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Playing with Conventions and Traditions: The Modern Legal Fairy Tale

Fairy tales are by no means the first things that come to our mind when we think of law with its rules, functions, and implications. Whereas fairy tales are usually associated with the realm of the fabulous, the imaginative, and thus the subjective, law is in our minds more akin to the concrete, the “real,” and thus the objective. Both law and fairy tales, at first sight, seem to present an irreconcilable pair that share hardly any point of contact.

However, in both legal history and Law and Literature-research fairy tales and law have been considered as being very influential on each other. Classical fairy tales have been analyzed according to their legal symbolism and have been perceived as “a source of law,” or rather as a source of “history of law.”¹ To connect legal history and philosophy with the reading of fairy tales is thus an approach that has been undertaken with certain abundance so far and stands at the origin of the interdisciplinary analysis of law and fairy tales.² Particularly within the study of German literature it has a very long tradition. The brothers Grimm, who are famous for their fairy tale collection as well as for their early reflections on the special relationship between law and literature, emphasize the legal element in their folk tales and even added – so it is said and speculated – juridical coinages as motifs in their fairy tales.³ In his lecture series *Deutsche*

1 Cf. Judith Laeverenz, “Märchen als rechtsgeschichtliche Quelle?” in *Dunkle Mächte im Märchen und was sie bannt, Recht und Gerechtigkeit im Märchen*, eds. Harlinda Lox, Sabine Lutkat, Dietrich Kluge (Krummwisch: Königsfurt, 2007): 254–295.

2 Cf. e.g., Judith Laeverenz, *Märchen und Recht: eine Darstellung verschiedener Ansätze zur Erfassung des rechtlichen Gehalts der Märchen* (Berlin: Peter Lang, 2001); Bernhard Großfeld, Andreas Möhlenkamp, “Die Mühle im Märchen und Recht. Zur Verknüpfung von Wirtschaft, Kultur und Recht,” *Neue Juristische Wochenschrift* 49.1 (1996): 1103–1111; Volker Ladenthin, “Recht und Gerechtigkeit im Märchen,” *Neue Juristische Wochenschrift* 30 (1994): 1928–1929; Heinrich Scholler, “Märchen, Recht und Rechtsentwicklung” in *Festschrift für Theodor Manz zum 80. Geburtstag*, eds. Peter Lerche, Hans Zacher, Peter Badura (München: Beck, 1981): 317–336.

3 Cf. André Jolles, *Einfache Formen: Legende, Sage, Mythe, Rätsel, Spruch, Kasus, Memorabile, Märchen, Witz* (Tübingen: Niemeyer, 1968), 226. Cf. also Heinz Rölleke, “Die Brüder Grimm und das Recht” in *Dunkle Mächte im Märchen und was sie bannt, Recht und Gerechtigkeit im Märchen*, eds. Harlinda Lox, Sabine Lutkat, Dietrich Kluge (Krummwisch: Königsfurt, 2007): 109–127.

Rechtsalterthümer, Jacob Grimm thus defined fairy tales as “materialien für das sinnliche element der deutschen rechtsgeschichte.”⁴

Fairly recent studies, such as that by the German scholar Judith Laeverenz, also credit fairy tales with the potential to represent law and legal values as cultural products.⁵ The interdisciplinary potential of fairy tales is similarly confirmed by the American scholar Katherine J. Roberts in her analysis of the connection between law and fairy tales. In her view, fairy tales are in a “unique position to link the disciplines of law and literature”⁶ because, as she adds, “[f]airy tales [...] are a sort of warehouse for a society’s shared meanings and value systems.”⁷ Law, or at least certain domains of law, and fairy tales seem to share a similar “program of social control”⁸ in so far as both worlds, the legal and the fairy tale world, set up their own system of “legitimate” and “illegitimate acts of violence”⁹ when they install the seemingly logical distinction between “legitimate punishment” and “illegitimate crime.” Examples are numerous: In “Little Red Riding Hood” the wolf’s eating of the grandmother is definitely an illegitimate crime; when the wolf is killed by the hunter, it is instead “legitimate punishment” and thus justice. Likewise, the killing of the wicked witch in “Hansel and Gretel” is perceived as legitimate whereas the behavior of the witch and the step-mother is portrayed as crime.

In my paper, I am going to deal with fairy tales and legal discourse, but I am not going to focus on this interrelation in classic fairy tales or in parodies and adaptations of these. In the following, I am interested instead in the special genre of, as I would like to call it, the “legal fairy tale.” At the center of my paper are thus not fairy tales that have *also* a legal impact (as is the case with Grimms’ *Children’s and Household Tales* (1812)), but contemporary fairy tales that have been written with the explicit aim of treating or examining certain legal topics and cases and, as a result, of promoting specific legal opinions and views. These contemporary legal fairy tales can be divided into two groups: factual legal fairy tales, namely, fairy tales that retell real legal cases; and legal didactic fairy tales that have been written with the explicit aim of teaching what law is, how it works, and why we need law.

