

# **The ethical dilemmas of national government lawyers in a Europeanized setting**

**Ellen Mastenbroek**

**Berry Tholen**

**Public Administration**

**Radboud University Nijmegen**

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## **1. Introduction**

In recent years a storm of indignation has arisen over the role of politicians and civil servants in ‘the war against terror’. Spurred by several journalistic and academic publications, various commentators have criticized the decision of former president Bush and his strategic advisors (Rumsfeld, Cheney) to set aside international and domestic law on torture, thus paving the way for aggressive interrogation methods at Guantanamo Bay and Abu Ghraib- or torture as some will have it.

A specific point of debate concerns the role played by government lawyers in legitimizing these practices. Attention has centered on the ‘torture memos’, advisory notes composed by the Justice Department’s Office of Legal Counsel. These memos have been widely criticized for constituting political advocacy rather than candid legal advice, and the government lawyers who composed them for being grossly incompetent (e.g. Clark, 2005; Wendel, 2005). Sands, amongst others, documents what he calls the lack of professionalism

and critical thinking among government lawyers in the Bush administration. He alleges that legal counsel in the White House, Department of Defense and the Department of Justice were so deeply committed to Bush's and Rumsfeld's resolution to win the war on terror, that they did not give impartial legal advice, but instead 'cloaked the policy with a veneer of legality' (Sands, 2009).

The US torture case is highly idiosyncratic, in that it involved highly contentious actions by politically appointed government lawyers, which evoked strong reactions from legal scholars. 'For sheer audaciousness and shock value, it is hard to top the attempt by elite United States government lawyers to evade domestic and international legal obligations,' as legal ethicist Wendel (2005) argues. At the same time, the case points towards a more general question: what are the *ethical obligations* of government lawyers? Following the torture memos, a vivid debate on this question has ensued.

This paper seeks to contribute to this debate on the ethics of government lawyering. We concentrate on the ethical obligations of government lawyers in both normative and empirical terms. To begin with the normative dimension, we ask the question what their ethos should be. The widespread critique by legal ethicists of the role played by lawyers in the torture case is premised on the assumption that legal officials should first and foremost live up to their role as 'guardians of constitutionality and legality' (Gillers, 2004; as quoted by Sands, 2009: 219). Legality, in this view, trumps a government lawyer's loyalty to their client. We will criticize this view for being imbalanced. Granted, government lawyers have their professional role and ethos, revolving around notions of legality and constitutionality. Yet at the same time, government lawyers are civil servants, having a distinct set of ethical demands: those resulting from their position in a bureaucracy, led by a legitimate political leader. From this perspective, government lawyers, just like civil servants more broadly, have to be loyal to their democratically elected superior. We will argue that the work of government lawyers is characterized by ethical dualism, just like that of other expert civil servants. In doing so, we seek to build a bridge between public administration ethics and legal ethics.

Second, we delve into the ethics of government lawyers in an empirical fashion. We wonder to what extent government lawyers recognize this ethical dualism, or prioritize one of the two roles. In other words: to what extent do they try to integrate their legal and political role? In addition, if government lawyers indeed view their work as driven by two sets of ethical demands, this raises the possibility of role conflict. We investigate to what extent conflicts between political loyalty and legal professionalism occur in day-to-day government lawyering in the face of EU legal obligations. Finally, we seek to find how government

lawyers resolve such role conflicts. What do they do when political demands do not square with legal requirements?

For the empirical part, we focus on a particular type of government lawyering: legislative drafting in the face of European Union legal obligations. This type of work revolves around the implementation of EU legal requirements into national law, and the making of national laws that are consistent with EU law. We do so for the case of the Netherlands. There, government lawyers are career civil servants instead of political appointees. For the US case, it has been observed that ethical tensions are more likely for political appointees (Lund, 1998: 67), whose career to a great extent depends on sensitivity to the political needs of his superior, the President. Yet we believe that these ethical dilemmas may just as well exist in a career bureaucracy, as decisions on promotion here are also influenced by the extent to which civil servants are sensitive to political needs.

The paper proceeds as follows. In section 2 we argue that the ethos of every expert in civil service inevitably has a dual character. In section 3 we specify the roles of the legislative drafters, the possible tensions between these two sets of obligations, and the strategies for dealing with role conflict. After a short explication of methodology in section 4, section 5 presents the findings of our investigation into the actual orientations and actions of Dutch legislative drafters. Section 6 offers a conclusion.

## **2. Real dilemmas**

Our aim in this section is to show that the moral universe of the civil servant in general, and that of the legislative drafter in particular, can only be understood in terms of pluralism. To arrive at this claim, we will start with the view from legal ethics, which prioritizes legality over loyalty to one's client. We then follow up with the Weberian position, which on first view is monist all the same, but eventually prioritizes political loyalty. Complications in each position lead us to a pluralist understanding of the ethos of the expert civil servant, implying the possibility of real dilemmas

### **2.1. The view from legal ethics**

Legal ethics is the body of ethical principles applying to lawyers, as found in codes drafted by the organized bar, bar association ethics opinions, case law, and scholarly texts (MacNair,

2003: 128).<sup>1</sup> The mainstream belief is that the legal profession is homogenous and that government lawyers share the same ethical duties as private lawyers (MacNair, 2006: 501). The key ethical principle, according to mainstream legal ethics in the US, is a fidelity of a lawyer to their client (MacNair, 2006: 509). In this model, the government lawyer takes his democratically elected superior as his client (Lund, 1998: 80).

The fact that a lawyer should *prima facie* be loyal to their client, however, does not mean that this role is unrestricted. Loyalty to the client is restricted by two types of considerations. To begin with, loyalty to a client should not be confused with loyalty to a client's particular constituent. As the executive branch is more amorphous than a natural person or even a corporation as a client, it has a much larger institutional client setting (MacNair, 2006: 253). According to Stokes Paulsen, being Counsel of the President, in the US context, means being counsel of the *office*, not *officer* (Stokes Paulsen, 1998: 100). This position is substantiated by Clark (2005). The margins of loyalty are thus heavily restricted, as a government lawyer must not act in the interest of a client's constituent, who is a temporary office holder, but of the underlying entity that is the client. According to Stokes Paulsen (1998, 104), a government lawyer who acts upon personal loyalty, becomes a 'co-conspirator'. In that case, 'the government lawyer has concluded he will violate the law not because some independent moral principle requires it, but simply to advance the personal interests of individual lawbreakers within the Administration to whom he feels personally loyal.'

