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## Pliny the Younger and the problem of *translatio cadaveris*<sup>2</sup>

### Abstract

In the correspondence between the governor of Bithynia-Pontus and emperor Trajan in the years 111–113 one can find an exchange on whether to allow a buried body to be exhumed and transported to be buried in a different place. Pliny, who was familiar with Roman practices in this respect, turned to the emperor seeking advice on what policy he should adopt with regard to the inhabitants of the province. The emperor's answer upheld the common practice that it was possible to move a body to a different burial site only when there was a strong reason for doing so (especially when the tombs were being violated or otherwise under threat). Trajan's judgement influenced the decisions by subsequent rulers who took their stance in this matter.

**Keywords:** rescripts, exhumation, pontifical law, tomb violation

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## Pliniusz Młodszy i problem *translatio cadaveris*

### Streszczenie

W korespondencji pomiędzy namiestnikiem Bitynii i Pontu w latach 111–113 n.e. oraz cesarzem Trajanem znalazł się wątek związany z dopuszczalnością ekshumacji oraz przenosin zwłok do innego miejsca pochówku. Pliniusz, który był zaznajomiony z rzymskimi praktykami w tym zakresie, zwrócił się do cesarza z prośbą o radę, jaki model postępowania ma przyjąć odnośnie do mieszkańców prowincji. Odpowiedź władcy utrzymała w mocy dotychczasową praktykę polegającą na dopuszczalności przeniesienia zwłok w inne miejsce jedynie wówczas, kiedy istniała po temu słuszna przyczyna (zwłaszcza, kiedy groby były zdewastowane lub zagrożone). Rozstrzygnięcie Trajana wpłynęło na decyzje kolejnych władców zabierających głos w tej sprawie.

**Słowa kluczowe:** reskrypty, ekshumacja, prawo pontyfików, znieważenie grobu

One of the instruments which allowed Roman emperors to influence the letter of the law in the times of the principate was that of a rescript. A rescript was essentially an answer issued in response to a question asked by municipalities, inhabitants of the province, administrators, judges and private persons. Fragments of imperial rulings or commentaries on them have been preserved to a large degree in the emperor Justinian's Digest. Others survived on inscriptions or in the papyri.<sup>3</sup>

Against this backdrop, the correspondence between Pliny the Younger and the emperor Trajan is of an exceptional character. In the year 111 AD Pliny became the governor of the province of Bithynia and Pontus.<sup>4</sup> He was charged with the duties of mainly improving the effectiveness of the administration of the province and controlling municipal finances. Thus the emperor's delegate, well acquainted with the realities of the capital and Italy, found himself in a new environment, where he was to be confronted with unfamiliar problems.<sup>5</sup> Due to the fact that he had a good relationship with the emperor, he never hesitated to address him with numerous questions.

Among the issues which demanded the emperor's intervention there appeared a question of permitting the exhumation of the body and moving the body to a different burial ground. In one of his letters Pliny shared his doubts with Trajan in the following way:

Certain persons have asked me to follow the practice of senatorial governors and permit them to move to a site of their choice the remains of their deceased relatives, either because their monuments have suffered through lapse of time or the flooding of the river or for other similar reasons. Knowing that when cases of this kind arise in Rome application must be made to the College of

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<sup>3</sup> Cf. U. Wilcken, *Zu den Kaiserrescripten*, "Hermes" 1920, 55, pp. 1–42; T. Hauken, *Petition and Response: an Epigraphic Study of Petitions to Roman Emperors 181–249*, Bergen 1998, passim.

<sup>4</sup> See: U. Wilcken, *Plinius' Reisen in Bithynien und Pontus*, "Hermes" 1914, 49, pp. 120–136. More on the life and career of Pliny the Younger – Th. Mommsen, *Zur Lebensgeschichte des Jüngeren Plinius*, „Hermes" 1869, 1, pp. 31–139; L. Winniczuk, *Pliniusz Młodszy w świetle swoich listów i mów*, Warszawa 1987, passim.

