Justiciability of rule through the example of the Electorate and Kingdom of Hannover

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1. *Historical introduction*

In the 19th century, the Kingdom of Hannover was the fourth biggest state in the German Confederation after Austria, Prussia and Bavaria. Although the original dukedom of Braunschweig-Lüneburg had been divided into several single principalities by repeated inheritance-treaties since the 13th century, in 1692 duke Ernst-August succeeded in receiving the grandeur of an elector for his line of the "Welfenhaus" residing in Hannover and therefore ascended to the small circle, who elected the kings and emperors of the Holy Roman Empire[1]. His son George[2] who was a great-grandchild of King James I of England and Scotland from his mother's side, ascended to the British throne in 1714[3]. After the enthronement, he became king of Great Britain and Ireland and of course stayed elector of Braunschweig-Lüneburg.

After the liberation from French occupation, Hannover was elevated to a kingdom at the congress of Vienna in 1814. This happened after the dukes of Bavaria, Württemberg and Saxony had already been made kings by Napoleon Bonaparte in 1806. In 1837, the year King William IV died, the personal union of Great Britain and Hannover ceased due to the so-called "salic law". In Great Britain, Victoria, the niece of King William ascended to the throne, while in Hannover his brother Ernst August became king and began to rule. The national independency of Hannover ended in the year 1866. When Bismarck was trying to force Austria out of the German Confederation, Hannover found itself stuck between the fronts. During the war between Prussia and Austria in 1866, Hannover was occupied by Prussian troops. On October 3rd 1866, the kingdom was annexed and converted into a Prussian province[4].

2. *Judicial control of domination since the 18th century*

2.1. *Judiciary and domination in the 18th century*

According to Peter Oestmann, Hannover was already referred to as «territory with a well-organised administration of justice»[5] in the 18th century. After the installation of the Higher Court of Appeal in Celle[6] for the electorate of Braunschweig-Lüneburg in 1711, Elector George I, who would ascend to the British throne in 1714, had stated the following points in the rules of court from 1713. Firstly, the court must exercise jurisdiction instead of the electors. The order stated:

> We give all power and force to our president, vice-president and highest council of the courts of appeal, they *instead of us* shall decide over all claims, which belong to the court of appeal according to the given edict. They shall think and *proceed only guided by the law and their conscience and mind*. They shall speak, recognise, command and assert themselves what they think that might be just and equitable. They shall do as we could have wanted[7].

Secondly, the elector «did not want to interfere with the judicial activities of the Higher Court of Appeal, instead of that, the judiciary should be allowed full autonomy»[8]. According to George I, the second point should be applied to his successors as well. Beyond that, the judges «shall also freely and fearlessly decide lawsuits which concern the elector himself, his chamber, authorities, rights or office bearers and the court *shall not be afraid to rule on a matter, in which the elector or his office bearers have personal interests*»[9]. The judges should be brought into position, where they could autonomously fulfil their judicial duties as an «impartial judiciary» and «only being subject to the almighty God»[10].

The Judges should therefore be released from all duties, which tied them to the elector and prince in case that the elector himself, his chamber or authorities must appear in court as parties. According to the words of the elector, this procedure would secure freedom and impartiality of the courts[11]. Thus, it was possible – and this should be emphasized – to suit the elector and achieve a sentence against him. King George II once asked the President of the Higher Court of Appeal, why he was losing his lawsuits so frequently and the President, Freiherr von Wrisberg, is said to have replied: «Because Your Majesty usually is wrong»[12].

2.2. *The constitutional crisis in 1837*

Judicial control of governance rudimentary developed in Hannover during the 19th century but then a well-known incident took place in the year 1837, which should demonstrate the dominance of royal prerogative after the enthronement of King Ernst August. The constitution, which Hannover had received from King William IV in 1833, was abolished immediately after his accession to power in 1837 and after obtaining a detailed judicial report by the new king. The decision by the king, which was back then and still is heavily criticised, had its reason in the personal condition of the crown prince, the only son of the king. The prince and future king became amaurotic in one eye in 1828 and the other eye in 1832. This led to a severe problem concerning the constitution.