Second, loyalty to a client is thought to be limited by constitutionality (Stokes Paulsen, 1998, 86). Just like any other executive branch officials, government lawyers must adhere to the law. 'A government's duty of loyalty to the administration in which he serves has (...) legal limits lest the lawyer become an accomplice in wrongdoing prohibited by law.' (Stokes Paulsen, 1998: 105). According to Wendel (2005, 6), the writers of the torture memos did not behave is morally abject because in writing a deficient advise they paved the way for torture, but because they violated their moral obligation to do right with regard to the law. In his words: 'Lawyers may not treat the law instrumentally, as an obstacle to be planned around, but must treat legal norms as legitimate reasons for political action in their practical deliberation.' (ibidem).

In sum, in the legal ethicist's view, legal requirements trump political loyalty, when push comes to shove. This position, however, has its blind spots. As MacNair (2006) pointed

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<sup>1</sup> The precise contents of ethical obligations for government lawyers differs between countries. Here, we focus on the situation in the US.

out, there are crucial differences between the regular client-solicitor relationship and the institutional setting in which government lawyers operate. Crucially, the government lawyer not only wears the hat of lawyer, but also that of civil servant.<sup>2</sup> How are a government lawyer's moral obligations impacted by the fact that they work at the service of government? To answer this question, we turn towards the field of public administration ethics.

## 2.2. The civil servant's ethos

The *locus classicus* of an elaboration of the typical civil servants ethos is *Politics as a Vocation* by Max Weber. Weber distinguishes the civil servant as a tenured professional from the politician. Both live - when we understand politics as a vocation - *of* but also *for* politics (Weber, 1991: 85). Essential to the politician's role is the fact that he is to take lead and assume responsibility. The expert official ["fachgeschulten Beamtentums"] on the other hand is to serve. "He shall administer his office *sine ira et studio*- without scorn and bias. Hence, he shall not do precisely what the politician (...) must always and necessarily do, namely, *fight*. (...) The honor of the civil servant is vested in his ability to execute conscientiously the order of the superior authorities, exactly as if the order agreed with his own conviction. This holds even if the order appears wrong to him (...). Without this moral discipline and self-denial, in the highest sense, the whole apparatus would fall to pieces" (Weber, 1991: 95).

Two considerations in *Politics as a Vocation* and relevant sections in other works of Weber underpin this ethos of political loyalty. One involves rationality: the civil servant that instrumentally implements the goals set by politicians maximizes governmental rationality. In Weber's understanding expertise can contribute to realizing goals more effective and efficient (goal-rationality), but is unable to value different goals (value-rationality) (Weber, 1988a: 489 etc, 582 etc). Sticking to implementing politicians' choices of goals, then, is the most rational way of employing expertise in office.

A second ground for establishing political loyalty as the core ethical principle of civil servants is legitimacy. Politicians in democracy are accountable to parliament and, through them, to the people. Because politicians, as holders of democratic offices, are in power and may be held responsible for their use of it, civil servants should abstain from making

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<sup>2</sup> To be precise, MacNair (2006) makes a distinction between public servant and salaries employee. Taken together, in Weberian terms, these form the concept of civil servant.

autonomous choices. Without such restraint, the democratic system of representation and accountability would become void and “the whole apparatus would fall to pieces”.<sup>3</sup>

In sum, Weber seems to have a vision of a singular and simple civil servant's ethos.<sup>4</sup> Yet, on closer inspection, Weber's presentation of the expert civil servant in *Politics as a Vocation* is rather shallow and unconvincing, even in his own terms. What does Weber exactly have in mind when he refers to the bureaucrat's expertise in *Politics as a Vocation*?

Weber mentions knowledge of dossier and procedure [“Aktenwissen und Dienstwissen” (Weber, 1968: 225)]. This kind of knowledge or expertise, however, comes down to having specific kinds of information. That hardly is what we usually understand by *expertise*. In other contexts, in fact, Weber presents a more refined idea of expertise, for instance in *Science as a Vocation*. Being a scientist is understood as having a profession. That profession involves certain rules and values. In the case of the scientist, for instance, these involve rules of methodology, a real engagement in discovering that which is worth to know and the professional honesty not to make claims beyond that which empirical research can offer (Weber, 1988a: 682 etc). Weber here seems refer to an understanding of expertise and expert behavior that goes beyond the knowledge of certain facts and a sheer instrumentalist focus on efficiency and effectiveness in the application of knowledge. It is an understanding of expertise resembles to the Aristotelian idea of a good practitioner of some kind, like an architect/constructor or a medical doctor. An expert in this line is someone who has the knowledge, but also specific abilities enabling him to employ it properly in specific cases and circumstances. The expert, typically, partakes in a specific type of activity, often together with others - an activity in which this expertise does have meaning and purpose. For the architect this involves the creation of useful and safe buildings, for the medical doctor it means enhancing health (Aristotle, 1982; MacIntyre, 1985: ch 14). Being an expert, in short, implies being guided by specific expertise-related rules and values.

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<sup>3</sup> Weber, to be sure, did not provide any substantial argument for democracy, neither in terms of interest representation, nor in terms of individual development. In his political writings, however, he evidently follows parliamentary democratic ideals (Weber, 1988b). For the debate on Weber's adherence to democratic ideals see (Beetham, 1985; Held, 1996; Mommsen, 1974a, 1974b).

<sup>4</sup> This understanding of civil servants' ethos, built on a strict distinction between the proper role of politicians and that of their employees, is often challenged by pointing out the reality of discretionary powers. Civil servants, the argument goes, have discretionary powers. That might be the result of a deliberative policy for reasons of flexibility. One might even maintain that any rule-following act involves interpretation and therefore discretion. Yet, whatever its origin, this liberty to act for civil servants implies that they must choose and therefore hold some responsibility (for an overview see Etzioni-Halevy, 1985; Frederickson, 2003: ch 2). This comment, however, does not really undermine the central idea of a simple ethos of obedience and loyalty. It can be interpreted as implying that civil servants should, when deliberating on possible actions in case of discretion, choose that alternative which (presumably) is in line with the goals of the political leaders.