<sup>5</sup> J.N. Hough, *A Few Inefficiencies in Roman Provincial Administration*, "The Classical Journal" 1939, 35, pp. 17–26.

Pontiffs, I thought I should consult you, Sir, as Chief Pontiff, to learn what course you wish me to follow.<sup>6</sup>

In accordance with the provisions of Roman law, the moment the body or urn was placed in the tomb, both the burial site and its immediate surroundings became untouchable.<sup>7</sup> Tombs, together with the bodies resting in them were considered to be things outside of private rights – *res religiosas*.<sup>8</sup>

In Rome and in Italy, an approval for exhuming and moving a body to a different burial ground could only be issued by a pontiff or emperor. Understandably, it was difficult to seek such an approval every time it was needed, especially given the fact that the distance to the capital was sometimes several thousand kilometres. Moreover, *ius pontificium* did not extend beyond the borders of Italy.<sup>9</sup> Pliny's letter indicates that in such situations rulings were passed in accordance with the local law and customs.

The doubts voiced by the governor of Bithynia-Pontus in this matter were absolutely justifiable.<sup>10</sup> The issues with regard to maintaining the tombs, their protection and eventual transferring of the body to a different place lay in the borderland between the human and divine law. For people living in the Mediterranean basin it was a taboo subject. Pliny's hesitations of religious or moral nature might have been accompanied by uncertainties concerning the law. In the opinion of a jurist Gaius:

<sup>6</sup> Plin. ep. 10.68: *Potentibus quibusdam, ut sibi reliquias suorum aut propter iniuriam vetustatis aut propter fluminis incursum aliaque his similia quocumque secundum exemplum proconsulum transferre permitterem, quia sciebam in urbe nostra ex eius modi causa collegium pontificum adiri solere, te, domine, maximum pontificem consulendum putavi, quid observare me velis.* English translation according to Pliny, *Letters Books VIII–X and Panegyricus*, transl. B. Radice, Cambridge Massachusetts 2004, p. 253.

<sup>7</sup> Y. Thomas, *Res Religiosae: On the Categories of Religion and Commerce in Roman Law*, [in:] P. Mundy, M. Mundy (eds.), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, Cambridge 2004, p. 60; J. Addame-Goddard, *Sobre los sepulcros en las Sentencias de Paulo. Análisis crítico de PS 1,21*, "Anuario Mexicano de Historia del Derecho" 2003, 15, p. 642; S. Schrupf, *Bestattung und Bestattungswesen im Römischen Reich. Ablauf, soziale Dimension und ökonomische Bedeutung der Totenfürsorge im lateinischen Westen*, Göttingen 2006, p. 154.

<sup>8</sup> More discussion on this subject – M. Jońca, *Przestępstwo znieważenia grobu w rzymskim prawie karnym*, Lublin 2013, pp. 62–80.

<sup>9</sup> A.N. Sherwin-White, *The Letters of Pliny. A Historical and Social Commentary*, Oxford 1966, p. 655.

<sup>10</sup> *Ibidem*, p. 122; J. Gaudemet, *La jurisdiction provinciale d'après la correspondance entre Pline et Trajan*, "Revue Internationale des Droits de l'Antiquité" 1964, 11, p. 343. To the contrary – L. Vidman, *Étude sur la correspondance de Pline le jeune avec Trajan*, Praha, 1960, p. 65. The Czech scholar voices his doubts whether the governor's permission was in the above situation needed at all. He explains the petition addressed to Pliny by the local people's vanity and excessive ambitions.

it has been held by the greater number of authorities that, in the provinces, ground does not become religious, as the ownership of the same belongs to the Roman people or to the Emperor, and we are only considered to have the possession or the usufruct of the same, and though it may not actually be religious, it is regarded as such.<sup>11</sup>

In Rome and in Italy, interring a body in the tomb caused the place to become immediately exempt from judiciary matters and became inviolable. Breaching such inviolability qualified among the gravest crimes against the sacral character of a place. During the period of the Roman Empire, tomb violation was punishable with severe penalties, also in secular law.<sup>12</sup> However, Pliny was not entirely certain whether Roman regulations could be applied *per analogiam* in the provinces. If, outside Italy, depositing a dead body in the tomb did not incur legal, but only factual exemption from judiciary matters, the question to be answered was whether under such conditions exhumation and moving the body violated the law. The emperor was asked to give his opinion on this matter as the high priest (*pontifex maximus*).<sup>13</sup>