Under the terms of § 14 of the constitution from 1833, a regency shall commence, if «the king is either under age or is prevented by any different reason to take over»[13]. This phrase in § 14 referred to chapter 25 of the Golden Bull (1356), which stated that the firstborn son shall always be entitled to the electorate, «as long as he is not insane, misguided or suffering from a different visible and obvious affliction, on behalf of which he must not rule over people as a prince»[14]. Amaurosis was among these afflictions, therefore the blindness of the crown prince endangered the succession to the throne[15]. The new constitution, which was put into effect in 1840 by King Ernst August, therefore stated in § 17: «A regency commences, if the king is under age or living with a mental condition, on behalf of which he is unable to lead the government»[16]. This alteration should secure that only mental defects, but not just physical limitations initiate a regency. Nevertheless, the blindness of the crown prince was widely discussed in public and caused some doubts regarding the ruling ability of the prince[17]. The disbelief was most likely triggered by the Prussian side.

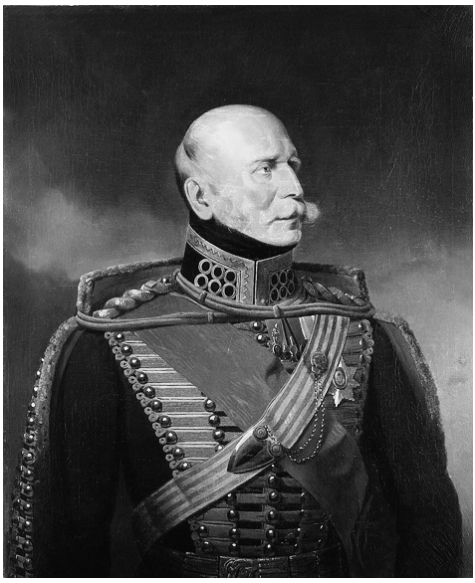
3. *Constitutional limitations of power*

Concerning the constitutional limitations of power this paper will on the one hand focus on the constitutional rules regarding limitations of the administration, on the other hand it will highlight the judicial control of administrational acts by the Higher Court of Appeal.

3.1. *Constitutional limitations of actions of the administration*

The constitution of Hannover from 1833 stated in § 151 I/III, that the meeting of estates was entitled to bring charges against a minister or against a member of the executive committee of a ministerial department, if an order of the king breaches the constitution and the minister or the member of the executive committee of a ministerial department had approved the specific order[18]. Under the terms of § 152, the trial should be conducted in front of the plenum of the Higher Court of Appeal. The Higher Court of Appeal could either determine an intentional breach of the constitution or assert that it does not happen (§ 152 III). The decision had dramatic legal and economic consequences for the defendant: Firstly, the person should be unseated and secondly, he would receive a ban, which included a prohibition of employment at a different ministerial office (§ 152 III). It was not possible to appeal to a higher court, moreover amnesty by the king was excluded (§ 152 IV).

Furthermore, the constitution from 1833 stated in § 37 that anybody who believes that he might be violated in his vested rights by overstepping actions of the administration, could appeal to ordinary courts. Only if the violation was caused on grounds of the constitution or another constitutionally enacted law, the statute itself or the constitution itself could not be made part of a demand against the state or administrative agencies. In fact, only a wrongful or unauthorised application on the constitution or a law could be reason for a demand if the exceeding or overstepping of competency by the agencies actually established a commitment for



King Ernst August I of Hannover. Painting by Edmund Koken

damages. Another point that must be presented by the claimant was a sufficient need for legal relief. In order to bring charges against the state, the claimant must prove, that he had sought help at the higher and highest competent administrational agency and that he did not receive any relief within an appropriate period of time. Orders of the administration could only be revised by the judges, if the constitution clearly states, that the point of question does not belong to the competency of the previously acting agency. The judicial examination was limited to the question, whether the actions of administration were lawful or not. The court of law must not assess, whether the agencies were advantageously acting or not. Basically both requirements – so seek relief in the administration first and the concentration on the revision on legal items – are still observed today.

Additionally, § 38 stated that, demands out of vested private rights against the fiscus and demands of the fiscus against citizens belonged to the competency of ordinary courts of law. Therefore § 38 preserved the judicial tradition of early modern Europe that specific rights (the so called properly acquired rights – "wohlerworbene Rechte") were protected by law.

