neither Lipsius nor Harrison has adequately justified his rejection of several attested *eisangeliai* and *graphai*.

The fullest recent discussion of *kakosis* actions is that of Rhodes (n. 3). He rightly accepts Harpocration's statement that all *kakosis* actions could be prosecuted by *eisangeliai*. Therefore, he also posits, unlike Lipsius and Harrison, an *eisangelia* for *kakosis goneon* and for *kakosis oikou orphanikou*, that is, he posits *eisangeliai* for all four *kakoseis*. On the other hand he does not seem to allow any independent *κακώσεως γραφαί*; according to him the term *graphe* among *kakosis* suits was merely an alternative name for *eisangelia*. He writes: 'prosecution for maltreatment of one's parents, of orphans, of heiresses, or for mismanagement of an orphan's estate, could be referred to either as an *eisangelia* . . . or as a *graphe*'; Isae. 11. *Her. Hagn.* uses both terms within one speech (para. 6, 15; 28, 31, 32, 35: the fact is noted by Harp., Suid., *loc. cit.*).¹⁸

In other words, he appears to be postulating a joint *eisangelialgraphe* for all four *kakoseis*; for the *kakosis oikou orphanikou* he also accepts *phasis*.

He does not state explicitly on pp. 629–630 whether this joint *eisangelialgraphe* was technically an *eisangelia* or a *graphe*; however, his attributing freedom from penalty to this suit indicates that he meant it to be technically an *eisangelia*.¹⁹

This, then, would appear to be the classification of Rhodes:

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| 1. | <i>Kakosis goneon:</i> | <i>eisangelialgraphe</i> |
| 2. | <i>Kakosis epiklerou:</i> | <i>eisangelialgraphe</i> |
| 3. | <i>Kakosis orphanon:</i> | <i>eisangelialgraphe</i> |
| 4. | <i>Kakosis oikou orphanikou:</i> | <i>eisangelialgraphe</i> and <i>phasis</i> |

It differs from that of Lipsius and Harrison in the *kakosis goneon* where Rhodes substitutes his *eisangelialgraphe* for the *graphe* postulated by those two scholars and in the *kakosis oikou orphanikou* where Rhodes adds *eisangelialgraphe* to the *phasis*.

Although Rhodes's view of the status of the *γραφαί κακώσεως*, a view based on his interpretation of Isaeus 11, cannot be refuted with mathematical certainty, it does not fit well with other evidence. Above all his assumption that there were no independent *κακώσεως γραφαί* cannot be reconciled with the account of *Ath. Pol.* 56.6.

In this section Aristotle enumerates a number of actions that had to be brought before the archon. He refers to these actions as *graphai* and *dikai* but does not tell us which were *graphai* and which were *dikai*. I follow here the generally accepted view that at least the first four offences in the list of Aristotle, that is, the four *kakoseis*, were

¹⁸ Rhodes (n. 3), 629.

¹⁹ Rhodes (n. 3), 57, 630.

prosecuted by *graphai* (see n. 3). In the same passage Aristotle also states that the suit against the first of the four *kakoseis*, the *kakosis goneon*, was penalty-free—*azemios*—to the volunteer prosecutor. Now, the Greek makes it perfectly clear that in the text this freedom of penalty is restricted to the *graphe* for *kakosis goneon* and does not extend to the other three *graphai*.²⁰ Moreover, when mentioning these other three *graphai*, Aristotle does not say that any one of them was also penalty-free to the losing prosecutor. If one or more of them, too, had been penalty-free it would have been very misleading to the reader to fail to reveal this feature in the case of any of these suits and to assign it explicitly to the *kakosis goneon* only. The following, therefore, appears to be the most natural interpretation of this passage: of the four *kakosis* actions only the one used in the *kakosis goneon* was penalty-free to the losing prosecutor. By implication the other three were subject to the usual penalties if he failed to obtain at least 20 per cent of the jury's vote. But if the *graphai kakoseos epiklerou, orphanon, and oikou orphanikou* in *Ath. Pol.* could involve penalties to the losing prosecutor, they cannot be identical, as is asserted by Rhodes, with their corresponding *eisangeliai* because the latter were penalty-free.²¹ It follows that a prosecutor of these *kakoseis* would have had a choice of two separate actions, a *graphe* and an *eisangelia*.