In answer to his enquiry, the pedantic legate received a dry reply<sup>14</sup>:

It makes things difficult for provincials if we enforce the rule of applying to the Pontiffs when they have good reason for wanting to transfer the remains of their deceased from one site to another. I think it would be best to follow the example of former governors of your province and grant or refuse permission on the merits of each individual case.<sup>15</sup>

<sup>11</sup> Gai. 7.2: *Sed in provinciali solo placet plerisque solum religiosum non fieri, quia in eo solo dominio populi Romani vel Caesaris, nos autem possessionem tantum vel usumfructum habere videmur. Utique tamen, etiamsi non sit religiosum, pro religioso habetur.*

<sup>12</sup> See: M. Jońca, op. cit., pp. 275–352.

<sup>13</sup> F. Cumont, *Un réscrit impérial sur la violation de sépulture*, “Revue Historique” 1930, 163, p. 248; A.N. Sherwin-White, op. cit., p. 122; J. Gaudemet, op. cit., p. 343.

<sup>14</sup> A.N. Sherwin-White, op. cit., p. 656, believes that the emperor did not understand his governor’s intentions and his justified doubts and that is why he treated him in such a brusque manner. J. Gaudemet, op. cit., p. 343: “the emperor’s answer is very common sense”. Cf. however, the tone of the answer to the question of moving a temple of Kybele in Nicomedia to a different site – Plin. ep. 10.50. Further discussion on the matter – J. Gaudemet, op. cit., pp. 343–344.

<sup>15</sup> Plin. ep. 10.69: *Durum est iniungere necessitatem provincialibus pontificum adeundorum, si reliquias suorum propter aliquas iustas causas transferre ex loco in alium locum velint. Sequenda ergo potius tibi exempla sunt eorum, qui isti provinciae praefuerunt, et ut causa cuique, ita aut permittendum aut negandum.* English translation according to *Pliny, Letters Books VIII–X...*, op. cit., pp. 253–254.

Unfortunately, the emperor's answer did not include any details with regard to how Pliny's predecessors behaved in such circumstances. From other sources it transpires that local administrators in various provinces, which differed in local customs, climate and geographical features adopted different modes of conduct in the case of exhuming and transferring the dead. In an enigmatic epitaph coming from a place called Khamissa (province: Africa Proconsularis) one can find the following text: "To Hercules, Manes gods for sancticity. Lucius Wetidius Saternus Wetidianus, eques, fifth son of Quintus Wetidius Juvenalius, fluent in both languages<sup>16</sup>, lived eighteen years, four months and twenty-eight days. In accordance with the permission of the governor of the province, after his remains had been brought from Carthage, he was buried here".<sup>17</sup> On the territory of Palestine, numerous boxes for human remains called ossuaria or ossulegia were found. On this ground, it has been assumed that exhumation and transferring the bodies from one place to another was common practice among the Jews.<sup>18</sup> On the other hand, on the territory of Gaul, the dead were deposited in the tomb with a clear intention of leaving them there *in perpetuum*.

It happened that in his letters Pliny referred to important matters, in which the emperor's ruling established a precedent, paving the way of conduct for subsequent generations of imperial officials.<sup>19</sup> Without doubt, the letters contained queries with regard to matters such as slaves who joined the legions after assuming somebody else's identity<sup>20</sup>, limitation period for certain crimes<sup>21</sup>, personnel delegated to supervise prisoners<sup>22</sup> or finally the report on the measures taken against Bithynian Christians, which still evokes considerable controversy.<sup>23</sup>

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<sup>16</sup> Probably, it is a reference to Latin and the Punic language. See: F. Millar, *Local Cultures in the Roman Empire: Libyan, Punic and Latin in Roman North Africa*, "The Journal of Roman Studies" 1968, 58, pp. 126–133. On using other languages apart from Latin in judicial matters on the territory of *Imperium Romanum* – A. Wacke, *Gallisch, Punisch, Syrisch oder Griechisch statt Latein. Zur schrittweisen Gleichberechtigung der Geschäftssprachen im römischen Reich*, "Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung" 1993, 110, pp. 14–59.