When we understand experts of any kind working in civil service in this way, their expertise is not limited to knowledge of dossiers and procedures. Civil servants trained and working in some way as for instance engineers, doctors, or lawyers, find their moral universe filled not only by values of obedience and loyalty. The values and rules of their specific field of expertise, the expertise for which they are recruited in the first place, also matter.

### **2.3. A pluralist ethos for expert civil servants**

We observe that Weber, when dealing with the role and ethos of civil servants, focuses on loyalty and obedience, while making a caricature of the bureaucratic expert and his expertise. When dealing with other issues, however, Weber shows himself to be keenly aware of the values that go with profession and competence. Starting from the side of legal expertise, we found an ethos that privileges legal requirements over loyalty - without however taking the grounds for loyalty seriously into account. Both monist approaches seem too single-minded, yet complementary in some sense in their one-sidedness.

The values of loyalty on the one hand, and those related to the specific expertise on the other might in everyday reality function parallel without any friction. Often being a civil servant and a doctor (or a lawyer, a architect, etc.) probably will not lead to complications. Yet, as the two related sets of values have their own source, tensions may arise because of contradicting demands on action. Eventually the moral universe of the civil servant must be understood in plural terms and real dilemmas - or contradicting roles if one likes - are really possible.

Adherents to the dominant view in legal ethics might reply that there are indeed similarities between legal experts in government's service and other kinds of experts. Like in other types of expertise, the lawyer can point out what course of action might offer the best results and which policies better be avoided. The civil engineer can point out which designs are dangerous; the medical doctor can tell what approaches to epidemics are likely to fail; the lawyer can point out which course of action is legal and what is, on the other hand likely to be corrected in judicial review. Yet, there is also, they might add, an important difference. The specific expertise of the lawyer involves legality, and that is of relevance to government in a different way than that what other experts might contribute. Legality is what gives (modern) governments their legitimacy. Legal expertise does not only help to remedy some societal problem through governmental action, it deals with the proper function of government as

such.<sup>5</sup> This specific aspect of legal expertise, it might be maintained, makes for an overriding obligation for lawyers in governments' service to let his professional ethos prevail over loyalty.

In evaluating this legal ethicist reply we can accept the argument that strict illegal actions of government undermine its legitimacy and that this gives good reason for an overriding obligation to resist and remedy illegal actions of public officials or a government service for all civil servants, not only legal officers (Bovens, 1998; Burke, 1986).<sup>6</sup> Three further comments have to be made, however. First of all, the principle of resisting illegal action will probably offer much less guidance than the legal ethicists hope it does. The dilemma often will not simply be one of legality or not. Being loyal might not mean contributing to illegal actions, but of being more or less lenient in interpreting law, or being thorough in doing legal research. Secondly, superiors of politicians might deliberately act illegally, yet not for personal gain but to avoid greater harm (compare the cases of dirty hands that Walzer analyzed (Walzer, 1973)). Does legality in these cases offer the government lawyer the right way to act? Finally, and most important for this study, the specific role of the government lawyer seems to be of relevance. His role might be that of an advocate, defending the government for some tribunal. He may then use legal arguments in ways he deems beneficial for his client. The government lawyer, however, might have another role, being more a guardian of legality. This role becomes the more important in cases where there are no or only few others who can perform this function. In both roles legality limits or guides the official's proper conduct, yet what this means exactly seems to differ. The advocate is not the one we expect to judge impartially or to balance relevant legal aspects and interest - there are others that have that function. The way we expect him 'to act according to law' differs from what we expect of the civil servant who's role is more that of a guardian of legality as such. The ethos depends, in other words, on the specific institutional setting in which lawyer works.

In sum, in general terms and in simple cases of (possible) illegal acts of superiors, it seems clear that the legal ethics should prevail, but for the larger part the dilemma remains real. There is no simple general rule to deal with the dilemmas that follow from the opposition between political loyalty and legality.

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<sup>5</sup> Supporters of this view might refer to Weber's words on legality as source of legitimacy in *Politics as A Virtue*.

<sup>6</sup> Accepting this argument does, of course, not answer the question what is the proper strategy - if any - in specific cases to resist or remedy such illegal actions.

#### 2.4. A further complication: Multilevel government

Before we can turn to the question what the tension between obedience and expertise implies for legislative drafters in governmental bureaucracy, we have to elaborate on yet another complication. One that is related not to rationality, but the context of legitimacy. Here, again, we can start from a Weberian depiction that, on closer inspection, proves to be too simple: the idea of government.

In the first pages of *Politics as a Vocation* Weber defines politics as related to the state. “‘Politics’ for us means striving to share power or striving to influence the distribution of power, either among states or among groups within a state” (Weber, 1991: 78). Observe that this definition does not allow relations between local and national governments, or between states and supranational organizations to be analyzed in terms of politics. Is there, or might there not be, strive for power and influence in the relations between different levels of government? Weber, of course, does not yet take into the account supranational institutions, nor has he elaborate on the relations between national and local or regional governments. He does not only omit these relations in his definition of politics, but also in the rest of *Politics as a Vocation* and in his other political writings. The complex and sometimes strained relation between different levels of government that the 19th century Dutch scholar and legislator Thorbecke tried to capture in his idea of “the organic state” (Beuckers, 1983) and that in our day and time is often referred to in terms of ‘relative autonomy’ of lower governments is not an issue for Weber. Consequently, obedience for Weber can be uncomplicated.

If we do take the plurality of semi-autonomous governments into account, the ethos of the civil servant, again, becomes less simple. As each level of government is democratically legitimate, law and policies of all levels are authoritative orders for a civil servant. Law and policies of different governments in a multilevel system might of course be complementary - obedience to authority in such a case is a straightforward matter. Authoritative orders, however might also conflict, given the relative *autonomous*, position of lower governments. In such a case a dilemma for the civil servant arises (e.g. Berg, 2007).

When we systematize the consequences the two types of complications might have for the civil servants’ ethos, the following matrix can be drawn. In line with our arguments the top left is least, and bottom right is most desirable. Next we address the question to what extent legislative drafters whose work has an EU dimension recognize this plurality of ethos. In other words: to what extent do they try to integrate these different roles? In order to answer this question, we will first try to specify the tasks and roles of legislative drafters.