The new constitution for the kingdom of Hanover from 1840 resumed these rules in its § 40. This paragraph stated that on the one hand conflicts about the necessity of administrational decisions could not be questioned in court. On the other hand, § 40 made clear that an administrational agency or office could be sentenced to pay for damages, if firstly, private rights are unlawfully violated due to wrong or unauthorised application or interpretation of the constitution or other laws or due to other actions by the agency and if secondly, all other judicial requirements of a claim for compensation were fulfilled. The courts must only accept a complaint if the claimant has proven that he already had in vain looked for legal relief at the highest competent agency. Therefore, the lawfulness of administrational actions has been liable for trial in a court of justice, if the claimant was violated in his rights and if he has vainly approached the agency prior to the submission of the complaint. And the new § 30 of the constitution of 1840 secured that administrational actions are controlled: A person must only be arrested, if the law includes this specific case. The arrested person must be questioned within twenty-four hours and he or she must be given information about the reason for arresting.

Though the king was named the source of all jurisdiction in § 9 I of the constitution from the year 1840, but § 9 II made clear that jurisdiction should be practised in accordance to the constitution by the ordinary courts. The king was supposed to have only a supervisory position. Particularly, the constitution emphasised that the king must not interfere with the jurisdiction. § 9 III stated that the king could not block the normal course of justice. Nevertheless, the king was reserved certain space of his own decisions. He could – under extraordinary circumstances – grant moratoriums, if he had listened to the state council (§ 9 IV). Additionally, under the terms of § 9 V, the king was given a specific right of pardon in criminal cases. § 9 V stated that the king must not worsen the sentence but he had the right to annul or reduce already given punishments. Furthermore, the king was entitled to stop or totally settle a criminal trial. This right of pardon has already belonged to the privileges of kings since Middle Ages. It can still be used by the Federal President of Germany these days.

3.2. *Judicial control by the Higher Court of Appeal concerning actions of the administration*

On 5th September 1848, a new law, which brought some alterations to the constitution, was enacted. This statute should make it easier to achieve judicial control. It stated in § 10, that a claimant could even appeal to higher courts, if his case did not hit a certain sum of money. Before the new law came into force, the right to appeal was dependent on a certain economic significance regarding the case.

The possibility of judicial control of administrational actions in the kingdom of Hannover was then codified into the Code of civil procedure in 1850[19]. This Code of civil procedure from 1850 seems to be a result of the so called "March-ministry" (*März-Ministerium*), which was convoked by King Ernst Augustus in 1848[20]. March-governments had been convoked in many different German states as a reaction to the beginning of the revolution in March 1848, but only in Hannover it stayed in office until 1850. Subsequently, the Hannoverian Code of civil procedure became the basis for discussions regarding a general Civil code of procedure for all German states. For this aim, a commission was holding several conferences in Hannover[21], similar to the conferences in Dresden preparing a unified law of obligations[22]. The Code of civil procedure of Hannover has been elaborated by Gustav Adolf Wilhelm Leonhardt, who was the last minister of justice in Hannover since 1865. From 1867 up to 1879, he served as minister of justice in Prussia. During this time, he contributed his services for the creation of the imperial statutes of justice (*Reichsjustizgesetze*) in 1877 consisting of the German Code of Civil Procedure, the Constitution of the Judiciary Act, the Code of Criminal Procedure and the Insolvency Act[23].

The Hannoverarian code of civil procedure made the oral proceeding the centre of the whole procedure for the first time[24]. Furthermore, the appellate system has been simplified by limiting the appeal stages up to two and providing with the right to appeal only one remedy[25]. The appeal led to a revision of the whole case by

the court of appeal[26]. Basically, only final judgements could be subject to an appeal[27]. The remedial procedure was organised in a way that a party who intended to appeal must always direct himself to the superior court of law[28]. The Small Senate of the provincial courts became the appeal courts for judgements by district courts. Verdicts by the Small Senate could be reviewed by the Great Senate of each provincial court and judgements of the Great Senate could be screened by the Higher Court of Appeal[29]. This (above mentioned) specific court was reinstalled for the electorate and (later) kingdom of Hannover after the liberation from the French troops in 1814. The former judicial order of the Higher Court of Appeal from 1713 was adapted and only slightly changed[30]. If a person had appealed, the verdict could not be executed, as long as the preliminary execution of the sentence had not been specifically ordered[31]. Therefore an appeal had a suspensive effect.

