The Scope of the Participant's Perspective in Joseph Raz's Theory of Law

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In this article I will explore Joseph Raz's methodological thesis about the conceptual priority of the participants of legal practices in the understanding of law. In particular, I will contend that given the participant's conceptual priority in the understanding of law we must conclude that legitimate authority is a necessary property of law. I will argue that to maintain that a claim to legitimate authority is the necessary property of law, and not legitimate authority itself, as Raz does,[1] we must abandon the participant's perspective. I will defend that Raz introduces his thesis of the claim to legitimate authority of law without further justification, and deprives it from support from a methodological point of view.

Raz asserts that the participant's perspective should have conceptual priority in the understanding of law.[2] He endorses the idea that the way in which these agents understand legal practice plays a key role in our understanding of law. In Raz's words:

> Given the admitted priority of the participant's point of view, even the observer, in order to acquire a sound understanding of the law, must understand it as it would be seen by a participant.[3]

In particular Raz maintains:

> Since to understand the law we must understand the way the law understands itself, that is the way its officials and others who accept its legitimacy understand it, we must understand it as it would be understood by people who see it as ethically justified, at least in the sense that it is ethically right to obey it, and therefore we must understand it as if it were so justified.[4]

Raz seems to adhere to the idea that without participants—that is, without agents that see the law as a legitimate source of justificatory reasons for action—there would be no law. He also goes further and argues that the existence of participants is not only necessary for the existence of law, but the way in which they understand law is *the* key in our understanding of it.[5] To say that we must understand law as

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1. Joseph Raz, "On the Nature of Law" (1996) 82 Archiv für Rechts- und Sozial Philosophie 1 at 13 [Raz, "On the Nature of Law"].
2. For a reading of Raz in this sense, see Ricardo Caracciolo, "El concepto de autoridad normativa. El modelo de las razones para la acción" (1991) 10 Doxa 67 at 74 ff.
3. Joseph Raz, "The Relevance of Coherence" in *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) 261 at 281 [Raz, "The Relevance of Coherence"].
4. Joseph Raz, "Why Interpret" (1996) 9:4 Ratio Juris 349 at 358.
5. Although it is possible to say that Raz finds in Herbert Hart's theory of law (HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) [Hart, *The Concept of Law*]) his immediate

participants do would mean that the way participants understand law is constitutive of our concept of law. In other words, for Raz, to say that we must understand law as participants do would mean that the participant's perspective has conceptual priority. From the participant's perspective law is ethically justified and source of justificatory reasons for action, and affirming that participants have conceptual priority means that we must understand it as if the law were a source of those reasons. I will come back to this issue in section 2 of this article.

It seems that, for Raz, the participant's conceptual priority is based on the assumption that law is an institution whose existence necessarily depends on how some of the agents who practice it think of it. Given the participant's conceptual priority, Raz believes that to understand law it will be necessary to explain the sense in which law is a source of objective reasons for action; that is, a source of reasons whose existence is independent of any subjective component such as desires, interests, beliefs, acceptance, etc.[6] Since from the participant's perspective law is a source of objective reasons for action, to understand law we will need to understand the kind of objectivity participants bind to law. Participants understand legal norms as objective reasons for action, since they assume they are grounded in a legitimate authority. If we take for granted the participant's conceptual priority, and the way Raz reconstructs that perspective, we should argue that where there is no legitimate authority, there are no legal norms. Since from the participant's perspective only legitimate authorities can be a source of objective reasons for action, illegitimate authorities cannot be sources of legal norms.

Surprisingly, Raz states that the *claim* to legitimate authority, and not legitimate authority itself, is the necessary property of law, abandoning the participant's perspective and giving then an alternative concept of law. Nothing is at first sight wrong in abandoning the participant's perspective or being committed to normative theoretical approaches. The problem with Raz's legal theory is that, according with his methodological commitments, as I will try to show, he leaves no theoretical space for enterprises that go beyond conceptual elucidation.[7]

1. Hart's Internal Point of View

Herbert Hart is certainly Raz's immediate theoretical background for his thesis that participants have conceptual priority in explaining what law is. For Hart, the

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theoretical antecedent, he arrives—as we shall see—to different conclusions in the way he understands the participant's perspective, and the role he maintains this perspective has in the explanation of what is law.

