# The Hermeneutics of the Good Friday Agreement: A Response to 'Getting Ready' by Brendan O'Leary

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# The Hermeneutics of the Good Friday Agreement

## A RESPONSE TO 'GETTING READY', BY BRENDAN O'LEARY

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My focus in this comment is on the interpretation of the Belfast/Good Friday Agreement ('the Agreement'). Or, rather, on the interpretation*s* (plural) of the Agreement, depending on whether the interpreter considers it primarily a legal, political, or historical document. The study and interpretation of texts such as the Agreement is called hermeneutics, named after the Greek god Hermes who served as the guide between the gods on Mount Olympus and ordinary mortals, interpreting their ways. Whilst not sharing the penchant of the denizens of Mount Olympus for arbitrariness, the Agreement does share with the gods a certain sacred quality, and frequently an air of mystery. My comments on this topic are stimulated by, rather than directly responding to, Professor Brendan O'Leary's detailed and thought-provoking article. O'Leary is correct to point to the political importance of the Agreement generally, and particularly in the context of a referendum on Irish unity since the agreement

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on such a referendum in particular circumstances was a critical part of the grand compromise that the Good Friday Agreement embodies. Not to follow the Agreement (unless it were revised according to legitimate processes) would be a significant breach of political trust.

That much is clear, but when we drill down into the Agreement there is much in the text that is less clear. Who are the people of Northern Ireland on whom so much rests? What is the status of power-sharing in the event of a referendum opting for unity between Northern Ireland and Ireland? What role can the British government appropriately play during the referendum campaign? Is a referendum in favour of unity required in Ireland in order to allow unification to take place? So, how should we go about interpreting the Agreement? More broadly still, what exactly *is* the Agreement. The Agreement is clearly a text with considerable historical resonances, and with an emerging history of its own. It was a hard-fought political bargain between the contending communities of Northern Ireland. And as O'Leary stresses, again correctly, it is an agreement between two sovereign states that is binding in international law and thus gives rise to legal obligations on those states. It also has a legal status at the domestic level in Ireland and the United Kingdom, both of which partially incorporated the Agreement into their respective legal systems. In the former case, by way of constitutional referendum; in the latter, by way of legislation.

In light of all this, how should we interpret the Agreement? I don't mean 'what does such-and-such a provision mean?', but rather, 'what are the methods by which we seek to give meaning to the Agreement?' To put it more accurately, if somewhat more pretentiously, what are the hermeneutics of the Agreement—what principles of interpretation apply to the Agreement? The reason this is a complicated question and worth pondering is because of the many different ways of looking at the Agreement, and thus the opportunity for multiple (and sometimes competing) hermeneutics. The perspective of a political scientist is likely to differ significantly from that of a constitutional lawyer, or from that of a historian or international judge, leading to the potential for different principles of interpretation to be applied, and different understandings of the Agreement to result. And all this may well be done in the utmost good faith. We do not have to build into this process any element of bad faith to see that different interpretations may arise.

From a lawyer's perspective, the appropriate stance to adopt in interpreting the Agreement was largely a question for the government lawyers in Dublin, Belfast and London, and during the period of relative quiescence in

Ireland-UK relations between the re-establishment of the Northern Ireland Executive and the Brexit referendum, the legal questions arising from the Agreement were relatively straightforward. Since that referendum, however, the legal interpretation of the Agreement has become a quotidian legal event engaging lawyers in Ireland and the UK, in private practice as well as in government service. That said, the importance of the Agreement, at least in the UK, was secondary to the legislation arising from that Agreement, which always took precedence, with the Agreement acting more as an interpretative aid to such legislation, the approach that successive courts took. The legal importance of the Agreement was further diminished by the significant lacunae in the structure of the Agreement itself, since there is no mechanism whereby disputes over the meaning of the Agreement can be adjudicated upon (through a legally-binding arbitration mechanism, for example) and so it was envisaged, no doubt, that disputes would be addressed politically, rather than legally. However, the Agreement's secondary status and the absence of international legal dispute settlement procedures, is now a thing of the past, since the Ireland-Northern Ireland Protocol to the EU-UK Withdrawal Agreement specifically incorporates several references to the Agreement, and (this is the important point) provides a dispute settlement mechanism which may therefore be called on to interpret the Agreement.