A third appeal stage was not provided. Indeed, after the first appeal the appeal stages were basically closed. There was just one exception, if the administration had overstepped its competency, the Higher Court of Appeal could be invoked[32].

In order to implement the law from 1840, § 430 of the Hannoverian Code of civil procedure stated that, regarding to appeals about the overstepping of competency by administrational actions the following two points shall receive attention. Firstly, the case must not hit a certain economic significance and secondly, the Higher Court of Appeal should be used as a third appeal stage, as long as it was not already the second appeal stage[33].

The published documents of the Hannoverian Code of civil procedure give an account of the motives behind the new § 430: By implementing the statute, the right of appeal should be expanded. For the question, whether or not the administration had overstepped its competency, the right to appeal should become a general remedy[34]. The new § 430 eliminated the old § 393, which had stated that only cases with an economic significance of 10 Thaler or more can be made part of a legal claim. Furthermore § 430 emphasized that it should not only be possible to appeal against verdict by the first appeal stage, but also against sentences given by the second appeal stage.

§ 430 seems to be a special statute. According to governmental motives, it was seen as an "anomaly", because it did not refer to a lawsuit between two private citizens, but it gave reason for a claim against the state[35]. Even the governmental motives highlight that the implementation of the law from 1848 wanted to bring questions about the competency of administrational actions always to the higher appeal court and therefore to the highest judicial instance of the kingdom[36].

Every violation of limitations of competency by the administration should be made reviewable by the Higher Court of Appeal[37]. Questions about economic significance should be irrelevant. Everyone, who might be violated should have the right to sue. Finally, the judges could countermand the administrational decision and award damages.

But on 1st August 1855 a new royal edict caused modifications and set aside § 10 of the above mentioned statute from 1848[38]. The edict has been a consequence of a constitutional alteration. The Higher Court of Appeal itself ruled that the question whether or not administrational action was within

its legal competency would not be liable for trial in a court of justice anymore[39]. Obviously, Adolf Leonhardt, the creator of the Code of civil procedure, did not agree with this verdict[40]. Nevertheless, the aforementioned § 40 of the constitution from 1840 was still in effect[41]. Therefore, the lawfulness of administrational actions could still be reviewed, but instead of a compulsory reviewing by the Higher Court of Appeal it was dependent on the economic significance of a case whether the Higher Court of Appeal or lower courts were competent to decide. Thus the legal practice continued which already existed since the beginning of the 18th century.

However, a specific administrative jurisdiction did not exist yet. This did not change until Otto Bähr[42] and Rudolf Gneist[43] came forward with their ideas and thoughts about a foundation of an administrative jurisdiction. So step by step specific administrative courts were formed in all German states, first in the grand-duchy of Baden in 1863. In Prussia, thus also in Hannover as a Prussian province, the first administrative courts were formed in 1872 and later other German states followed.

Conclusion

To summarise, § 40 of the constitution from 1840 secured that administrational actions can be reviewed regarding their lawfulness by judges. Therefore the judgements of lower courts and administrative acts could be revised in a higher court of justice[44]. However, a gradual development of control did not take place in Hanover until 1866. In fact, it was more like some steps forward, followed by some steps backward. So the legal condition practised in 1711 was only slightly modified and in the form of a civil procedure made a little bit more judicially precise. While the order of the Higher Court of Appeal in 1713 mentioned "rights" of the elector, the constitution in 1840 expressly used the words "revision of administrational acts" and the obligation to damages in case of a violation of private rights. But it should be emphasised that the control of administrative acts had been laid in the hands of independent judges in 1711, when the elector George I. established the Higher Court of Appeal in Celle. Thus one may call the Higher Court of Appeal a constitutional court in the early 18th century.