4 Grimm quot. in Laeverenz, *Märchen und Recht*, 18. [“material that serves [to analyze] the sensual element of the history of German law.”]

5 Cf. Laeverenz, *Märchen und Recht*, 20.

6 Katherine J. Roberts, “Once Upon the Bench: Rule Under the Fairy Tale,” *Yale Journal of Law & the Humanities* 13.2 (2001): 497–529, 499.

7 Roberts, “Once Upon the Bench,” 506.

8 Roberts, “Once Upon the Bench,” 504.

9 Roberts, “Once Upon the Bench,” 503.

Bob Rains' *True Tales of Trying Times: Legal Fables for Today* can serve as a very significant example of the first group. In this booklet the author Bob Rains (a professor of law and former judge – as explicitly stated on the cover) confronts us with real cases, retold – as he himself proclaims – as “fables.”

True Tales of Trying Times Legal Fables for Today

PROFESSOR BOB RAINS

Illustrated by E.A. Jacobsen

With a Foreword by
Justice J. Michael Eakin
Pennsylvania Supreme Court

Wildy, Simmonds & Hill Publishing / Willow Crossing Press

Fig. 1: Title page of Bob Rains' *True Tales of Trying Times: Legal Fables for Today*

Even though the author himself calls his tales fables, from a literary scholar's perspective these texts are more akin to the fairy tale genre than to the fable genre. The stories are structured according to themes into nine chapters: “On the Road,” “Love and War,” “Animal Farm,” “Order in the Court,” “Workers of the World,” “Rights of Way,” “All in the Family,” “Crime and Punishment,” and “Holiday Stories.” The booklet concludes with a list of so called “Legal Citations,” which provides the reader with the concrete references to the real cases hiding behind the stories of the book. Each story tells what happens in a very plain and simple manner and concludes with an ironically and comically expressed moral to the story in rhyme. The little texts are thus characterized by a number of formulas typical of fairy tales. The titles themselves are reminiscent of fairy tales in that they partly summarize the following as in: “The Artist, the Artiste, and the Attorneys.” This story then starts with the classic opening formula: “Once upon a time, an artist and an artiste got married. They shouldn't have.”¹⁰

¹⁰ Bob Rains, *True Tales of Trying Times: Legal Fables for Today* (London: Wildy, Simmons & Hill Publishing; Carlisle: Willow Crossing Press, 2007), 38.

A second group of legal fairy tales can be labeled as legal didactic fairy tales. For this category two very different texts, in form and in content, can serve as examples: *Alles, was recht ist. A short story about law* by Hanno Beck and Juliane Schwoch and *Die Suche nach dem idealen Mandanten. Ein Märchen für Steuerberater, Mandanten und andere Menschen* by Gerhard Brunner and Sven Heißler. The latter could be translated as *In Search of the ideal client. A fairy tale for tax counselors, clients, and other people*. Whereas the first text is a bilingual fairy tale in German and English (thus the double title) that basically explains why people living together need laws and why these laws need to be executed, the second is a fairy tale in the form of a comic instructing us on the art of tax counseling and the laws of finances.

Similarly to Bob Rains' text, these two texts are also explicitly framed by legal experts: *Alles, was recht ist. A short story about law* is published by the "KPMG Rechtsanwaltsgesellschaft mbH," a German law firm, and one of its authors, Hanno Beck, is university professor for macroeconomics and economic law; the writer of the comic *Die Suche nach dem idealen Mandanten* is a lawyer and the text itself is published by NWB, a publishing house specializing in fiscal and financial law. Consequently, in all the above mentioned texts, the authors are in their first profession jurists and even expose their profession and thus implicitly display their expertise on the cover, in the cover text, or in the introduction – which, needless to say, already provides us with a specific reading signal: the text is to be read against the background of the author's professional expertise. Contrary to "classic fairy tales" where the author, or rather originator, is unknown (and only a later collector becomes known and ultimately identified with the fairy tales, as is the case, for example, with the Brothers Grimm), in our case the author is known and sometimes even over-emphasized (see Bob Rains and his book's cover), a fact which strongly influences our process of reading. The question of the originator and thus of the text's intentionality (namely, to show aims and functions of these "legal fairy tales") is of particular importance, which, again, stands in contrast to classic fairy tales. In the merely oral stage of fairy tales there is still a strong correlation between what is told and who tells it: the fairy tale-teller uses the fairy tale to "tell," to explain, or rather to process his world,¹¹ whereas in the fairy tale's written stage, the influence of the "writer" of fairy tales becomes less significant, or as Spanner puts it: "Der Dichter ist bei dieser Erzählung gänzlich gleichgültig."¹²

11 Lutz Röhrich, *Märchen und Wirklichkeit*, 2nd edition (Wiesbaden: Franz Steiner, 1964), 228.

12 Werner Spanner, *Das Märchen als Gattung* (Gießen: von Münchowsche Universitäts-Druckerei Otto Kindt, 1939), 7. ["In this sort of narration [fairy tale] it is immaterial who the author is."]