**Figure 1 Perspectives on civil servants' ethos**

Recognition of pluralism of levels	Recognition of pluralism of values	
	No	Yes
No	strict internally oriented servant	strict internally oriented expert official
Yes	integrating servant	integrating expert official

### 3. Roles and strategies of legislative drafters

We have thus sketched the dualist ethos of expert civil servants. In this section we tailor the general principles of political loyalty and legal professionalism to the function of the government lawyer, so as to distill their particular roles. In doing so, we focus on a particular type of government lawyer, namely the *legislative drafter*.

Legislative drafters form a subgroup of government lawyers who play a crucial part in drafting laws and regulations.<sup>7</sup> Yet they have received barely any academic attention (but see Purdy, 1987; Marcello, 1996; Nourse, 2002; MacNair, 2003, 2004), let alone from the field of public administration. This is surprising because of the disproportionate impact of the work of drafters as compared to government lawyers, or private lawyers acting to defend one particular client (Purdy, 1987, 68).

In the Netherlands, legislative drafting is the precinct of a specific group of government lawyers: *wetgevingsjuristen*.<sup>8</sup> They are responsible for putting their (junior) minister's policy wishes into concrete form by drafting bills and executive measures (Veerman, 320-321).<sup>9</sup> In doing so, they combine the tasks of advising on matters of substantive law with more technical drafting tasks. They usually work at staff legal divisions, cooperating with so-called 'policy officials', who are in the hierarchical line of a department.

<sup>7</sup> The exact role of legislative drafters is bound to vary strongly cross-nationally, depending on the role of Parliament in submitting legislation. In the US, for instance, federal level drafters are chiefly involved in preparing executive regulations, whereas Congress is assisted by its own legislative drafting office. In the Netherlands, drafting is done at the particular departments, which all have a clearly identifiable legislative drafting division.

<sup>8</sup> The drafters are not the only legal experts involved in the process of legislation in The Netherlands. The *Raad van State* (*Council of State*, an advisory council of legal experts) has the explicit task to advice the Dutch legislator (government and parliament) on aspects of legality in drafted law.

<sup>9</sup> Please note the difference with the American setting, where drafters work for legislators (see Purdy, 1987).

Increasingly, the work of Dutch legislative drafters has an EU dimension. In many policy areas, EU law exerts influence on the government's policy leeway. This effect takes two main forms. First, the member states of the EU have a duty to implement treaties and secondary legislation into their national law. Legislative drafters play an important role in this directly EU-induced work, as they advise on and draft the bills and measures needed to give effect to EU law. Second, EU law increasingly affects autonomous law making. That is, national law must be in line with EU law, as the latter takes precedence over the former. Legislative drafters bear the primary responsibility for guarding the compatibility of national law with EU requirements, which is a highly specialized legal task. How do drafters go about their EU-related work?

### **3.1. EU-related drafting roles**

In this section we tailor the generally principles of political loyalty and legal professionalism to the EU-related work of legislative drafters, i.e. implementation and safeguarding EU legal compatibility of national legislation. In doing so, we draw upon work by Purdy (1987) and MacNair (2003) on the ethical obligations of legislative drafters, and Moss (1996) on executive branch legal interpretation.<sup>10</sup> From this literature we can distinguish three roles: the translator, the guardian of EU law, and the integrating professional.

From the perspective of political loyalty, to begin with, the drafter should be a *translator* of their client's wishes (Purdy, 1987, 80). They should give effect to the instructions given by their superiors (cf. MacNair, 2003, 145), by transforming these into legal terminology. In the Dutch administrative system, the drafter's client is the minister. Crucially, drafters in this role conception are not responsible for ensuring legality or constitutionality of a bill, but should act 'non-judgmentally' and 'as directed' (Purdy, 1987, 79;95). Legal considerations do not enter the equation. That is, not for an intrinsic reason. In this view, it is a drafter's duty to fully inform his superior on the consequences of his actions (Purdy, 1987, 100). To fully effectuate the principle of political loyalty, the drafter should not automatically transform all policy instructions given by their superior. Instead, he should also advise on the risks of a desired course of action, thus protecting his superior's broader

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<sup>10</sup> This type of lawyering concerns the interpretation of existing law during their execution. In interpreting laws, lawyers help defining it, which makes this type of lawyering resemble legislative drafting (Moss, 1996, 1304). What is more, both tasks are carried out in a politico-administrative environment, with lawyers acting under a political superior- be it their minister, the president (in the case of the American Office of Legal Counsel), or a legislator.

interests, such as staying in office. Legal advice in this model hence takes a teleological rather than a deontological form.

At the other extreme, we distinguish a role grounded in legal professionalism. A drafter's cardinal duty, in this view, is to ensure the rule of law (MacNair, 2003, 145). The drafter, in this view, does not only work for his direct, and contemporary superior, but has a moral obligation to respect the law (cf. Wendel, 2005). A similar view can be gleaned from Moss (2000). Under the neutral expositor model, to use his terms, the government lawyer acts as a judge instead of an advocate. That means he should steer clear from policy influences, working from the 'best view of the law' (Moss, 2000, 1306). He should deliver advice that is 'objective and not colored by the exigencies of a particular circumstance or policy goal' (Moss, 2000, 1310). To what extent does this argument apply to the EU? Crucially, the member states are obliged to comply with EU law, based on the constitutional principles of autonomy and derived principles of supremacy, direct effect and Community Loyalty. The key is that the member states cannot autonomously decide whether or not to comply with EC law: they have voluntarily and irreversibly transferred certain legislative powers to the Community and are obliged to comply with the legal provisions arising from the use of these powers (Kapteyn and VerLoren van Themaat, 1998, 81). The drafter then becomes a *guardian of EU* law, instead of a translator of their client's policy wishes.

Third, we could sketch an intermediate role, in which the drafter seeks to connect political loyalty with legal conscientiousness. Moss (2000) labels this role the advocate model, according to which the government lawyer- or in this case drafter- is 'to act as an advocate, proffering any reasonable argument in support of his client's policy objectives'. According to this position, which we will call the *integrating professional*, the President (in the US system), or the ministers in the Dutch system, are responsible for their political decisions. 'The lawyer may candidly assess the relative merits of competing arguments for his client, but ultimately should not stand as a roadblock to the effectuation of administration policy (...)' (Moss, 2000, 1306).