Apparently aware that Aristotle's text is incompatible with his view of the *κακώσεως γραφαί*, Rhodes appears to correct Aristotle with this statement: 'This exemption (sc. of the losing prosecutor from the penalties) applies to all charges of *kakosis*, not only *goneon* . . .'.²² In other words, he appears to be charging Aristotle or his entourage with a substantial error. There are further difficulties with Rhodes's view that the four *kakoseos graphai* in 56.6 were in reality *eisangeliai*. *Ath. Pol.* 56.6 states that the action for *kakosis goneon* was *azemios*, penalty-free. If this action had, indeed, been an *eisangelia*, then there would have been no point in Aristotle's informing us that this particular *kakoseos eisangelia* was *azemios*; as far as we know, all *kakoseos eisangeliai* were penalty-free. On the other hand, it would make perfect sense to inform us that a regular, normal *graphe* was *azemios* because, as stated by Rhodes himself,²³ it was the norm for *graphai* to be subject to penalties. Finally, if the *kakosis* suits were, indeed, technically *eisangeliai*, why did Aristotle choose not to designate them by that name?

Rhodes's difficulties with *Ath. Pol.* 56.6 arise from his particular interpretation of the text of Isaeus 11. As was mentioned above, Rhodes deduced from Isaeus' calling the *kakosis* suit alternately *eisangelia* and *graphe* that there were no independent *κακώσεως γραφαί*; he writes: 'Prosecution for maltreatment of one's parents, of orphans, of heiresses, or for mismanagement of an orphan's estate, could be referred to either as *eisangelia* . . . or as a *graphe*; Isae. XI.Her. Hagn. uses both terms within one speech . . .'.²⁴

If Rhodes's interpretation of Isaeus were the only one possible then, indeed, we should have to reconcile ourselves to his account of the *kakosis* actions, an account that entails charging Aristotle or his associates, men living within the legal system they

²⁰ A different interpretation of this passage is made by Rhodes (n. 3), 57. He writes: '56.6 states that *εἰσαγγελίαι κακώσεως* are *ἀζήμιοι τῷ βουλομένῳ διώκειν* . . .' ('the *eisangeliai* for *kakosis* are penalty-free for the voluntary prosecutor . . .'). However, this is not what the text of 56.6 states. The actions there are called not *eisangeliai* but rather *graphai* and *dikai*. Moreover, it is only the *κακώσις γονέων*, that is stated there to be *azemios*. It is, of course, probably true that all four *kakoseis* could be prosecuted by penalty-free *eisangeliai* but no statement to that effect is found in *Ath. Pol.* 56.6. Rhodes appears here to be guilty of a momentary lapse.

²¹ Harrison (n. 3), 118.

²² Rhodes (n. 3), 630.

²³ Rhodes (n. 3), 630, para. 1.

²⁴ Rhodes (n. 3), 629.

describe, with ignorance or error. There is, however, nothing in the text of Isaeus that would compel us to subscribe to Rhodes's interpretation of it. Nothing in that text indicates that the use of the term *graphe* to refer not to an independent *graphe kakoseos*, but rather to an *eisangelia kakoseos* constituted established practice. It is just as likely that this use in Isaeus of *graphe* for *eisangelia* parallels the other occasional uses of *graphe* for other public actions.²⁵

This interpretation of Isaeus has the advantage of not requiring us to interfere with the text of *Ath. Pol.* 56.6. For this reason it has to be given preference over the interpretation of Rhodes, one that stands in contradiction to the Greek of 56.6. To sum up, this discussion indicates that, contrary to the view held by Rhodes, the *kakosis epiklerou*, the *kakosis orphanon*, and the *kakosis oikou orphanikou* in *Ath. Pol.* 56.6 were prosecuted by independent *graphai*, sc. by actions not identical with *eisangeliai*. Therefore, the prosecutor in any of these three *kakoseis* had a choice between two actions, an *eisangelia* and a *graphe*. I shall argue below that this was the case also for the *kakosis goneon*.

One way of weakening this two-action hypothesis could be to show that at the time of the composition of *Ath. Pol.* 56.6 the *κακώσεως εἰσαγγελίαι* were no longer penalty-free and could, therefore, be identical in this respect with the Aristotelian *graphai*. Evidence shows that from about 333 B.C. prosecutors in the major public *eisangeliai* became subject to a fine of 1000 drachmas if they failed to obtain at least one-fifth of the jury's vote.²⁶ The extension of this fine to the *κακώσεως εἰσαγγελίαι* is adumbrated by Rhodes.²⁷ There is no evidence, however, that these new penalties were extended to prosecutions for *kakosis*. Therefore, it does not seem advisable to assimilate the *graphai* in *Ath. Pol.* 56.6 to the *κακώσεως εἰσαγγελίαι*.