6. Bernard Williams, "Internal and external reasons" in *Moral Luck. Philosophical Papers 1973-80* (Cambridge: Cambridge University Press, 1981) at 101.

7. I find then problematic the author's affirmations that to explain the concept of law is a secondary task of the theory of law, and that to explain the nature of law is its primary task (see Joseph Raz, "Can there be a Theory of Law" in Martin Golding & William Edmunson, eds, *The Blackwell Guide to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2005) 324 at 327-28 [Raz, "Can There be a Theory of Law"]. For a development of a criticism to Raz regarding to this issue, see Paula Gaido, "The Purpose of Legal Theory: Some Problems with Joseph Raz's View" (2011) 30:6 Law & Phil 685 [Gaido, "The Purpose of Legal Theory"].

existence of law as a set of norms depends on some key members of the legal practice, typically judges, accepting or adopting the internal point of view with regard to a social practice that consists of recognizing competence as sources of law to certain facts of the world.[8] Those who adopt such perspective accept law as constitutive of patterns of conduct taken as justification of their own action, and criticism of those who deviate from them.[9] According to this interpretation of Hart's theory, law is constitutive of justificatory reasons only for those who adopt the internal point of view. Law *per se* does not constitute any particular type of reason to act. That means that its existence as a set of reasons depends on the subjective fact of being accepted.

Although Hart considers that the participant's perspective is relevant in the explanation of what is law, he does not consider it to have any methodological priority. Hart rests his analysis of what is law on the external observation of what he regards as paradigm cases of law. The set of features that is presented in paradigm cases of law is what the theorist accounts for by formulating the concept of law. To clarify the theoretical enterprise to which Hart is committed to, it is interesting to take note of what Jules Coleman says:

> For Hart, the investigation of usage is not, as some have claimed, oriented towards identifying some set of shared criteria that fix the application conditions of the term 'law'. Rather, the investigation of usage serves to provide, in a provisional and revisable way, certain paradigm cases of law, as well as helping to single out what features of law need to be explained. Descriptive sociology enters not at the stage of providing the theory of the concept, but at the preliminary stage of providing the raw materials about which one is to theorize.[10]

If this interpretation is right, the defining features of law are determined by the theorist, independently of the conceptual schemes to which the participants of the legal practices are committed to.

At this point it is relevant to point out three issues regarding Hart's legal account. Firstly, we should note that the participant's acceptance could be based

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8. For Hart—it could be remembered—it is not necessary for all the members of the legal practice to adopt the internal point of view, or the internal point of view to be verified regarding all the rules that integrate the legal system. In particular, it is necessary for at least the members of the government structure—especially judges—to adopt the internal point of view with regard to the rule of recognition—the master rule of the system. In turn, when Hart says that acceptance of the rule of recognition by the officials of the system is necessary, he does not mean that the rest of the rules in the system are in fact not accepted, but that this acceptance is not a necessary condition for the existence and stability of the legal system in general. Cf Hart, *The Concept of Law*, *supra* note 5 at 113.

9. *Ibid* at 78, 100-07.

10. Jules Coleman, "Methodology" in Jules Coleman, Scott Shapiro & Kenneth Einar Himma, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) at 336. In tune with this analysis one might relate the way Hart understands the concept of law with Max Weber's ideal types. Here it is possible to recall Ernesto Garzón Valdés characterization of the different ways to understand the notion of ideal type; see Ernesto Garzón Valdés, *Derecho y naturaleza de las cosas. Análisis de una nueva versión del derecho natural en el pensamiento jurídico alemán contemporáneo I* (Córdoba, AR: Universidad Nacional de Córdoba, 1970) at 39.