<sup>17</sup> ILAlg-01, 01363: *Heracli | D(is) M(anibus) s(acrum) | L(ucius) Vetidius | Maternus | Vetidianus | eques Rom(anus) | Q(uinti) Vetidi Iuvena|lis quinquen|nalici filius | utraq(ue) lingua | eruditus p(ius) v(ox)it a(nnos) XVIII | m(enses) IIII d(ies) XXVIII per|missu praesidis a | Karthagine de stu|dio relatis reliquii | h(ic) s(itus) e(st)*. See also: F. Cumont, op. cit., p. 250, footnote 2.

<sup>18</sup> B. Metzger, *New Testament Studies: Philological, Versional, and Patristic*, Leiden 1980, pp. 83–84. More on the subject – E.M. Meyers, *Secondary Burials in Palestine*, "Biblical Archeology" 1970, 33, pp. 2–29.

<sup>19</sup> B. Levick, *Plinius in Bithynia and what followed*, "Greece and Rome" 1979, 26, pp. 119–131.

<sup>20</sup> Plin. ep. 29.

<sup>21</sup> Plin. ep. 31.

<sup>22</sup> Plin. ep. 19.

<sup>23</sup> Plin. ep. 96.

The resolution on allowing exhumation and transference of dead bodies issued in Bithynia may be included among the abovementioned rescripts. A deeply-ingrained conviction of inviolability of human remains deposited in the tomb was often stronger than a pragmatic attitude permitting exhumation in strictly defined circumstances. This is why queries in this regard continued to appear. However, the subsequent decisions of Roman emperors in this matter did not depart from the mode of conduct outlined in Pliny's query and Trajan's answer.

It seems that in the times of Pliny the issues related to the protection of graves and inviolability of the dead were still within the authority of the pontiffs. With time, however, appropriate regulations in this matter started to appear also in civil law.<sup>24</sup> Trajan's resolution was certainly one of the sources used by subsequent law-givers. The jurist Marcian summarizes an edict issued by Marcus Aurelius and Lucius Verus in the following words: "The Divine Brothers decreed by an Edict that a body should not be disturbed after it had been lawfully interred, that is to say, placed in the ground; for a body is held to be placed in the ground where it is deposited in a chest with the intention that it shall not be removed elsewhere".<sup>25</sup> Yet, it was generally accepted that there might occur circumstances forcing exhumation and moving the body.<sup>26</sup> This is why the emperors did not omit to add: "It must not be denied, that it is lawful to remove the chest itself to a more convenient spot, if circumstances demand it".<sup>27</sup> As a matter of fact, the rulers restricted themselves solely to the question of transferring ashes kept in the urn (or in the sarcophagus)<sup>28</sup>, but it seems that the abovementioned rule was applicable also while removing dead bodies. Examples of typical circumstances justifying the undertaking of similar interventions can be found in post-classical "Paulus's Sentences": "When under the threat of flooding or collapsing of the tomb, the body once buried may be, after offering ceremonial sacrifices, removed to another place at night".<sup>29</sup>

A petition with which one Dionisia turned to the emperor Caracalla in 213 AD is especially interesting. The petitioner described the vile condition of her son's

<sup>24</sup> J. Adame-Goddard, op. cit., p. 642.

<sup>25</sup> D. 11.7.39: *Divi fratres edicto admonuerunt, ne iustae sepulturae traditum, id est terra conditum corpus inquietetur: videtur autem terra conditum et si in arcula conditum hoc animo sit, ut non alibi transferatur.*

<sup>26</sup> F. Cumont, op. cit., p. 249.