The contents of each of these legal fairy tales, however, differ considerably one from each other. The story of *Alles, was recht ist* takes place in the cellar of a courthouse, where a tribe of mice have been living peacefully for quite some time and have also been observing and studying humans dealing with law. They get their food supply, in part, out of the huge amount of paper produced by stored legal files and (seemingly less important) law codes (such as the “Commentary on the Land Tax Act” and the “Practicians’ Commentary in the Federal Allotments’ Act”¹³). One day the idyll is disturbed by a group of rats, and the two groups of creatures with different capacities, powers, interests, and inclinations have to organize their living together, which they end up doing by creating laws and by determining punishments in case of misconduct. After an initial hard time in which different views on law and the need for law-abiding behavior clash, a number of dangerous and life threatening incidences convince all co-habitants that certain rules of conduct are the only way to survive and not to be discovered (and killed) by the human beings living above them. The process of establishing a legal system that controls and governs their living together can be seen in the following sequences:

“No.” Whitebeard [one of the mice] was annoyingly assertive in his utterance. “It’s not a question of who is better, or who has more rights – we all have the same rights, and no one is better than the other. You want us to respect liberties? Then you have to respect our liberties too. Every animal is equal and has the same rights.” Whitebeard was internally relieved – Spider had told him these phrases at one time. The humans used them frequently when they put their heads together in the upper rooms of the courthouse.¹⁴

After the rats committed a series of offences that put the whole community at risk, they decide to install a legal trial and to impose some punishment and finally start to build their own legal system:

[...] After these offences had been equalized with punishments, the leaders agreed that rules had to be established now. “Incidentally, the humans do the same thing. They call their rules ‘laws.’” Laws? The rats knew the word. Ugh, they’re just banning everything that’s fun. [...] one day, they all sat down with Exhibit, wrote down the laws that had been enacted up to them and added to them. The mice called this the ACC, the Animal Civil Code. Which once again the rats didn’t give a toss about. However, they did give a toss about the laws now. The story as a whole had taught them this lesson: Rules make sense – even if you might not always like them – if everyone sticks to them. And they stuck to them. The ACC was stored in a public location where everyone could look into it

¹³ Cf. Hanno Beck, Juliane Schwoch, *Alles, was recht ist. A short story about law* (Frankfurt am Main: Frankfurter Allgemeine Buch, 2012), 103.

¹⁴ Beck, Schwoch, *Alles, was recht ist*, 71.

at any time. It was signed with a pawprint from one of each of the different species of animal living in the courthouse.¹⁵

The text provides a much idealized (typical of the fairy tale genre) and sometimes even naïve or rather mono-dimensional image of law and living together. The didactic impact it tries to achieve is more than obvious. The legal fairy tale can therefore be understood as an exemplification of “fabulous law” (in Claudio Soliva’s terms), namely, as the perception of law that exists beyond doubt and reproach, which has an ideal, exemplary character, and therefore a conception of law that can only exist in an imaginary world.¹⁶ Whereas in my first example of Bob Rains’ fictionalizing and retelling of real legal cases in *True Tales of Trying Times* we can talk of “law in fairy tales,” in this latter example of *Alles was recht ist* we have to deal with “law as fairy tale.”

The second of the two “legal didactic fairy tales” also follows the format of a fairy tale; however, the fairy tale genre is partly undermined by the addition of a medium other than writing, and one which is highly unusual for fairy tales, namely, the comic. The story revolves around a tax counselor who sets out to search for the perfect client, and by doing so he has to climb, among others, the “Schuldenberg” [the mountain of debt],¹⁷ has to cross the “Konjunkturtal” [economic trough]¹⁸ and has to avoid “Finanzlöcher” [financial holes].¹⁹ Later on he is stopped by the “Gesetzeswall” [the wall of laws]²⁰ but luckily finds some “Regelungslücken” [judicial loopholes]²¹ to get through the wall. Then he has to walk through the “Weg der höheren Instanzen” [stages of appeal].²² On his way there, it rains “Beweisanträge” [motions to take evidence] and there is a hail of “Rechtsgutachten” [legal opinions].²³ Finally he reaches the peak of the ruling of the Supreme Court and has to fight the mean dragon “Fis-Kus” [treasury].²⁴

15 Beck, Schwach, *Alles, was recht ist*, 73, 103.

16 Cf. Claudio Soliva, “Fabelhaftes Recht,” *Schweizerische Juristenzeitung* 91 (1995): 145–152, 145.

17 Gerhard Brunner, Sven Heißler, *Die Suche nach dem idealen Mandanten. Ein Märchen für Steuerberater, Mandanten und andere Menschen* (Herne: nwb, 2010), 30.