on different reasons (prudential, moral, religious, etc.).[11] In addition, law only constitutes justificatory reasons for those who accept it. Finally, from the participant's perspective legal norms are justificatory reasons different from prudential or strategic reasons. One can recall that Hart distinguishes the idea of internal point of view from the idea of external point of view. According to Hart, those who adopt the external point of view regarding law may have a theoretical or a practical interest. A theoretical interest is held by those who are interested in its analysis, explanation, or justification. A practical interest is held, on the other hand, by those who seek to adjust their behaviour to it, but only because of a possible sanction or in the hope of obtaining some kind of benefit. The difference with those who accept based on fear of a possible, or in the hope of obtaining some kind of benefit, consists in that those who accept see law as justificatory reasons for actions. For those who adopt the external point of view, in turn, the fear of a possible sanction or the hope of obtaining some kind of benefit is the reason that justifies action, not legal norms. Participants accept legal norms as justifying their action in the legal field, independently from other types of competing reason. The existence of participants explains the existence of legal norms. Further, for Hart the existence of legal norms constitutes legal obligations for those who accept them, but also for those who do not.

In the contemporary discussion two issues are considered problematic in Hart's theory: the sense in which law is the source of justificatory reasons for those agents that do not adopt the internal perspective, and the sense in which the relevant idea of justification that explains the normativity of law can be understood independently of any moral component. Raz maintains that a subjective component is insufficient to affirm the existence of a reason for action. For Raz reasons are facts that indicate how one should behave, regardless of whether they become known or desired.[12] Besides, he considers impossible to explain legal normativity without explaining the moral value with which law is necessarily bound.[13] He arrives to such conclusions after giving conceptual priority to the participant's perspective—therefore, it will be necessary to analyze how Raz characterizes it.

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11. Hart, *The Concept of Law*, *supra* note 5 at 198-99; HLA Hart, "Postscript" in *The Concept of Law,* 2d ed by Penelope A Bulloch & Joseph Raz (Oxford: Clarendon Press, 1994) 238 at 257; HLA Hart, "Commands and Authoritative Legal Reasons" in Joseph Raz, ed, *Authority* (Oxford: Blackwell, 1990) 92 at 103 [Raz, *Authority*]; HLA Hart, "Legal and Moral Obligation" in A I Melden, ed, *Essays in Moral Philosophy* (Seattle: University of Washington Press, 1958) 82 at 92-93.

12. See Joseph Raz, *Practical Reason and Norms* (Princeton, NJ: Princeton University Press, 1990) at 17.

13. See Joseph Raz, "The Purity of the Pure Theory" in Richard Tur & William Twining, eds, *Essays on Kelsen* (Oxford: Oxford University Press, 1986) at 79 [Raz, "The Purity of Pure Theory"]; Joseph Raz, "Hart on Moral Rights and Legal Duties" (1984) 1:4 Oxford J Legal Stud 123 [Raz, "Hart on Moral Rights and Legal Duties"]. It must be remembered that in earlier works this connection is not always clear; rather his statements give rise to an opposite interpretation. Bayón highlights this switch in Juan Carlos Bayón, *La normatividad del derecho* (Madrid: Centro de Estudios Constitucionales, 1991) at 37 n 39, 38 n 42.

2. Raz's Reformulation of the Internal Point of View

We should note the ambiguity in affirming that the participants have conceptual priority. It can be interpreted in at least two different senses. On one hand, it can mean that the existence of different concepts of law is possible, and that the participant's concept of law should be given preference (option a-). On the other, rather, it can mean that the concept of law is one, and that the participants have an advantage in accessing it (option b-). I consider *option a-* as the one Raz endorses. For Raz it is a concept of law, *ours*,[14] that must be elucidated, and the way it is understood by those who accept the law defines its correct understanding.[15] As mentioned before, Raz's participant's conceptual priority seems to be based on the assumption that the existence of law necessarily depends on how some of the agents who practice the law think of it. This would lead Raz to state that the appropriate way to theorize about law is from the internal point of view.