Yet, this intermediate role is less extreme than that of the translator.<sup>11</sup> That is, it accepts that there are legal and constitutional limitations to policy wishes, which must be guarded by the drafter. The key here is with the term 'reasonable argument' (Purdy, 1987, 85). When a lawyer cannot come up with a reasonable argument, i.e. 'if the legal hurdles are

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<sup>11</sup> Confusingly, Purdy (1987) uses the term 'advocacy' to denote the drafter-as-translator role. Please note the difference with the advocacy model of Moss (1996), which does recognize the existence of legal limitations to policy wishes.

clearly insurmountable,' they should block their superior from reaching their policy objectives (Moss, 2000, 1306). In that case, hence, law ultimately prevails over domestic policy wishes. 'If assisting the legislator would involve the drafter in clear wrongs (...), the drafter should refuse to so act.' (Purdy, 82).<sup>12</sup> Applied to our case, the drafter is to prioritize EU law over national policy objectives, if these are mutually incompatible.

In sum, we can distinguish three competing role conceptions for drafters, which are depicted in table 1. Underlying these conceptions are two dimensions: the consideration of national policy objectives and the respect for EU legal limits. The *translator*, working from a concern with political loyalty, bases his work on his minister's instructions. He may take EU legal limits into account, but only in a teleological sense, advising his minister on the risk of an illegal course of action. Legality does not figure as intrinsic concerns. The *guardian of EU law* does not take into account policy instructions during EU implementation or the making of autonomous legislation, but strives for the best interpretation of EU law. The *integrating professional*, finally, prioritizes policy instructions, as far as these can be reasonably reconciled with EU legal requirements.

**Table 1 Conceptualization of the three drafting roles**

		Respect for EU legal limits	
		yes	no
Consideration of national policy wishes	yes	integrating professional	translator
	no	guardian of EU law	other role conceptions <sup>13</sup>

<sup>12</sup> One problem of this role is that it is not clear what the terms 'reasonable argument' and 'clear wrong' mean in the reality of legislative drafting. What is the dividing line between a reasonable and a contorted argument? When is a particular interpretation of a law 'clearly wrong'? These terms are debatable.

<sup>13</sup> Drafters which are led nor by national policy wishes nor by EU legal requirements may have another role conception, and be driven for instance by EU policy wishes, national legal requirements or their own notions of the public interest.

### 3.2. Strategies for dealing with role conflict

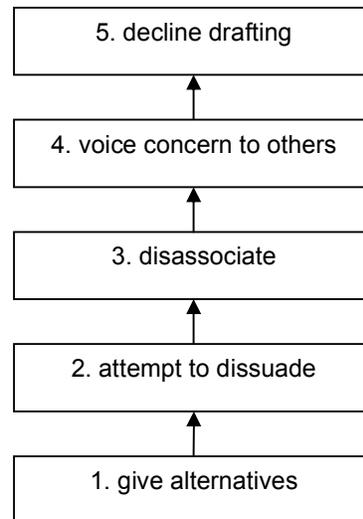
When political loyalty and legal professionalism pose mutually inconsistent demands on the legislative drafter, they find themselves in a situation of *role conflict*. On the one hand they are supposed to give legal advice helping the politician to reach his goals, *sine ira et studio*. On the other hand their professional ethos demands that the experts maintain the rule of law in the legislative process. If a particular policy is politically expedient, but impossible with an eye on EU law, these diametrically opposed points of view cannot be reconciled by referring to a common value. How do legislative drafters deal with these contrasting pressures on their work?

In ordering the various strategies that can be used when policy wishes and EU law conflict, it is useful to portray this situation as one of role conflict. That is, the integrative role, which itself is a compromise between that of the guardian and the translator, can be internally inconsistent. An individual caught up in such a conflict between role expectations has three options: live up to the one expectation, live up to the other expectation, or avoid the role conflict altogether (Van de Vliert, 1983). In the following, we will take stock of the strategies used by Dutch drafters in real-life conflicts between EU law and national policy wishes.

Before doing so, we draw upon the escalation ladder developed by Purdy (1987). He developed several ethical guidelines for drafters, criticizing the automatic application of the body of general legal ethics to drafting. Central to the guidelines is the principle that the drafter's primary duty is to the legislative process and the legislature as a whole- not to individual clients. The drafter is to play an intermediate role, seeking to cater to the policy needs of a legislator, unless these wishes run into insurmountable legal limits. If this is the case, the drafter should take 'reasonable steps' to protect the interests of the legislative process and the legislature. Ordered on a scale of increasing severity, Purdy (1987, 83-85) the drafter should first sketch alternatives to his principal's proposal and advise on the implications and consequences of the various options. This advice need not be limited to legal matters, but may comprise political, societal or other considerations. Second, he may try to dissuade the legislator of his desired course of action, using verbal or written statements. Third, he may disassociate with the bill, by asking to withdraw from it, avoiding public endorsement, or avoiding 'signing off'. Fourth, and much more sensitive, the drafter may voice his concerns to others. Application of this option is severely limited by the ethical and professional principle of confidentiality, which shapes the work of government lawyers. Fifth, the drafter may decline to draw the bill altogether. This is an extreme strategy, which can only be resorted to when no other means are available.

The strategies given by Purdy indicate a piecemeal shift from the integrating position towards the rule of EU law. Yet, his typology raises several questions. This is a normative typology- to what extent are these strategies used in reality? Specifically, we can envisage that in the case of role conflict drafters move towards the other extreme, and serve policy wishes instead.

**Figure 2 Escalation ladder (Purdy, 1987)**



#### ***4. Method***

For this project, we used data from a project funded by the Ministry of Justice aimed at studying the extent, forms and depth of Europeanization of the work Dutch legislative drafters. Part of this project concerned the role conceptions, dilemmas and coping strategies of drafters working on EU-matters. The project consisted of two sets of interviews. First, eleven interviews were held with key persons in the field of legislative drafting in the Netherlands.<sup>14</sup> These interviews served to explore the topic and important dimensions to the work of ‘Europeanized’ drafters. Second, in depth interviews were held with civil servants actually involved in legislative drafting. This article will focus on the second series of interviews.