[1] *Geschichte des Landes Niedersachsen, (Territorien-Ploetz)*, Freiburg/Würzburg, Ploetz, 1988[5], pp. 19 ss., pp. 34 ss., pp. 47 ss.; M. Bertram, *Das Königreich Hannover*, Hannover, Hahnsche Buchhandlung, 2003, pp. 9 ss.; E. Schubert, *Hannover*, in W. Buchholz, (edited by), *Das Ende der Frühen Neuzeit im „Dritten Deutschland"*, (Historische Zeitschrift, Beiheft 37), München, Oldenbourg, 2003, pp. 25-51; An account of the older history of the princedom gives G. Pfannkuche, *Patrimonium - Feudum - Territorium, Zur Fürstensukzession im Spannungsfeld von Familie, Reich und Ständen am Beispiel welfischer Herrschaft im sächsischen Raum bis zum Jahre 1688*, Berlin, Duncker und Humblot, 2011.

[2] R. Hatton, *George I elector and king*, London, Thames & Hudson, 1978, New Haven, Yale University Press, 20012, germ. tr. *Georg I. - ein deutscher Kurfürst auf Englands Thron*, Frankfurt am Main, Societas, 1982.

[3] G. Schnath, *Geschichte Hannovers im Zeitalter der neunten Kur und der englischen Sukzession 1674-1714*, vol. I-IV, Hildesheim, Lax, 1938/1976/1978/1982; G.C. Gibbs, *Union Hanover/England. Accession to the throne and change of rulers. Determining factors in the establishment and continuation of the personal union*, in R. Rexheuser (edited by), *Die Personalunionen von Sachsen-Polen 1697-1763 und Hannover-England 1714-1837. Ein Vergleich*, Wiesbaden, Harrassowitz, 2005, pp. 241-274; A. Reitemeier, *Hannover und Großbritannien: Die Personalunion 1714-1837*, in K. Lembke (edited by), *Als die Royals aus Hannover kamen, Hannovers Herrscher auf Englands Thron 1714-1837*, Dresden, Sandstein, 2014, pp. 18-45.

[4] E. Pitz, *Deutschland und Hannover im Jahr 1866*, in «Niedersächsisches Jahrbuch für Landesgeschichte», n. 38, 1966, pp. 86-158; G. A. Craig, *Geschichte Europas 1815-1980*, München, C. H. Beck, 1983, pp. 179 ss.; Bertram, *Das Königreich Hannover* cit., p. 129; A. Dylong, *Hannovers letzter Herrscher. König Georg V. zwischen welfischer Tradition und politischer Realität*, Göttingen, Matrix Media, 2012, pp. 164 ss.; F. Köster, *Das Ende des Königreichs Hannover und Preußen. Die Jahre 1865 und 1866*, Hannover, Hahnsche Buchhandlung, 2013; T. Vogtherr, *1866-Wie kam es zum Ende des Königreichs Hannover*, in «Niedersächsisches Jahrbuch für Landesgeschichte», n. 88, 2016, pp. 209-226.

[5] P. Oestmann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren*, Köln/Weimar/Wien, Böhlau, 2015, p. 240.

[6] P. Jessen, *Die Gründung des Oberappellationsgerichts und sein Wirken in der ersten Zeit*, in *Festschrift zum 275jährigen Bestehen des Oberlandesgerichts Celle*, Celle, Cellesche Zeitung Schweiger & Pick, 1986, pp. 21-62; E. von Meier, *Hannoversche Verfassungs- und Verwaltungsgeschichte 1680-1866*, vol. I, Leipzig, Duncker & Humblot, 1898, pp. 294 ss.

[7] *Chur-Fürstliche Braunschweig-Lüneburgische Ober-Appellations-Gerichtsordnung*, Celle, 1713, [pp. 6 s, in the electors preface without indication of pages]: «Wir geben auch Unserem Praesidenten, Vicepraesidenten und Ober-Appellations-Räthen vollkommene Macht und Gewalt *an Unsere statt und in Unserm Nahmen* alle die Sachen, welche nach Anweisung besagter Verordnung an Unser Ober-Appellations-Gerichte gehören und erwachsen, anzunehmen, anzuhören, darin procediren zu lassen, zu handeln, *denen Gesetzen und Acten folglich auch Ihren Gewissen und bestem Verstande nach zu sprechen*, zu erkennen, zu gebieten und zu verschaffen, alles was recht und billig, […] wie Wir solches selbst aus Hoch-Obrigkeitlichem Ambte und Gewalt thun könten oder möchten».