Raz considers concepts are social entities that are the product of a social construction.[16] In particular, our concept of law is characteristic of a particular cultural community, viz., modern Western society.[17] Concepts understood as cultural products establish the necessary properties of an object for the concept to apply to it. The pattern of correctness in the use of our concept of law is then determined by a community's shared adoption of certain criteria. Thus, the concept of law cannot have a pattern of correctness extrinsic to the practice that constituted it. It is particularly relevant to add that—contrary to Hart—the concept of law for Raz is not introduced by theorists to explain a social phenomenon, but rather is a concept entrenched in the society's self-understanding.[18] If stipulation is not available, and no identifiable essential properties of law exist without some concept of it, the object of legal theory cannot be but to analyse the essential properties of our concept of law.[19] In an interview with Juan Ruiz Manero, Raz states:

> The principal intention of it (the theory of law, *PG*) is to make clear the way in which the law is conceived by those who are subject to it, to the extent that this is more a conceptual investigation than an empirical one. In other words, legal philosophy claims to explain the concept of law of those who are subject to it. If this concept is vague, then, legal philosophy must give an explanation that shows that

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14. Raz, "Can There be a Theory of Law", *supra* note 7. Joseph Raz, "The Problem of Authority: Revisiting the Service Conception" (2006) 90 Minn L Rev 1003.

15. The participant's conceptual priority, as we shall see, is not equivalent to state that they master the concept of law or that they can never be wrong in identifying correct examples of law. I will return later to these distinctions.

16. It seems that Raz adheres to non-individualistic conceptual relativism (See Raz, "On the Nature of Law", *supra* note 1 at 6; Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison" (1998) 4 Legal Theory 249 at 281. Roughly speaking, non-individualistic conceptual relativism maintains that the concept of a thing is the way in which a group conceives it. The measure of correctness of the use of a concept here is determined by a community's shared use of certain criteria. See Maria Baghramian, *Relativism* (New York: Routledge, 2004) at 212 ff.

17. Raz, "Can There be a Theory of Law", *supra* note 7 at 332, 335.

18. *Ibid* at 331.

19. Gaido, "The Purpose of Legal Theory", *supra* note 7.

> this concept is vague. Giving an explanation that transformed a vague concept into a precise one is far from being a virtue, it is a philosophical vice.[20]

Therefore, if it is affirmed that participants have conceptual priority, in the sense that the way they understand law shows the right way to understand it, the only possible task to the legal philosopher would be—if this starting point is accepted—to elucidate their understanding of law. The task of legal philosophy should ultimately be to give the best articulation of their self-understanding.

Raz maintains that participants cannot accept law if not for moral considerations. His argument in reaching this conclusion could be summarised as follows. Within our conceptual practice, any imposition of a duty upon a third party admits no justification other than one based on a moral reason. Raz expresses this idea when he states:

> For it seems that rules telling other people what they *ought* to do can only be justified by *their* self-interest or by moral considerations. My self-interest cannot explain why they ought to do one thing or another except if one assumes that they have a *moral* duty to protect my interest, or that it is in *their* interest to do so. While a person's self-interest can justify saying that he ought to act in a certain way, it cannot justify a duty to act in any way except if one assumes that he has a *moral* reason to protect this interest of his.[21]

It follows that reasons based on strategic considerations or on self-interest are not understood as justifying the imposition of duties on others. What I seek to highlight with this is that for Raz the concept of applying a norm, of imposing a duty upon another person, indicates in our conceptual practice the existence of a moral belief. Therefore anyone claiming someone else to fulfil a duty may not have this belief, but cannot deny it if he or she understands that the concept of imposing a duty on another person requires it. Denying that moral belief would imply ignoring the conceptual commitments required by the notion of justification. In this sense, one who denies the moral belief would be frustrating the act of justifying. In our legal practices—the argument continues—the imposition of duties on others is typically sought. For those who are participants of these practices—insofar as they are also members of our conceptual practice—the law, then, cannot but have a moral basis. Raz holds explicitly this idea when he states:

> Therefore, it seems to follow that I cannot accept rules imposing duties on other people except, if I am sincere, for moral reasons. Judges who accept the rule of recognition accept a rule which requires them to accept other rules imposing obligations on other people. They, therefore, accept a rule that can only be accepted in good faith for moral reasons. They, therefore, either accept it for moral reasons or at least pretend to do so.[22]