With an eye to case selection, the following considerations were central. To begin with, we concentrated on those departments with a sizeable legislative output and a sizeably EU legal input. We thus excluded the Prime Minister’s Office, which produces hardly any

law. We also excluded the departments of Education, Culture & Science and of Defense because these two are still hardly affected by EU law. Second, we narrowed our scope to the work done in the central legislative divisions. We did not take into account the legislative activities of ‘line lawyers’, working at policy divisions.

All in all, we studied 10 out of 13 central governmental departments. At each department, we interviewed a legislative drafter and their superior. As the research was explorative rather than theory testing in nature, we intended to maximize empirical heterogeneity. To that end, we chose for a *most different systems design* (Przeworski, 1970: 34), meaning that we selected a group of respondents who differed on key background variables. The advantage of this design is that it maximizes the chances of identifying different ways of dealing with EU dilemmas. At the same time, in case a homogeneous picture results, this cannot be assigned to variance in those background variables, which would render any conclusions more robust.

The background variables we controlled for were seniority and role integration. *Seniority*, to begin with, is expected to affect the basic role orientation towards drafting. As several respondents in the first round of interviewees pointed out, a shift in role orientation has occurred over the last ten to fifteen years, resulting in a more pragmatic and more EU-sensitive attitude. This is likely to affect the extent to which drafters experience EU law-induced role conflict and the strategies they use for solving these dilemmas. A second background variable was *role integration*. The question here is whether drafters have a purely legislative role, or also operate as policy officials. The expectation is that this matters for the role conception and dilemmas experienced, as well as for the strategies used.

Combined, the two background variables form four categories, over which we equally selected our respondents (see table 1). The respondents were selected in cooperation with the Ministry of Justice. In total, twenty persons were selected and interviewed.

The interviews we held were semi-structured. We worked with a topic list that contained the main topics and possible answer categories that we kept developing over the course of the interview round. The questions asked were highly open, so as to do justice to the explorative nature of the project. Superiors and drafters were interviewed separately where possible<sup>15</sup>, so as to allow them to speak as freely as possible on often sensitive matters.

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<sup>14</sup> Ministerie van Justitie (ICER, strafrecht), Raad van State, Academie voor de Wetgeving, Universiteit Utrecht, Ministerie van Buitenlandse Zaken (ECER) en het Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (Bureau IZ).

<sup>15</sup> At one department we interviewed the drafter and the superior together, due to efficiency considerations on their part.

Finally, how did we gather information about the three different roles, role conflict, and the strategies? To distill the role conceptions assumed by the respondents, we asked the respondents what they see as their role in EU-related work. If this question proved difficult, we asked them what they view as their duties or objectives in their work. To construct the roles, we looked at the two background variables underlying the roles sketched above: consideration of national policy wishes and eventual respect for EU legal limits. Typically, we then would proceed by asking to what extent respondents perceived conflicts between EU law and national policy demands in their work and which actions they would take in case of such irreconcilability.

**Table 2 Selection of respondents**

		<b>Seniority</b>	
		<b>&lt; 15 jaar work experience</b>	<b>&gt; 15 jaar work experience</b>
role integration	policy and drafting integrated (Fin, Jus, BZ, BZK)	2 drafters and 1 superior <sup>16</sup>	2 drafters and 2 superiors
	policy and drafting separated (VWS, SZW, LNV, V&W, VROM, EZ)	4 drafters and 3 superiors	3 drafters and 3 superiors

<sup>16</sup> We did not speak to a superior at the Ministry of Foreign Affairs, because the legislative function here is negligible and an interview at this level would not have added much information.

## 5. *Empirical results*

### 5.1. **An integrated position?**

Most of the respondents could reflect on their role as national drafter working in an EU setting.<sup>17</sup> Only one of these respondents subscribed to the role of guardian of EU law, indicating that his primary objective was to ensure substantively correct and timely implementation, without making any reference to the interplay between policy objectives and EU legality.

At the other extreme, one respondent seems to subscribe to the role of translator. He explained that he is led by political loyalty to his minister. In his view, it's the drafter's duty to think along with his minister and to help him reach his objectives: 'you are an instrument maker rather than an inspector.' EU law, in his point of view, does not pose an insurmountable obstacle to policy objectives. As he explains, 'we have learnt that we don't need to treat directives as law.' This contrasts with the view of the older generation, which tended to implement directives in the most conscientious way possible. 'Now we implement in the most attractive way possible. We try to get away with it.' In this view, it is the drafter's duty to enable the minister to make his or her own decision. If a minister's policy objectives run counter to EU law, the drafter has to advise him, which is in line with the translator position sketched above. In the respondent's words: 'I would point out the risks, by saying: 'I wouldn't do it, but if you want to anyway, these are the risks. We are civil servants.'

The great majority of the respondents, have a more nuanced role conception, and somehow try to connect political loyalty with their role as guardian of EU law. In the words of one of them, 'you have to make your minister happy, while ensuring correspondence with EU law.' More specifically, respondents indicate that they are led in their work by their minister's objectives, policy wishes, or policy choice. As one of them explains: you think along about the rules, duties, and rights we want to enact in the Netherlands. Such a position implies sensitivity to policy wishes, and hence cannot be resolved with the role of 'neutral expositor', which concerns finding the best view of law in isolation from policy pressures. At the other side, these respondents do acknowledge that EU law limits the room for maneuver. They try to stay within the boundaries of EU law, while attempting to be loyal to their minister.

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<sup>17</sup> The three respondents who did not reflect on the role of a drafter in EU implementation/the making of autonomous legislation primarily talked about their role in EU negotiations, which is beyond the scope of this paper.