[8] *Chur-Fürstliche Braunschweig-Lüneburgische Ober-Appellations-Gerichtsordnung* cit., [pp. 6 s]: «Auch wollen Wir und Unsere Successores sollen Dieselbe an gedachten Erkäntnüssen nicht hindern oder die an Unserm Ober-Appellations-Gerichte anhängige oder dahin gehörige davon avociren, sondern bey demselben der Justiz allerdings ihren Lauff lassen».

[9] *Chur-Fürstliche Braunschweig-Lüneburgische Ober-Appellations-Gerichtsordnung* cit., [pp. 6 s]: «Und damit Unsere Praesidenten, Vicepraesidenten und Ober-Appellations-Räthe jetzt und künfftig desto freyer ohne alle Scheu und Furcht darunter verfahren; So wollen Wir dieselbe *in den Sachen, so Uns und Unsere Successores, Unsere Cammer, Ämbter und Jura oder Unsere Officiales, die in Unsern Nahmen agiren, einigermaßen betreffen oder dabey Wir und Unsere Successores selbst oder Sie Unserntwegen ein Interesse haben könten und möchten*, der auf Beforderung und respicirung Unsers besten und Interesse geleisteten Pflichte und Verbindung erlassen haben, dergestalt, daß Sie auch bey solchen Sachen wie überall bey administration Ihres Ambts auff nichts als Gott den Allmächtigen und eine ganz unpartheyische Justiz sehen und in so weit und dahin aller Pflichten erlassen sein sollen».

[10] *Chur-Fürstliche Braunschweig-Lüneburgische Ober-Appellations-Gerichtsordnung* cit., [p. 7]: «dergestalt, daß Sie auch bey solchen Sachen wie überall bey administration Ihres Ambts *auff nichts als GOtt den Allmächtigen und eine ganz unpartheyische Justiz sehen* und in so weit und dahin aller Pflichten erlassen sein sollen».

[11] Schubert, *Hannover* cit., pp. 47 s.

[12] K. Gunkel, *Zweihundert Jahre Rechtsleben in Hannover, Festschrift zur Erinnerung an die Gründung des kurhannoverschen Oberappellationsgerichts in Celle*, Hannover, Helwing, 1911, p. 116; as well in K. Kroeschell, *recht unde unrecht der sassen - Rechtsgeschichte Nie-*

dersachsens, Göttingen, Vandenhoeck & Ruprecht, 2005, p. 219.

[13] *Sammlung der Gesetze, Verordnungen und Ausschreiben für das Königreich Hannover* 1833, n. 29, pp. 286-330, 289.

[14] *Die Goldene Bulle, Nürnberger Gesetzbuch*, cap. 25, § 3, in L. Weinrich, (edited by), *Quellen zur Verfassungsgeschichte des Römisch-Deutschen Reiches im Spätmittelalter (1250-1500), (Freiherr vom Stein-Gedächtnisausgabe, Bd. 33)*, Darmstadt, Wissenschaftliche Buchgesellschaft, 1983, n. 94a, pp. 314 ss., pp. 382 s.

[15] To the constitutional crisis in 1837 and its previous history: Bertram, *Das Königreich Hannover* cit., pp. 52 ss.; Dylong, *Hannovers letzter Herrscher* cit., pp. 27 ss., pp. 43 ss.; J. Krüger, *Blindheit und Königtum - Die Blindheit des Königs Georg V. von Hannover als verfassungsrechtliches Problem*, Frankfurt am Main, Lang, 1992, pp. 46 ss.

[16] *Sammlung der Gesetze, Verordnungen und Ausschreiben für das Königreich Hannover* 1840, n. 34, pp. 141-191, 144; Dylong, *Hannovers letzter Herrscher* cit., pp. 43 ss.

[17] Dylong, *Hannovers letzter Herrscher* cit., pp. 46 ss.

[18] *Grundgesetz des Königreiches Hannover vom 26. September 1833,* in *Sammlung der Gesetze, Verordnungen und Ausschreiben für das Königreich Hannover* 1833, n. 29, pp. 286-330, 326 s, and as well in D. Willoweit, U. Seif (edited by), *Europäische Verfassungsgeschichte*, München, C. H. Beck, 2003, pp. 533-548; concerning the administration E. von Meier, *Hannoversche Verfassungs- und Verwaltungsgeschichte 1680-1866*, vol. II, Leipzig, Duncker & Humblot, 1899, pp. 25 ss., pp. 74 ss., p. 215.