There are several intriguing divergences between the principles of interpretation that derive from a view of the Agreement as a political compromise, those that derive from the historian, and those who view it as a legally-binding agreement. There are, of course, considerable differences within the respective disciplines of history, law and politics, but some broad differences are apparent in how texts are interpreted. Those coming to the interpretation of the Agreement wearing a historian's hat tend to adopt the view that the Agreement should be interpreted (at least to some extent) in light of what the intentions of the drafters and politicians were at the time of the Agreement. The details of the negotiations in which the Agreement was concluded are now relatively well known, at least in outline. Several things seem to be clear about what happened in those exciting days before Easter 1998: by the end, the negotiations were rushed; the negotiators were close to exhaustion; the drafting was often haphazard; and the different strands in which the negotiations were conducted were only loosely patched together. The famous 'ambiguity' of the Agreement was not always intentional or strategic; sometimes it just resulted from a somewhat chaotic process. Viewing the Agreement historically, gauging the intentions of the parties on any particular issue, in such a

way as to attempt to lead to definitive interpretation, is more likely than not to lead to the conclusion that the Agreement doesn't address the issue.

The principles of interpretation commonly followed by lawyers, on the other hand, are generally not that concerned with whether or not the founding fathers and mothers of the Agreement knew what they were doing, or discussed it, or intended a particular result. Whether the drafters thought about what they actually achieved is neither here nor there. The issue for lawyers is rather what the text says, interpreted against the background of what the aim of those parts of the Agreement is, an aim that can be gleaned from the structure and overall purpose of the Agreement and the fact that it is nested in international law obligations more broadly. When lawyers talk about the 'intention' of the drafters, that is a construct which basically involves attributing to the drafters the intention to achieve the legal understanding of the Agreement. To put it bluntly (more bluntly than perhaps is necessary): the drafters 'intended' what we (lawyers) tell you the Agreement means. 'Intention', here is (more politely) a legal fiction. Whereas to historians, the actual intents might not be discoverable, for lawyers the collective intent can always be constructed. The words are the best evidence for that collective intent, but once constructed, the collective intent can be used to fill in the gaps in the words.

For political scientists, or at least for students of politics for whom power and ideology are central, whilst sharing lawyers' scepticism of purely historical interpretations, legal interpretations may well also seem naïve, if not downright obtuse. It is obvious, surely, that the relationship between interpretation and politics is more complex than the lawyer's simple account supposes. The interpretation of texts is thus made a more overtly political enterprise. Such politics scholars do not have to resort to the dubious claim that textual interpretations are *only* ideological and instigated by power; suggesting that they are *also* shaped by ideology and power is sufficient to make their point. For those proposing this insight, an approach to interpretation that enables us to decode the ideological underpinnings of the Agreement will be as, if not more important than any detailed textual analysis, to its understanding. Textualist legal interpretation simply misses the wood for the trees; political scientists don't make that mistake. For lawyers, however, the idea that there is a single way of understanding the aims or telos of any complex text strains credulity, and can result in the description of a wood that is wildly out of sync with any reading of the text, and often seems to have more to do with political preferences than with political analysis.

As the Agreement moves closer and closer to centre stage in Anglo-Irish relations, and potentially to UK-EU relations post-Brexit, the interpretation of the Agreement will become more and more contested. The temptation, of course, is for each interpreter to become, as lawyers would say, 'results driven', meaning that the method that produces the favoured substantive result is adopted, rather than the method that is most appropriate for the situation in which the question of interpretation arises. That is not the way forward, if the Agreement is to retain and, one hopes, increase its legitimacy over time. We will increasingly be presented in the future with a confrontation between differing (and conflicting) hermeneutics—a historical hermeneutic, a legal hermeneutic, and a political hermeneutic. We need to discuss these differences if we are not to talk past each other in the serious debates that will occur as to how the Agreement should be interpreted, and possibly even endangering its future. The Greek gods on Mount Olympus needed only one Hermes; the Agreement has many more—they should talk more often about what they are doing, and how they are doing it. This comment is intended to encourage such conversations.

Read Brendan O'Leary,
'Getting Ready: The Need to Prepare for a Referendum on Reunification',
https://doi.org/10.3318/ISIA.2021.32b.1
and the response by Fionnuala Ní Aoláin,
'On the Sanctity of Borders'
https://doi.org/10.3318/ISIA.2021.32b.3
and the reply by O'Leary,
https://doi.org/10.3318/ISIA.2021.32b.4