**Table 3 Role conception of interviewees**

	role aspects		role conception
	political loyalty	EU legality	
1	/	correct and timely implementation	guardian of EU law
2	political will formation	legal requirements	integrating professional
3	policy objectives	limits of EU law	integrating professional
4	minister's objectives	/	translator
5	make your minister happy	EU law	integrating professional
6	minister's choice	EU legal requirements	integrating professional
7	rules, duties, and rights we want to enact in the NL	EU legal boundaries	integrating professional
8	policy objectives	(EU) legal boundaries	integrating professional
9	policy wishes	(EU) legal boundaries	integrating professional
10	political choices	good implementation	integrating professional
11	policy wishes	(EU) legal requirements	integrating professional
12	policy	(EU) law	integrating professional
13	not discussed		
14	policy wishes	(EU) legal boundaries	integrating professional
15	political wishes	EU law	integrating professional
16	policy wishes	EU requirements	integrating professional
17	not discussed		
18	material practice in the NL	EU law	integrating professional
19	not discussed		
20	minister's choice	EU legal requirements	integrating professional

## 5.2. Between a rock and a hard place: the incidence of role conflict

*‘Politics and business don’t want us to be the best pupil in the class. So you are under a lot of pressure to loosen the way you apply EU law.’*

Most respondents hence have an integrated role conception, and try to balance national policy objectives with EU legal considerations. Yet, such integration is not always feasible: conflicts may occur between a minister’s policy objectives and EU law. Choosing to uphold EU law then means compromising one’s loyalty to the minister, and vice versa. In this situation, a role conflict occurs: a situation in which mutually incompatible behaviors are expected for a single person (Driscoll, 1981, 179). How often does this occur?

Most interviewees mentioned the occurrence of conflicts between EU legality and a minister’s policy demands.<sup>18</sup> At the same time such role conflicts are not all too common, as several interviewees were quick to point out. And if they occur, they are usually sorted out quite smoothly. Here, a department’s attitude towards the EU works as a lubricant, as one respondent asserted: ‘Everyone at the department understands EU law takes primacy.’ Similarly, at another highly Europeanized department, the policy divisions are reported to accept EU law limitations on policy.

Role conflicts between political loyalty and EU legality occur at various stages of the EU policy process. They may arise during the *implementation stage*, at which EU law needs to be transposed into national law. During this process, tensions between legal quality and policy wishes may occur. According to one respondent, ‘politicians have a hard time accepting a loss of policy freedom, when there is law coming from Brussels.’ One respondent mentioned the high costs of implementation, which may be averted through suboptimal implementation. Another dilemma relates to the actual application of the transposed EU law. Often, implementing agencies demand all kinds of exceptions to EU law. Policy officials are reported to then put pressure on legislative drafters to think of tricks. According to a respondent, many dilemmas relating to EU-law run along these lines, at various departments.

Conflicts between policy demands and legal professionalism also may occur during the making of autonomous legislation, as was explained by five respondents. One of them conveyed that his division often receives policy demands that are at odds with EU law.

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<sup>18</sup> In reality, these policy objectives are often not voiced directly by the minister, but by the policy officials resorting under him.

Another interviewee gave the example of a vast deregulation scheme, proposed by a policy division, on the basis of which half of all legislation in force at a particular field of policy was to be cut. The legislative division indicated that this was impossible, as some 90% of that legislation originated from the EU. Another respondent added that these conflicts often concern EU law relating to procurement and state aid:

*'In such a case I will tell them that this is against the rules. Yet in some cases they decide to go ahead anyway.'*

### **5.3. EU-related role conflicts: which way out?**

In the case of role conflict, the individual has three general options at his disposal: live up to the one role, live up to the other role, partially live up to both role expectations, or avoid the situation (Van der Vliert, 1983, 52). What option does the individual drafter ultimately choose? First, some respondents indicated that they aim at a compromise between the two role expectations, by reconciling national policy wishes with EU legal requirements. The chief strategy for doing so, mentioned by eight drafters, is interpretation. As one of them argued:

*'You have to be creative and flexible with the legal preconditions. (...)The main challenge is to make possible what (the minister) wants- in one way or another.'*

There are limits to making possible to this 'conceptual flexibility', as one of them called it. One respondent explained how he would seek out the limits, while making sure that his interpretation remained justifiable. This remark may be connected to the notion of 'reasonable argument', which is central to Moss's intermediate position. As another respondent explained, interpretation in the end comes down to 'settling the boundaries of EU law'. This is not a straightforward task; it is a complicated balancing act involving creative puzzling, as one of them explained: 'When I shape it like this, it may be possible, but if I shape it differently, surely not.' Others seem to be a bit less conscientious, as was put aptly by one superior: 'You shouldn't take EU law too literally, you have to treat it more flexibly (than national law).'

If interpretation does run against EU legal limits, the drafter is stuck between a rock and a hard place, and has to prioritize either political loyalty or EU legality. Of the 15 respondents with an integrated role conception, four interviewees indicated that they would ultimately prioritize EU law. ‘There are limits to flexibility,’ one of them said; ‘in the end people have to accept the inevitable. (...) If I’d have to exceed the limits of EU law, this simply would not happen.’ Another respondent agreed, stating that ‘there is simply no room to help your own sector.’ Another was given by the fourth respondent, who explained that he would recommend his minister to try to change EU law, so that it becomes compatible with his objectives. All in all, these three drafters would decline to draft the measure, which is the most extreme course of action given by Purdy (1987). An alternative, given by one respondent, would be to go along with the deficient draft, while avoiding to sign it off-disassociation in Purdy’s escalation ladder.

The majority of the respondents, though, conveyed that they would ultimately prioritize political loyalty. These respondents concurred that their political superior has the final policy-making responsibility, and that the task of the drafter is to enable him to take sound decisions- a principle rather close to the translator role, described above. As a civil servant, one respondent clarified, ‘you have to be ‘as loyal as a puppy.’ In the words of someone else this means that you may have to work on something that is legally questionable. One superior was particularly outspoken about this course of action:

*‘A lawyer is not a guardian of the law. (...). It is your job to serve your minister as well as possible. The minister is your boss. You have to inform the minister well, and (...) make sure that he knows what he does. But when push comes to shove, he is responsible. That is the core of a civil servant’s existence.’*

According to these respondents, drafters should not stop short at policy objectives, and translate them without a blink, but make their minister well aware that he is violating EU law- and of the risks involved. Two respondents gave details on such risk assessments. Crucial considerations are the chances of a ‘political mess’, the financial consequences, for instance resulting from possible ECJ cases, and the chances that stakeholders will try to have EU law enforced. On the basis of this assessment, the minister will decide whether or not to keep to his plans; ‘politics settle the dilemma in the end.’ In the words of one of them:

*‘When (my minister) really wants something, we will think of a supporting argument.’*