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20. Juan Ruiz Manero, "*Entrevista a Joseph Raz*" (1991) 9 Doxa 321 at 335 [translated by author]. See also Joseph Raz, "Teoría y conceptos: réplica a Alexy y Bulygin" translated by R Sánchez Brigido, in H Bouvier, P Gaido & R Sánchez Brigido, eds, *Una discusión sobre teoría del derecho: Joseph Raz, Robert Alexy, Eugenio Bulygin* (Madrid: Marcial Pons, 2007) at 120 [Raz, *Teoría y conceptos*].

21. Raz, "Hart on Moral Rights and Legal Duties", *supra* note 13 at 130.

22. *Ibid.*

Thus, in understanding the justificatory character of law we will need to elucidate the type of connection that links law and morality from the participant's perspective. For Raz, notably, the acceptance of law implies a specific moral belief: one that maintains that law is a *moral or legitimate structure of authority.* A legitimate authority that, on the other hand, is asserted or claimed by those who formulate authoritative directives, given the interests affected.[23] Participants of legal practices are committed to believe law as a source of this kind of justificatory reasons, but they can also be wrong in the identification of particular cases of law. The identified directives will constitute this type of reason only if its authority is effectively legitimate. This is how Raz states it:

> But since not every authority is legitimate not every authoritative directive is a reason for action.[24]

Up to this point, the relation between law and morality seems to be a necessary one. For sure, according to Raz, participants of legal practices are committed to an objective conception of rationality. Participants of legal practices, then, are also committed to refuse to use the name of "law" to any regulatory practice where their belief is falsified. Given the participant's conceptual priority, this is exactly the conclusion to which those who theorize about law should arrive. However, this is not the conclusion that Raz embraces. He thinks that there can be law constituted by illegitimate authorities. Let's explore his argument.

Before doing that, it is relevant to note that Raz must assert that *if* legal dispositions are valid, by originating in a legitimate authority,[25] they have (moral) binding force for all those who are its subjects. As Raz expresses it:

> If there is an authority which is legitimate, then its subjects are duty bound to obey it whether they agree with it or not.[26]

In addition, it should be stressed that Raz does not put on a same level moral legitimacy with moral correctness. In this sense, for him it is possible for legal norms to exist having a legitimate authority as their origin and that, considered individually, being morally incorrect. However, if legitimacy is a property absent from its source of origin, its directives are not justificatory reasons.

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23. Raz, "On the Nature of Law", *supra* note 1 at 13; Raz, "The Purity of Pure Theory", *supra* note 13.

24. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 46 [Raz, *The Morality of Freedom*]; see also in this same line Raz, "On the Nature of Law", *supra* note 1 at 14.

25. The legitimate character of authority is assessed, for Raz, from the individual's point of view (Raz, *The Morality of Freedom*, *supra* note 24 at 71-104), and taking the set of its directives into account (Raz, "On the Nature of Law", *supra* note 1 at 11). What I seek to highlight is that for Raz the legitimacy of authority should not be assessed taking into account each of its directives or with regard to all its subjects generally. The sample from which to assess the legitimacy of authority is the set of its directives, and the relevant relationship to determine its legitimacy is individual, not collective. In this line of thought, it is not possible for Raz to predicate a general duty of obedience regarding law.

26. Joseph Raz, "Introduction" in Raz, *Authority*, *supra* note 11 at 4. This conclusion poses numerous problems. Exploring them goes beyond the purpose of this article.

To follow the idea Raz would have in mind when he asserts that a claim to legitimate authority—and not legitimate authority itself—is the necessary property of law, it is useful to revise the scope of the participant's conceptual priority according to his theory. I will explore this issue in the next section.