If, indeed, at least three of the four *graphai* for *kakosis* in *Ath. Pol.* 56.6 were actions separate and distinct from the corresponding *eisangeliai*, a question arises. As far as we know there would have been only one substantial difference between these three *graphai* and their corresponding *eisangeliai*. The *eisangeliai*, unlike the *graphai*, would have been free of penalties to the losing prosecutor.²⁸ Harrison rightly points out that no prosecutor in his senses would have chosen to prosecute these *kakoseis* by *graphe* rather than by the less dangerous *eisangelia*.²⁹ How do we account, then, for the presence among the *kakoseis* suits of these apparently useless *graphai*?

An answer is possible if we follow a suggestion of Gernet.³⁰ He thinks that in the

²⁵ On such an occasional use of *graphe*, see M. H. Hansen, 'Graphe or dike Traumatos?', *GRBS* 24 (1983), 310–11. On the statement of Isaeus, see also Harpocration, s.v. *Εἰσαγγελία*, who writes: 'Ἰσαῖος μέντοι περὶ τοῦ Ἀγνίου κλήρου τὸ αὐτὸ πρᾶγμα εἰσαγγελίαν καὶ γραφὴν ὠνόμασεν . . .' (Isaeus, indeed, in his [sc. speech] About the Inheritance of Hagnias called the same thing *eisangelia* and *graphe* . . .'). The fact that Harpocration adduces as noteworthy this interchange of *eisangelia* and *graphe* indicates that in his opinion this kind of interchanging was not a routine employment in *kakosis* actions of these two terms.

²⁶ Lipsius (n. 3), 940–1.

²⁷ Rhodes (n. 3), 57 and 630.

²⁸ Harrison (n.3), 118. With respect to the penalties for the losing defendant in these actions the *eisangeliai* were *ἀγῶνες τιμητοί* (Lipsius [n. 3], 353 and Harrison [n. 3], 118). There is no evidence for the *graphe*. *Phasis* was an *ἀγὼν τιμητός* (Lipsius [n. 3], 315 and 353). MacDowell ([n. 6], 197) deems it possible that the procedure and the penalty for *phasis* in an orphan's estate may have been quite different from those for *phasis* of contraband goods or a ship or a silver mine and may not have involved a penalty at all.

²⁹ See Harrison (n. 3), 117–18.

³⁰ L. Gernet, *Recherches sur le développement de la pensée juridique et morale en Grèce. (Étude sémantique)* (Paris, 1917), 446–7.

kakosis suits the *graphai* were introduced earlier than the *eisangeliai*. This hypothesis suggests an explanation for the presence of these *graphai*. Originally the four *kakoseis* would have been prosecuted only by *graphai*, *graphai* that with the exception of the *graphe kakoseos goneon* were not penalty-free. Subsequently, the Athenians may have come to feel that the fear of incurring the 1000-drachma fine was keeping away some potential prosecutors. In consequence, the penalty-free *eisangeliai* would have been introduced for these *kakoseis* in order to facilitate such socially desirable prosecutions. That new types of prosecution by *eisangelia* could be introduced even during the advanced democracy is shown by the *eisangelia* against public arbitrators. The date of its institution is usually placed around the end of fifth century B.C.³¹ The coexistence, then, of the *graphai* and the *eisangeliai* would be accounted for if we assume that after the introduction of the *eisangeliai* the *graphai*, even though, perhaps, of no interest any longer to a prosecutor, retained their official place among the *kakosis* actions. It is much less likely that the *eisangeliai* for *kakosis* could have been in place earlier than the corresponding *graphai*. If these *eisangeliai*, penalty-free as far as we know, had preceded, there would have been no point in adding the *graphai*, actions offering only a disadvantage to the prosecutor.

The precedence in time of the *graphai* for *kakosis* may also explain why in *Ath. Pol.* 56.6 Aristotle classifies all four *kakosis* actions apparently as *graphai* but fails to mention the *eisangeliai* and the *phasis*. If it was known that the *graphai* had been instituted first, Aristotle may have considered them to be the primary *kakosis* actions with the *eisangeliai* and the *phasis* being deemed supplementary.