18 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 33f.

19 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 39.

20 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 50.

21 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 51.

22 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 52f.

23 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 53.

24 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 67.

Fig. 2: "The Wall of Law"²⁵

Fig. 3: "Judicial Loopholes"²⁶

²⁵ Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 51.

²⁶ Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 52.

The comic clearly reveals and plays with the metaphoric character of the legal and economic language (however, it focuses on the German language – therefore not every pun can be directly translated into English with the same effect). The metaphoric ground of economic and legal jargon paradoxically provides the ideal setting for a fairy tale because in a fairy tale world the above mentioned locations such as the “mountain of debt” do not seem alien at all. In other words, metaphorical terms such as “financial holes” can be understood literally in a fairy tale world and present fabulous locations. The fairy tale – and in this special case a fairy tale in the form of images – visualizes an already, perhaps abundantly, figurative language and thus also parodies this special legal register. Whereas in the case of both Rains’ *True Tales* and Beck and Schwoch’s *Alles, was recht ist* the fairy tale genre serves to retell real events in a “fabulous,” that is, fictional way – the fairy tale genre presenting a sort of second way out in order to render things more clear – in the case of *Die Suche nach dem idealen Mandanten* well-known and conventionalized fairy tale patterns are used to mock and parody a certain way of legal talking and thinking very alien to the otherwise de-rationalized fairy tale world.

In the following I would like to focus on two interrelated questions in particular: What makes fairy tales so attractive, still today, and why do jurists as authors choose fairy tales in order to reexamine certain legal themes? As Roberts outlines very convincingly in her paper, fairy tales, in general, do have a “distinctively legal structure” and thus a “role in shaping legal behavior.”²⁷ Certain characteristic elements of the fairy tale resemble legal practices and legal texts, above all judicial opinions. First and foremost, the summary of the story in one sentence as it happens in the final moral to the story strongly resembles the judge’s sentence, which summarizes and evaluates the most important facts. Secondly, both legal texts and fairy tales are characterized by an “economy of prose,” and, thirdly, they share a “low tolerance for ambiguity.” Finally, fairy tales rely on a structure as equally fixed as judicial opinions.²⁸ Having these points in mind, I will go on to elaborate on the special potential of the fairy tale genre as an “advertiser” for legal ideas, beliefs, or simply legal knowledge.

The most obvious reason to use a fairy tale for the depiction of legal matters lies, needless to say, in its high degree of familiarity and its recognition value. Interestingly, the legal fairy tales I am focusing on, all start with or are preceded by arguments in favor of the positive potential of fairy tales. The author, or someone else who writes a foreword, explains why it is precisely the fairy tale that

²⁷ Roberts, “Once Upon the Bench,” 498.

²⁸ Roberts, “Once Upon the Bench,” 520–524.

brings about new or different insights into the “world of law.” Rains’ *True Tales of Trying Times* is accompanied by a foreword by Micheal Eakin, justice at the Pennsylvania Supreme Court – the status and profession of Eakin are also explicitly registered on the cover. The foreword is again disguised in a fairy tale, when Eakin tells the story how Rains’ fables came about:

Once upon a time in the vineyards of the law, there toiled a man who aspired to help those who would make fine wine from the study of cases that grew there. He helped apprentices reap large principles, and the small nuances too, and all the variations that lay between. To help these pupils become lawyers and counselors and advocates, he would illuminate legal doctrine and illustrate the human consequences. [...] But for all the happiness this brought him, from time to time he saw that not all cases dealt with matters of great weight. [...] He saw that many cases did not lend themselves to opinions that would become pillars of jurisprudence. He noticed tales most odd, strange weavings of facts and persons unbelievable, with courts left to resolve matters more peculiar than scholarly. Then one day he saw a fable. He scarcely recognized it at first; indeed, he was not sure what he had seen. But not long after, he saw another. Then another, and soon he saw fables everywhere. There, amongst the cases most profound, were cases quite pretty, nearly inconsequential, but clearly they were cases, and if you looked at them just right, they were indeed what he thought they were: fables waiting to be told. And he gathered them and now decants them for us all. And the wine is sweet and quite palatable. It is well worth the drinking.²⁹

What we learn from this foreword (which – admittedly – overdoes it a bit with its metaphoric language and adapted fairy tale tone) is that the fables that follow should have a didactic value, which in “plain” legal cases cannot always be found or is less obvious. Once they are seen through the lens of a fairy tale teller (which means leaving out certain things, adding others, and especially explicitly phrasing the moral), they become didactic. In order to underline the didactic aim, the narrator always ends his little narrations with the “gist of the story,” that is, the moral to the story, which is phrased in rhyme in an ironic tone. The fable entitled “The Father Who Was Too Honest with His Sons” ends, for example, with: “Doting parent, my advice is / Never tell your little kids / That you once engaged in vices / Of the sort the law forbids.”³⁰

Also in my second example, *In search of the ideal client*, the authors explain in their “Foreword” why they chose the genre of the fairy tale for their purpose, namely: “Gerade das Märchen bringt auf erzählerische Weise die wesentlichen Dinge auf den Punkt, die wir vor lauter Fakten, Fakten, Fakten übersehen. Inso-

²⁹ Rains, *True Tales*, 11 f.