3. The Scope of Raz's Participant's Conceptual Priority: The Moral Sting

When Raz states his view of concepts he distinguishes between the *possession* of a concept and the *complete mastery* of a concept.[27] A concept is *possessed* in cases in which, under normal circumstances, examples of it can be identified. And this regardless whether or not the properties taken into account refer to essential properties of the object to which the concept makes reference. In this case it is possible to point out an error, because the properties taken into account to identify correct examples of the concept are only useful under normal circumstances and not on all occasions. Thus, even though the participants of legal practices, for a conceptual reason, must at least *possess* the concept of legitimate authority, this does not mean that he or she cannot be wrong in identifying the specific cases that exemplify it. This occurs because the properties taken into account to identify correct examples of the concept on one occasion can lead to error when there is a change in circumstances.

A concept is *mastered*, on the other hand, when all the necessary properties of the object referred to are known. Even though this assumption is hard to verify, Raz admits that it is a possibility. In this case Raz also notes the possibility of error in its application. For example, in cases where complete knowledge of the concept of legitimate authority exists, one may suffer from pragmatic deficiencies that affect the identification of correct instances of authority. Thus, Raz rules out the possibility of a necessary connection between the belief in the legitimacy of an authority and its actual legitimacy.

In Raz's explanation of what is law, two levels of practices can be distinguished: legal and conceptual. He correspondingly makes reference to two different kinds of participants: participants of the legal practice and participants of the conceptual practice. In the legal practice participants are committed to the idea that law has legitimate authority. From the participant's perspective, denying the existence of legitimate authority is incompatible with asserting the existence of law. Participants of the conceptual practice or those individuals that adopt the concept of these participants, on the other hand, may indicate that those that participate in a specific legal practice are mistaken in their respective justificatory practice. The error which those agents incur may be reconstructed in terms of a deficient mastering of the concept of legitimate authority or a pragmatic deficiency in its application (in the case it could be said that the agents master the concept). The deficiencies I am referring to indirectly impact the mastering of the concept of law or the identification of correct examples of it.

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27. See Raz, *Teoría y conceptos*, *supra* note 20 at 113-14; Raz, "Can There be a Theory of Law", *supra* note 7 at 326.

To understand what Raz is thinking of, I believe it is useful to stress that for Raz, having "conceptual priority" does not entail complete infallibility, leaving room for some types of error. The privilege to determine which ideas are relevant (conceptual priority) does not entail complete mastery of them. This distinction allows the author to conclude that it is plausible to think of the possibility of error both in complete mastery and in the application of the concept of law. The participant's conceptual priority, in this sense, is compatible with the possibility of being wrong in the usage or complete understanding of the concept of justification and the concept of law.

Furthermore, Raz maintains that the belief in the moral legitimacy of law, although incorrect, must be a *recognizable, not absurd* belief. In Raz's words:

> However misguided such beliefs can be, they must be recognizable moral o political beliefs, and not every attitude to, or belief about, other people or about social practices and institutions meets this condition.[28]

Now, would Raz be prepared to admit that normative systems such as that of Nazi Germany—just to cite one example—are based on an acceptance of a moral character? Could it be said that Nazi officials accepted law based on a recognizable moral belief? Raz's responses to these questions are affirmative. Raz seems to suggest that the scope that should be given to the idea of moral belief, in this sense, is of a minimal character. To be recognizable as a moral belief, a belief in how other people should behave must at least appear to stand on the basis of a justification that exceeds self-interest. In this line, he should be thinking that Nazi officials understood theirs impositions on Jews as based on this kind of justifications.

From the participant's perspective the idea of claiming and accepting authority cannot be understood unless presupposing the authority's moral standing. An assertion of authority without the presupposition that authorities are sources of reasons that goes beyond self-interest, are unintelligible. In addition, this moral presupposition is based on the assumption that the authority has moral capacity. The moral capacity at stake includes, on one hand, the capacity to act in accordance with moral reasons, and on the other, the capacity to know such reasons. As Raz states:

> The statement that a normative system is authoritatively binding on us may be false, but at least it makes sense, whereas the claim that a set of propositions about volcanoes authoritatively determines what we ought to do does not even make sense... Trees cannot have authority over people. But someone whose awareness of what trees are is incomplete, a young child, for example, can claim that they do have authority. He is simply wrong. Similarly, even if he is aware of the nature of trees, he may make an insincere claim to that effect. Perhaps he is trying to deceive a newly arrived Martian sociologist. Notice, however, that one cannot sincerely claim that someone who is conceptually incapable of having authority has

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28. Joseph Raz, "Intention in Interpretation" in R George, ed, *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Oxford University Press, 1996) 249 at 260 [Raz, "Intention in Interpretation"].