Finally, two respondents disclosed a more covered way of serving their superior’s political objectives, namely by *omitting* checks on EU legality. As one drafter explained, drafters may decide *not* to inform their superior of inopportune EU legal requirements and risks involved, if doing so would complicate the minister’s position. When this information is held back, the minister ‘may always claim ignorance.’ As a superior at another division conveyed that this is a rather common practice:

*‘EU law used to be neglected out of ignorance, but now is neglected intentionally.’*

#### **5.4. The effect of hierarchical position**

Is there any effect of seniority on the role conception of drafters? Unfortunately, firm conclusions are hard to produce, because of the low N. Yet, we can distill a weak tendency from the figures. Of the 10 drafters interviewed on this matter, one chose an initial guardian role, and nine an integrated position. Of those, four would eventually prioritize EU law, against four who would remain politically loyal. Of the seven superiors who talked to us on this issue, one was a translator, and six tried to integrate policy and EU law. All six would eventually prioritize political loyalty. Superiors thus seem more attuned to the policy needs of their minister, and seem more willing to compromise the ‘best view of law’ than drafters, who tend to be more conscientious in upholding EU law.<sup>19</sup>

#### **5.5. Strategies**

The dilemma between policy objectives and EU legal requirements is not taken lightly by the respondents. Most drafters use various strategies before choosing for one of the two ultimate options. As for those who end up guarding EU law, the strategies vary from trying to dissuade their policy counterpart and eventually minister, and suggesting alternatives that could be reconciled with EU law. Two respondents explained how they would focus on the EU level,

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<sup>19</sup> We can think of two possible reasons for this effect: selection effect due to promotion policies, and proximity to the minister, which makes individuals more susceptible to policy considerations.

by consulting the European Commission, or seeking support from other member states for the Dutch policy objectives.

At the political loyalty side of the spectrum, various strategies are reported as well. The eleven respondents who ultimately prioritize their minister's wishes listed eight different strategies, on average using two strategies per person. Besides interpretation, which we already mentioned, the reported the following strategies: providing alternatives to their policy counterpart or minister (3x), building rapport to increase the interest in drafters' arguments (2x), and trying to dissuade their policy counterpart or minister (3x). Other strategies mentioned were to find information about the limits of EU law, to negotiate with a policy division, and surrender on less important points of contention. Finally, two respondents described that they would direct their attention to the European level, and try to change the role expectations from that side. More specifically, one respondent would try to change EU law, another one would seek support from other member states or from the European Commission for the Dutch position.

Finally, to what extent do respondents follow the escalation ladder proposed by Purdy (1987)? All five strategies are mentioned by the respondents, except 'voicing the problem to others'. At most, drafters will involve their superiors, so as to be able to gain access to – eventually- the minister. Possibly, this whistle-blowing option is considered too severe. Another observation is that the giving of alternatives and sketching risks is not viewed as a single option, but as two different strategies. Third, the empirical order of usage differs from that of the model. dissuasion often follows before dissuasion. In addition, several respondents indicated differences in sequence between strategies.

## **6. Conclusion**

Just like any type of expert civil servant, government lawyers fulfill two roles. On the one hand, they have to be loyal to their political superior, fulfilling his policy wishes and protecting his position. On the other hand they have to behave in line with the values and rules of the legal profession, and ensure legality and constitutionality of the laws they draft. The work of government lawyers working the EU legal context, is underpinned by yet another dilemma: loyalty for the European versus the national level. In this paper, we have focused on the interplay between the duties of national political loyalty versus ensuring EU legality.

When we focus in more detail on the work of legislative drafters working in a Europeanized setting, the following roles emerge. The *translator*, working from a concern with political loyalty, bases his work on his minister's instructions. He may take EU legal limits into account, but only in a teleological sense, advising his minister on the risk of an illegal course of action. Legality does not figure as intrinsic concerns. The *guardian of EU law* does not take into account policy instructions during EU implementation or the making of autonomous legislation, but strives for the best interpretation of EU law. The *integrating professional*, finally, prioritizes policy instructions, as far as these can be reasonably reconciled with EU legal requirements.

When political loyalty and legal professionalism pose mutually inconsistent demands on the legislative drafter, they find themselves in a situation of *role conflict*. We asked 20 drafters which role conception is central to their work and to what extent they experience dilemmas between their national policy role and EU legal role, and how they go about solving such dilemmas.

The interviews held provided us with a wealth of information on drafters' ethos. This led to the following observations. To begin with, the majority of respondents recognized the dual roles shaping their work, and somehow try to integrate EU legal concerns with national policy objectives. This integral or policy sensitive attitude, as it was called, was alleged to be a relatively new development, relating to law in general, not just EU law.

At the same time, most respondents recognized that it is not always possible to bridge national policy advocacy and EU legal requirements. Role conflicts may exist, even though these are claimed to be an exception rather than the rule. These conflicts may arise either during implementation or the making of autonomous legislation.

How do drafters go about settling these strategies? Most commonly, they first try to somehow reconcile the conflicting roles, for instance by thinking of alternatives that are in line with EU law, or by trying to persuade the role sender that a certain proposed course of action violates EU law. Eventually, though, this may prove impossible. Most respondents indicated that ultimately, they would inform the minister of the risks involved in the proposed unlawful course of action, leave the decision whether or not to violate EU law to their minister- and abide by that decision. A minority of the respondents argued they would not give in to policy pressures, and ultimately upheld EU law against incompatible national policy objectives. Differentiating between drafters and their superiors, it turns out that the latter are more inclined to give in to policy pressure. Superiors seem more attuned to the policy needs of their minister, and more willing to compromise the 'best view of EU law.'

All in all, Dutch legislative drafters on average seem to try their best to connect EU law with national policy objectives, if necessary by interpreting EU law and exploring its limits. They are neither ruthless translators of national policy objectives, nor conscientious guardians of EU law. This is laudable, as this position does justice to the ethical duality characterizing the work of professionals working in a democratic system. At the same time, most respondents ultimately prioritize their role of political loyal civil servant over that of a legal professional doing justice to EU law. It thus becomes clear that neither political appointments nor great political unrest, factors invoked to explain the ‘co-conspiring’ by lawyers in the US torture case, are necessary conditions for government lawyers acting upon political loyalty.

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