[19] E. A. von Boetticher, *Die Justizorganisation im Königreich Hannover nach 1848 und ihre Ausstrahlungskraft auf die Staaten des Deutschen Bundes und das Reich bis 1879*, Hannover, Wehrhahn, 2015, pp. 245 ss.

[20] Kroeschell, *Recht unde unrecht der sassen* cit., p. 269; W. Jensen, *Des Bürgers Recht - Hannoversche Debatten und die Praxis vor Gericht (1814-1866)*, in «Niedersächsisches Jahrbuch für Landesgeschichte», n. 82, 2010, pp. 27-66, 50 ss.; G. van den Heuvel, *Monarchische Handlungsspielräume im Königreich Hannover (1814-1866)*, in «Niedersächsisches Jahrbuch für Landesgeschichte», n. 89, 2017, pp. 63-81; St. Brüdermann (edited by), *Geschichte Niedersachsens, vol. 4, Vom Beginn des 19. Jahrhunderts bis zum Ende des Ersten Weltkriegs, Teil 1: Politik, Wirtschaft*, Göttingen, Wallstein, 2016, pp. 77 ss.

[21] Kroeschell, *recht unde unrecht der sassen* cit., pp. 279 ss.; Oestmann, *Wege zur Rechtsgeschichte* cit., pp. 241 ss.; von Boetticher, *Justizorganisation* cit., pp. 405 ss.

[22] C. Schöler, *Deutsche Rechtseinheit, Partikulare und nationale Gesetzgebung (1780-1866)*, (Forschungen zur deutschen Rechtsgeschichte, vol. 22), Köln/Wien/Weimar, Böhlau, 2004.

[23] M. Ahrens, *Prozessreform und einheitlicher Zivilprozess. Einhundert Jahre legislative Reform des deutschen Zivilverfahrensrechts vom Ausgang des 18. Jahrhunderts bis zur Verabschiedung der Reichszivilprozessordnung* (Tübinger Rechtswissenschaftliche Schriften, vol. 102), Tübingen, Mohr Siebeck, 2007, pp. 436 ss.

[24] Ahrens, *Prozessreform* cit., pp. 324 ss., 430 ss., 454 ss., 461 ss.; von Boetticher, *Justizorganisation* cit., pp. 248 ss.

[25] von Boetticher, *Justizorganisation* cit., p. 261; A. Leonhardt, *Die Justizgesetzgebung des Königreichs Hannover. Unter besonderer Berücksichtigung der Regierungs- und ständischen Motive zum practischen Gebrauche herausgegeben*, vol. 2, Hannover, Helwing, 1851, p. 165.

[26] von Boetticher, *Justizorganisation* cit., p. 261.

[27] von Boetticher, *Justizorganisation* cit., p. 262.

[28] § 400 BPO in G. J. Dahlmanns (edited by), *Neudrucke zivilprozessualer Kodifikationen und Entwürfe des 19. Jahrhunderts, Materialien zur Entwicklungsgeschichte der ZPO, Band 1, Bürgerliche Prozeßordnungen für das Kgr. Hannover von 1847 und 1850*, Aalen, Scientia, 1971, p. 598, and as well in A. Leonhardt, *Die Bürgerliche Proceßordnung*, Hannover 1861[3], p. 268.

[29] § 400 BPO in Dahlmanns (edited by), *Neudrucke* cit., p. 598, and as well in Leonhardt, *Die Bürgerliche Proceßordnung* cit., p. 268; Leonhardt, *Justizgesetzgebung* cit., p. 167; Gunkel, *Rechtsleben* cit., pp. 348 s.

[30] Ahrens, *Prozessreform* cit., pp. 335 s.; St. A. Stodolkowitz, *Das Oberappellationsgericht Celle und seine Rechtsprechung im 18. Jahrhundert*, Köln/Weimar/Wien, Böhlau, 2011; B. Heile, *Die Zeit von 1733 bis 1866, in Festschrift zum 275jährigen Bestehen des Oberlandesgerichts* cit., pp. 63-112.