<sup>27</sup> D. 11.7.39: *Sed arculam ipsam, si res exigat, in locum commodiorem licere transferre non est denegandum.*

<sup>28</sup> The term *arcula* used by the Roman jurist denotes a box, which, depending on the size, may refer to both a sarcophagus or an urn. Further discussion – A. Paturet, *Le transfert des morts dans l'antiquité romaine: aspects juridiques et religieux*, "Revue Internationale des Droits de l'Antiquité" 2007, 54, p. 350.

<sup>29</sup> PS 1.21.1: *Ob incursum fluminis vel metum ruinae corpus iam perpetuae sepulturae traditum sollemnibus redditis sacrificiis per noctem in alium locum transferri potest.*

tomb. It is possible that she wanted to obtain the emperor's opinion as a result of the difficulties she had experienced at the hands of the local administration. In the rescript one can read the following: "If the current of the river poses a threat to the remains of your son or if there is another, right and necessary reason, after the governor of the province has assessed the situation, you will be able to transfer the body to a different place".<sup>30</sup>

It is worth pointing out that the emperor emphasized the fact that obtaining permission for moving the body was possible only on condition that there existed very serious reasons for doing so. Such situation was also mentioned by Pliny in his letter. Both texts refer to the force of nature in the form of the current of the river. It is important inasmuch as land owners on whose land there were graves often made an effort to remove them from their land, as it would increase the price of their property.<sup>31</sup>

In the act of the emperor Constantius of 349, addressed to the praetorian prefect Limenius, one can find the following statement: "The following rule must be observed in the future, that in the provinces the judges of the respective districts and in the City of Rome Your Eminence, together with the pontiffs, shall inspect to see if any monument should be restored by repairs, provided that, if permission finally should be granted, a time shall also be fixed for the completion of the work".<sup>32</sup>

In the 4th century the competences of governors in the area of granting permission for exhuming and moving the body became more clearly defined. The reaction of the authorities was triggered by the growing extent of the phenomenon, which Pliny the Younger did not refer to in his letter. Apart from permissions granted at a specific request there also appeared official orders. It was suspicious especially in situations when the officials ordering the removal of the bodies had "investment plans" with regard to the ground where the tombs were located. This is why the abovementioned act of Constantius includes a conspicuous warning: "But even if a monument has been torn down by the order of a judge, in order that

<sup>30</sup> CJ 3.44.1: *Si vi fluminis reliquiae filii tui continguntur vel alia iusta et necessaria causa intervenit, aestimatione rectoris provinciae transferre eas in alium locum poteris.*

<sup>31</sup> O. Behrends, *Grabraub und Grabfrevel im römischen Recht*, [in:] H. Jankuhn et al. (eds.), *Zum Grabfrevel in vor- und frühgeschichtlicher Zeit*, Göttingen 1978, p. 87. This would also remove the irritating duty of the establishment of the easement *iter ad sepulcrum*. See: F. de Visscher, *Le droit des tombeaux romains*, Milan 1963, pp. 83–89.

<sup>32</sup> CT 9.17.2.1: *Hoc in posterum observando, ut in provinciis locorum iudices, in urbe roma cum pontificibus tua celsitudo inspiciat, si per sarturas succurrendum sit alicui monumento, ut ita demum data licentia tempus etiam consummando operi statuatur.* See also: S. Schrumph, op. cit., p. 162, footnote 435. The act uses the term *iudices*. It refers most probably to the governors of the province – C. Pharr, *The Theodosian Code and Novels and the Sirmondian Constitutions: A Translation with Commentary, Glossary, and Bibliography*, Princeton 1953, p. 239, footnote 10.

the penalty may not be avoided under the pretext of erecting public buildings, We order the aforesaid judge to assume the payment of this fine [i.e. a pound of gold – M.J.]”.<sup>33</sup>

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<sup>33</sup> CT 9.17.2 pr.: *sed si ex praecepto iudicum monumenta deiecta sunt, ne sub specie publicae fabricationis poena vitetur, eosdem iudices iubemus hanc multam agnoscere; nam ex vectigalibus vel aliis titulis aedificare debuerunt.*

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