³⁰ Rains, *True Tales*, 109.

fern ist es ein ideales Medium zur Vermittlung von sensiblen Sachverhalten.”³¹ And in the foreword to *A short story about law* we read: “Do lawyers indulge in telling fairy tales? Hardly, but a fairy tale helps us to understand why we need the law, what constitutes the law and why we need lawyers.”³²

What becomes clear from these preliminary remarks concerning the fairy tales is that fairy tales are used to instruct and to educate their readers. The reason fairy tales are particularly able to do so lies in their quite conventionalized story pattern, which nearly everybody is familiar with no matter what one’s social, cultural, and intellectual background. Ian Ward, with regard to the usefulness of children’s literature in Law and Literature research, brings forward the argument that: “Everyone has read *The Tale of Peter Rabbit*. Not everyone has read *The Metaphysics of Morals*.”³³ He underlines that canonical children’s literature and – we should add – fairy tales are part of a collective memory and knowledge. As for this “timelessness” of the basic pattern of the genre, André Jolles’ thoughts on a suitable description and definition of fairy tales prove helpful: Together with legend, myth, fable, and others, he considers fairy tales as one of the so called “einfache Formen” [simple forms]; in Jolles’ view, a fairy tale is a pre-literary verbal genre that is originally characterized by its oral and thus folkloristic character and is always also an expression of a certain mentality. These “simple forms” can evolve and become “higher” esthetic forms as we see in the development of the “Volksmärchen” [folk (fairy) tale] into the “Kunstmärchen” [literary fairy tale]. In his definition, Jolles hints at the formal simplicity of plain fairy tales, or, rather, at the unimportance of the level of form in fairy tales. The level of discourse is thus neglected or at least by no means foregrounded; the content level is characterized by a certain repertoire of requisites that is interchangeable: “Sowohl bei der Kunstform wie bei der Einfachen Form können wir von ‘eigenen Worten’ reden, bei der Kunstform jedoch *die eigenen Worte des Dichters*, in denen sich die Form endgültig vollzieht, bei der Einfachen Form *die eigenen Worte der Form selbst*, in der sie sich jedesmal in derselben Weise vollziehen kann.”³⁴ Jolles terminology of “einfache Form” is disputed;³⁵ for our pur-

31 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 5. [“It is exactly the fairy tale that, through narrative, puts the essential things in a nutshell, things that we otherwise fail to see because of sheer facts, facts, facts. In this sense, it is the ideal medium to communicate sensitive matters.”]

32 Beck, Schwach, *Alles, was recht ist*, 61.

33 Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge: University Press, 1995), 90.

34 Jolles, *Einfache Formen*, 235. [“Both the esthetic and the simple form are characterized by their respective “own words,” but whereas the esthetic form is characterized by *the poet’s*

pose, however, it proves most useful because it confirms the fact that the genre of fairy tales can be used as a pattern, a kind of “baking tin,” which can be filled with different contents and used for quite diverse aims (and reasons).

As far as these contents are concerned, research on fairy tales agrees that fairy tales do not recount the particular but the typical, that is, the general,³⁶ and are always based on a fixed morality, which again makes them particularly capable of transporting legal ideas. Dietz-Rüdiger Moser thus defines the content structure of fairy tales as: “daß sie keine Probleme schildern oder aufdecken, sondern Konfliktlösungen anbieten, die akzeptierten Moralprinzipien entsprechen; daß sie tradiert werden und deshalb nicht nur bestimmten epischen Gesetzen verpflichtet und formelhaft gebaut sind, sondern auch Figuren, Requisiten und Weltbilder vergangener Zeiten konservieren.”³⁷ What Moser hints at is the fact that fairy tales do not offer a variety of questions and answers, but rather move directly to a plain and clear solution of otherwise fairly complex problems. Fairy tales design a certain world order (usually an ideal world order) and are, in this respect, particularly apt to propagate certain ideas of law – as is also confirmed by the German legal scholars Großfeld and Möhlenkamp in their analysis of mills in fairy tales and legal discourse: “Und letztlich wird im Märchen die Ordnung der Welt entworfen. Gut wird von Böse getrennt [...] Unser Rechtsgefühl wird im Märchen nicht nur angesprochen, sondern entwickelt. Darum ist das Märchen auch für Kinder so wichtig.”³⁸

A further fact that has to be considered when we ask ourselves why jurists write legal fairy tales is the particular “double codification” or “double vision” (in Ian Ward’s words)³⁹ of fairy tales. Traditionally, fairy tales can be read both as children’s literature and as “plain” adult literature – in this way they offer precisely a “double vision” – and thus the implied audience is a vast one. The implicit

own words, through which the form finally takes shape, the simple form is characterized by the form’s own words, by which it is shaped each time in the same way.”]