[31] §§ 408 – 411 BPO in Dahlmanns (edited by), *Neudrucke* cit., p. 604 ss., and as well in Leonhardt, *Die Bürgerliche Proceßordnung* cit., pp. 274 ss.

[32] § 430 BPO in Dahlmanns (edited by), *Neudrucke* cit., p. 615, and as well in Leonhardt, *Die Bürgerliche Proceßordnung* cit., p. 285; E. W. G. Schlüter, *Commentar zur allgemeinen bürgerlichen Proceß-Ordnung für das Königreich Hannover*, Stade, Pockwitz, 1863, vol. II, p. 68; T. Klein, *Königreich Hannover*, in K. G. A. Jeserich/H. Pohl/G. Ch. von Unruh (edited by), *Deutsche Verwaltungsgeschichte*, vol. II, Stuttgart, Deutsche Verlagsanstalt, 1983, pp. 678-715, 708 ss.; von Boetticher, *Justizorganisation* cit., p. 262.

[33] Schlüter, *Commentar* cit., § 430, pp. 67 ss.

[34] Schlüter, *Commentar* cit., § 430, pp. 68 s.

[35] § 430 BPO in Dahlmanns (edited by), *Neudrucke* cit., p. 615, and as well in Leonhardt, *Die Bürgerliche Proceßordnung* cit., p. 285; Schlüter, *Commentar* cit., § 430, p. 68.

[36] Schlüter, *Commentar* cit., § 430, p. 68: «allein der dem gedachten §

10 zum Grunde liegende Gedanke schien weiter zu gehen und auf die fernere Anomalie des § 430 unter 2. zu führen. Hiernach wird die Frage über jene Zuständigkeit [einer Verwaltungsbehörde] stets zur Entscheidung des höchsten Gerichts gebracht werden können».

37 Expressly the governmental motives refer to § 10 III of the statute of 1848: «Der § 10 des a. Gesetzes vom 5. September 1848 lautet im dritten Absatze: Verwaltungsmaßregeln, welche von den Verwaltungsbehörden außerhalb der Grenzen ihrer Zuständigkeit vorgenommen sind, können auf Antrag des dadurch in seinen Rechten Verletzten durch die Gerichte aufgehoben werden. Daneben kann von denselben geeigneten Falls auf Schadloshaltung erkannt werden. Bei Entscheidung über die Zuständigkeit soll für die Berufung an die Obergerichte eine Appellationssumme nicht erforderlich sein». Published in Schlüter, *Commentar* cit., § 430, p. 68.

38 Schlüter, *Commentar* cit., § 430, p. 69.

39 Oberappellationsgericht in the case Wehland vs. Ahrbeck, Tribunals-Entscheidungen, vol. III, n. 66, quoted according to Dahlmanns (edited by), *Neudrucke* cit., p. 615, and as well in Leonhardt, *Die Bürgerliche Proceßordnung* cit., p. 285.

40 Leonhardt, *Die Bürgerliche Proceßordnung* cit., p. 285, footnote 1; and in Dahlmanns (edited by), *Neudrucke* cit., p. 615.

41 Schlüter, *Commentar* cit., § 430, p. 69.

42 O. Bähr, *Der Rechtsstaat*, Cassel, Wigand, 1864.

43 R. Gneist, *Das heutige englische Verfassungs- und Verwaltungsrecht, Bd. I: Geschichte und heutige Gestalt der Aemter in England mit Einschluß des Heeres, der Gerichte, der Kirche, des Hofstaats*, Berlin, Springer, 1857; R. Gneist, *Verwaltung, Justiz, Rechtsweg: Staatsverwaltung und Selbstverwaltung nach englischen und deutschen Verhältnissen mit besonderer Rücksicht auf Verwaltungsreformen und Kreisordnungen in Preußen*, Berlin, Springer, 1869; R. Gneist, *Der Rechtsstaat*, Berlin, Springer, 1872; R. Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland*, Berlin, Springer, 1879².

44 To the role of the courts for the realisation of justice: D. Willoweit, *Gerechtigkeit und Recht. Zur Unterscheidung zweier Grundbegriffe der Jurisprudenz (Sitzungsberichte der Bayerischen Akademie der Wissenschaften 2018, Heft 1)*, München, Bayerische Akademie der Wissenschaften, 2018, pp. 79 s.