The argument that all the *kakoseis* could be prosecuted both by *graphai* and by *eisangeliai* could seem less plausible in the case of *kakosis goneon*. According to *Ath. Pol.* 56.6, the action used here was *graphe kakoseos goneon*. Aristotle states that this action was penalty-free—*azemios*—to the prosecutor. But if it was penalty-free it is not obvious why it should have been supplemented later by an *eisangelia*, a suit that as far as we know would offer the prosecutor no advantage over a penalty-free *graphe*. Yet Harpocration does appear to say that *eisangeliai* were available for all *kakoseis*. The presence of this *eisangelia* can be explained, however, if we assume that the *eisangeliai* for *kakosis* were not introduced for each *kakosis* separately but rather for the four *kakoseis* as a group. Although in practice no *eisangelia* was needed for an easier prosecution of *kakoseis goneon*, it was also true that technically both a *graphe* and an *eisangelia* would be now available to a prosecutor.

Another argument against the availability of two actions, a *graphe* and an *eisangelia*, in the *kakosis goneon* is given by Hansen.³² He asserts that since in *Ath. Pol.* 56.6 the *graphe kakoseos goneon* is said to be penalty-free it must be an *eisangelia*. However, this need not necessarily be true in the case of maltreatment of parents. Dover has demonstrated from the sources that this offence was deemed to be worse than the maltreatment of anyone else.³³ The Athenians, therefore, may have early wished to encourage the prosecution of such maltreatment by making this *graphe* penalty-free for the prosecutor.

³¹ D.M. MacDowell, *RIDA* 18 (1971), 271 dates it to 399/8 B.C. S. C. Humphreys, 'The evolution of legal process in ancient Attica', in E. Gabba (ed.), *Trium Corda. Scritti in onore di Arnaldo Momigliano* (Como, 1983), 239–42 argues that public arbitrators were introduced already by Cleisthenes. Her argument is less well supported by the sources. See also the scepticism of Rhodes (n. 3), 780 (his addendum to 591).

³² Hansen (n. 24), 311.

³³ K. J. Dover, *Greek Popular Morality in the Time of Plato and Aristotle* (Berkeley and Los Angeles, 1974), 273–4.

In order to explain why Aristotle calls this action *graphe* if it was really an *eisangelia* Hansen states that *graphe* here is used in a broader sense. This assumption seems to be open to two objections. First, if the action in the *kakosis goneon* was, indeed, an *eisangelia* why would Aristotle not employ this more accurate term? More important, how were his readers expected to guess that the term *graphe*, especially since it is rendered more specific here by the addition of *azemioi*, was being used in the words of Hansen 'in the broader sense "public action"' and was meant to refer to an *eisangelia*? To sum up, it seems preferable to believe that when Aristotle called the action in *kakosis goneon* a *graphe*, what he had in mind was an ordinary, normal *graphe*.

In deciding whether one or two actions were available for the *kakosis goneon* no clear guidance can be derived from the penalties attested for this offence. Several penalties are mentioned in the sources. One of them is *atimia*. It is connected to the *kakosis goneon* by And. 1.74, Xen. *Mem.* 2.2.13, Diog. Laert. 1.55, and Pollux 8.44–5. The death penalty is mentioned by Lysias 13.9 and Dem. 39.33. Finally, Isaeus in 1.39–40 speaks of μέγιστα ζημῖαι. It is unfortunate that these authors fail to name the action or actions that gave rise to these penalties. In consequence, we cannot be certain whether these penalties belong to one action, sc. to the *graphe kakoseos goneon*, or to the *eisangelia*, or have to be divided between these two actions.

To sum up, I have argued in this paper that contrary to the views of Lipsius, Harrison, and Rhodes, all four *kakoseis* could be prosecuted both by *graphai* and by *eisangeliai*. On the basis of Gernet's work I have also given an explanation for the coexistence of these two actions. Therefore, I believe that the following were the actions available to the prosecution for each of the four *kakoseis*:

- (a) *kakosis goneon*: *graphe* and *eisangelia*
- (b) *kakosis epiklerou*: *graphe* and *eisangelia*
- (c) *kakosis orphanon*: *graphe*, *eisangelia*, and possibly *apagoge*
- (d) *kakosis oikou orphanikou*: *graphe*, *eisangelia*, and *phasis*