35 Cf. Dietz-Rüdiger Moser, *Märchenforschung* (Würzburg/München: Bayerische Blätter für Volkskunde/Bayerisches Nationalmuseum, 1980).

36 Cf. Moser, *Märchenforschung*, 59 and Jolles, *Einfache Formen*, 234.

37 Moser, *Märchenforschung*, 59. “[...] they do not portray or reveal problems but offer resolutions to conflicts, which correspond to generally accepted moral principles; they are handed down and (hence are not only bound to follow certain epic rules and a certain formulaistic structure, but they also preserve figures, requisites, and world views of former times.”]

38 Großfeld, Möhlenkamp, “Die Mühle im Märchen und Recht,” 1105. [“And ultimately the world order is laid out in the fairy tale. Good is separated from evil [...]. In the fairy tale our sense of right and wrong is not only addressed, but is developed. That’s the reason why fairy tales are particularly important for children.”]

39 Ward, *Law and Literature: Possibilities and Perspectives*, 93.

reference to the conventions of children's literature, that is, the "perceived simplicity of language and the triviality of subject-matter,"⁴⁰ makes fairy tales particularly apt for popular legal depictions. The allusion to texts that – at least from their first appearances – address an audience of children contributes to a certain (even though misleading) "lightness," which, again, represents an alternative to the otherwise difficult legal literature. The German lawyer Andreas Möhlenkamp sees the great potential of fairy tales (of both explicitly and implicitly legal ones) in the fact that they can complement legal dogmatics. Möhlenkamp is convinced that the otherwise too complex legal language (especially that used in court where it should be clearly understood also by non-professionals) should be "lightened" by the reference to literature, and especially to the commonly known settings of fairy tales.⁴¹ Fairy tales consequently have a particular potential to "popularize" law, to "lighten" the understanding of legal processes and systems, and this is due, on the one hand, to the conventionalized pattern of the genre, which has a huge recognition value and thus at the same time a great potential to be playfully ironized, and on the other hand, due to its universal readability and reception by all sorts of readers – younger and older ones, more and less educated ones.

Talking about the function of fairy tales to propagate certain ideas of law inevitably raises the question of the special referential status of fairy tales and thus their fictionality, or the special relationship between fiction and reality they inhabit. In my analysis, I am focusing, needless to say, on written fairy tales, that is to say on fairy tales that are exclusively made for the written medium. However, since they clearly imitate the conventions of canonical fairy tales, they must also implicitly refer to an oral tradition and thus to the legitimatizing its own truth and reality status.

The special reality status or non-reality status of fairy tales is one of the oldest (that is, most basic) research questions of fairy tale research. In the respective academic discussion I can gather two problems: Firstly, the question of the special reality of fairy tales is often answered in terms of mere content, namely, that fairy tales represent fabulous contents. The level of form (or rather the duality between form and content) has been widely neglected (which is, however, by no means astonishing since first and foremost fairy tales had to be considered within their oral evolution). But for modern legal fairy tales the level of discourse has also to be taken into consideration as it is an important channel for the production of

⁴⁰ Ward, *Law and Literature: Possibilities and Perspectives*, 90.

⁴¹ Cf. Andreas Möhlenkamp, "Rechtsinstitute und Vertragstypen in Grimms Märchen" in *Dunkle Mächte im Märchen und was sie bannt, Recht und Gerechtigkeit im Märchen*, eds. Harlinda Lox, Sabine Lutkat, Dietrich Kluge (Krummwisch: Königsfurt, 2007): 234–253, 249.

meaning. Secondly, fairy tale research is highly interdisciplinary:⁴² it is a research object for philology, historical sciences (including legal history), anthropology, ethnology, theology, and psychology. Therefore, each research area brings about its own “reality problem”⁴³ (as Lutz Röhrich puts it) and thus has its own access to and understanding of fictionality.

To start with, it might be useful to recall the development of the esthetic concept of fiction. Up to the eighteenth-century fiction, or rather the author’s “fictionalizing” (that is, the process of inventing), was (predominantly) considered a mere act of faking and lying and was thus seen as “morally condemnable.” Only modern theories from the eighteenth century onwards have started to reflect on the reality-status of fiction and less about its truth-status. So, in other words: whereas in early theories the dichotomy fiction–truth prevails, in modern fictional theories it is clearly the dichotomy fiction–reality that predominates. As for the reality-status, so called ontological approaches define the fictional world as a world of its own with its own reality, fiction being a sort of parallel world; this is most famously expressed in the “possible world-” (or: second world-) theories by Umberto Eco, Marie Laure Ryan, and others. In this view, the dichotomy fiction–reality is negotiated within the system fiction itself. Elena Esposito thus differentiates between “the fictional reality of fiction” and “the real reality” of reality.⁴⁴ If fiction is considered as an independent system, the question arises how we might distinguish fictional worlds from non-fictional worlds. The distinction fiction vs. truth and/or reality does prove to be less productive. Therefore, if we want to define the “being,” “the reality” of the fictional world, it proves helpful to talk about the special kind of referentiality of this world. With Dorrit Cohn, among others, we can describe fiction as being – primarily – self-referential in that fiction is “a world [that] creates the world to which it refers by referring to it.”⁴⁵ Consequently, instead of the opposition real–fictional, the opposition self- vs. hetero-referential should be used: Fiction imitates (at least in part) a world outside itself (and is thereby necessarily hetero-referential); these hetero-references, however, are newly arranged within the imitation, lose their hetero-referential function and are newly referentialized within the fictional world. In other words: the reference to a world other than itself acquires within the system of fiction its own, “new” meaning.

⁴² Cf. Kathrin Pöge-Adler, *Märchenforschung. Theorien, Methoden, Interpretationen* (Tübingen: Gunter Narr, 2007), 13 f.

⁴³ Röhrich, *Märchen und Wirklichkeit*, 3.

⁴⁴ Elena Esposito, *Die Fiktion der wahrscheinlichen Realität* (Frankfurt am Main: suhrkamp, 2007), 11.

⁴⁵ Dorrit Cohn, *Distinction of Fiction* (Baltimore: John Hopkins University Press, 1999), 13; cf. also Gérard Genette, *Fiction and Diction* (Ithaca: Cornell University Press, 1993) 25 f.

Fairy tales seem still to carry within themselves reminiscences of both discussions about fiction: the question of truth as well as the question of the reality in their narration. Therefore, the early debate on this “immoral faking of fictional works” is still traceable in fairy tales. It even seems to be an innate characteristic of the genre to refer to the “true content” of the text and to distinguish itself from “mere lying.” In his early study on fairy tales, Röhrich presents a collection of introductory sentences which hint at the ambiguous status of the content of the following narration as far as “truth” is concerned: “Es ist nicht ganz wahr, es ist aber auch nicht ganz erlogen;” “Wäre es nicht geschehen, würde man’s nicht erzählen;” or: “eine Geschichte, die war und nicht war.”⁴⁶ And a quote from the introduction to a fairy tale collection from 1787 starts with the paradoxical argumentation: “Die Liebe zum Märchen ist aus der Liebe zum Wahren zu erklären. Gerade aus der Liebe zum Wahren wächst der allgemeine Hang zum Wunderbaren.”⁴⁷ Fairy tales, or at least introductions to written fairy tales, seem to emphasize the effect of truth that lies within the fabulous content. What these phrases suggest is, on the one hand, clearly the didactic element and aim of fairy tales. The message is: we can truly learn something about the world. On the other hand, they seem also to fulfil the purpose (especially in early collections such as that mentioned above) to legitimate the telling of fabulous, that is, non-real contents and thus to avoid the criticism of propagating falsehood and lie. Also, in one of the legal fables I am focusing on we find such introductory elements of authentication that a second later are dismantled. In the “Disclaimer” to Bob Rains’ *True Tales of Trying Times* we read at the end: “Please enjoy these scribblings for what they are. Take them, like the truth, in small doses. [accompanied by the hint, expressed with a wink] And, whatever you do, stay out of the court.”⁴⁸ Even here, a reference to the status of truth of the text that follows as well as the didactic purpose are explicitly expressed: the tales should serve to deter people from committing illegal acts.

These preliminary remarks on truth (which we apparently find in classic as well as in modern legal fairy tales and which, ironically, play with the conventions of the traditional genre), however, should not be mistaken for a certain extra-referentiality (that is, for a reference to a non-fictional reality). As far as reference is

⁴⁶ Cf. Röhrich, *Märchen und Wirklichkeit*, 303, 232. [“It is not totally true, but not entirely made up either;” “Had it not happened, one wouldn’t tell it;” or: “A story that happened and didn’t happen.”]

⁴⁷ Cf. *Kindermärchen, aus mündlichen Erzählungen gesammelt* (Erfurt, 1787), quot. in Röhrich, *Märchen und Wirklichkeit*, 233. [“The love for fairy tales is rooted in the love for truth. And it is exactly this love for truth which nourishes the inclination for the fabulous.”]

⁴⁸ Rains, *True Tales*, 16.

concerned, fairy tales seem to be provided with a certain form of “minimal reference” or rather “non-reference,” which we usually see very clearly in the opening formula: “Once upon a time, there lived an unhappy girl...” The locations, time, and characters are held as general and indefinite as possible. In this way, referentializations outside the diegetic world are impossible or at least avoided and we get a maximum of distancing. In other words, we have an extreme case of self-reference (comparable to the fantastic genre) or a nearly exemplary self-reference (typical of the fictional genre) as described, among others, by Gérard Genette:

The fictional text is thus intransitive in its own way, not because its utterances are perceived as intangible [...], but because the beings to which they apply have no extra-textual existence, and the beings refer us back to the utterances in a movement of infinite circularity. [...] this intransitivity constitutes the text as an autonomous object and its relation to the reader as an esthetic relation, in which meaning is perceived as inseparable from form.⁴⁹

Whereas the “mice fairy tale” adheres to the conventions of classic fairy tales (in its content, structure, and discourse) – there are no hetero-referentializations whatsoever – my other two examples play with the opposition self- vs. hetero-referentiality.

Bob Rains’ text – as already partly shown – broaches the issue of the opposition hetero- vs. pseudo-referentiality or self-referentiality. The hetero-referentiality, and thus the combining of the narrations’ contents with their real events, is given by the added “quotation list.” In the disclaimer the author refers to this list in sarcastic terms: “For those who, for some inexplicable reason, prefer to read the unvarnished truth, I have provided citations to all the cases in this little tome.”⁵⁰ However, the disclaimer is followed by a “Forewarning,” which reads as follows: “Discerning readers, here’s the gist: / Webster’s says a ‘fabulist’ / Is a person who is able / To concoct a clever fable, / Someone we might all admire / Were he not as well a liar.”⁵¹ In the disclaimer the author plays with the difference truth vs. reality; in the forewarning he then hints at the fact that his announced hetero-referentiality might in fact be (just) self-referentiality, which leaves us with, or at least seems to announce, an unreliable narrator.

The “tax counsellor fairy-tale-comic” also plays with different forms of referentiality. Whereas the story is clearly fabulous in its content, the self-referentiality is undermined by a certain hetero-referentiality on the level of story as well as by a certain esthetic self-reflexivity on the level of discourse. Firstly, the self-referential story of the tax counsellor’s fight for the ideal client is regularly inter-

⁴⁹ Genette, *Fiction and Diction*, 25, 26.

⁵⁰ Rains, *True Tales*, 15.

⁵¹ Rains, *True Tales*, 17.

rupted by explicit (hetero-referential) quotes (set in brackets) of and comments on new or peculiar tax regulations.⁵²

Fig. 4: "Comments on peculiar tax regulations"

52 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 13.

Secondly, our narrator-protagonist, the tax counsellor Peter Schmidt, leaves the merely diegetic level several times by explicitly referring to his previous oeuvre such as to a couple of articles in certain scientific journals and to another comic: *Steuerberater – Helden in Anzug und Krawatte* [Tax counselors – heroes in suit and tie]. He always provides the reader with a very clear reference; in the case of the comic we are even given the ISBN-number.⁵³ The narrator thus reveals himself as author. And thirdly, we find self-reflexive intrusions into the story when we witness a discussion between the illustrator and the writer. In one of these debates they discuss whether a “sunrise” would be overly romantic and thus a contradiction to Schmidt’s adventurous quest or just the right amount of kitsch any entertaining story needs. The writer insists on the sunrise being cut out, the illustrator threatens, on his part, to only draw stick figures thereafter.⁵⁴ As these examples show, fairy tales can be close to truth but far away from reality, which makes them particularly apt for legal depictions.

Summing up, the fairy tales discussed above, which I have called legal fairy tales, are characterized by being explicitly stated as fairy tales, are always accompanied by a foreword that legitimates the genre, and are written by legal professionals. Their purpose is to draw on well-known patterns and models to treat contents, in an entertaining tone, that would otherwise be less accessible for non-professionals. However, the fictional mode also fulfils a further purpose: all texts draw on an overly conventionalized fairy tale pattern and stick almost to the extent of exaggeration to these traditional story structures (as has been highlighted); however, they refer at the same time to very topical, current matters, be it causes of the financial crisis in the tax counsellor-fairy tale, be it bizarre juridical cases in Rains’ “legal fables,” or be it the hint at an obsessive storing of legal files and bizarre laws (and commentary on laws) in the mice tale. The fairy tale genre thus provides an ideal shifting between distance and closeness and thereby allows a self-reflexive and – in our case very often – self-ironic insight into the legal profession.

53 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 10.

54 Brunner, Heißler, *Die Suche nach dem idealen Mandanten*, 54.