> authority if one understands the nature of one's claim and of the person of whom it is made.[29]

Raz should extract deep consequences from the fact that from the participant's perspective law is bound to the idea of legitimacy. Indeed, given the participant's conceptual priority, he should then conclude that the absence of legitimate authority implies the absence of law. Notwithstanding, he concludes that law is merely morally intelligible.[30] For Raz "the law must be morally intelligible, for it must be intelligible that they (the participants of legal practices, *PG*) have this attitude to their law".[31] According to Raz, a normative system is morally intelligible and thus able to qualify as a legal system, even though broad sectors of its subjects are oppressed and feel absolutely no loyalty to it. Now, in what sense can it be asserted that Nazi regulative system, albeit morally intelligible, was law?

Raz seems to be thinking that the moral belief implied in the act of justifying the imposition of duties upon others introduces a standard of excellence into our concept of law that states that the intrinsic value of law is its legitimacy. Raz indicates:

> What makes the law different, what makes its intrinsic excellence a moral excellence, is that it is a structure of authority, that it is in the business of telling people what they must do. Necessarily, the law claims to have legitimate moral authority over its subjects. Hence its intrinsic virtue is to have such authority. To say that is to say that its virtue is to be moral but in a special way, in meeting the conditions of legitimacy. Like cities and universities it too can excel in other ways, including in other moral ways. The possession of moral legitimacy is only its intrinsic excellence, the one it must have, not the only one it may, or ideally should have.[32]

According to this reading, although the idea of legitimacy is a necessary one to understand the idea of law, its satisfaction is not necessary to be able to assert the existence of law. The idea of legitimacy would work as a standard of excellence characteristic of law. It would allow us to affirm not only that Nazi law was morally aberrant, but a poor example of law. However, for Raz, the possibility of rejecting Nazi law as an example of law should be discarded. This follows from Raz's quotation:

> Far be it for me to claim that all legal systems do enjoy moral legitimacy, which means that legal duties are really duties binding on people rather than being the demands governments impose on people. All I am saying is that when it is assumed that any legal system is legitimate and binding, that is does impose the duties it purports to impose—and I will generally proceed in this discussion on the assumption that the legal systems we are considering enjoy such legitimacy—in such cases we cannot separate law from morality as two independent normative points of view, for the legal one derives what validity it has from morality.[33]

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29. Raz, *Ethics in the Public Domain*, *supra* note 3 at 201.
30. See Raz, "Intention in Interpretation", *supra* note 28 at 260-61.
31. *Ibid.*
32. Joseph Raz, "About Morality and the Nature of Law" (2003) 48 Am J Juris 1 at 14.
33. Joseph Raz, "Incorporation by Law" (2004) 10 Legal Theory 1 at 6-7.

However, if we admit that this is an accurate interpretation of what Raz has in mind, what now remains to be explained is the actual scope the author grants to the assertion that the participants have conceptual priority. This is so because from the participant's perspective, the law does not aspire to the legitimacy it may lack—it actually possesses it. Here Raz seems to be founding his reasoning on the assumption that understanding the idea of law is something different to verifying the existence of law. In the context of his legal theory, however, as I have tried to show, it is disputable that the existence of law could depend on something beyond our conceptual scheme. If it is affirmed that legal philosophers "in order to acquire a sound understanding of the law, must understand it as it would be seen by a participant",[34] it must be concluded that where the aspiration to legitimacy fails, there is no law. To be able to assert that the necessary feature of law is a claim to legitimate authority Raz disregards his initial methodological commitment, according to which to understand what the law is we have to follow the participant's perspective. It could be worthy to stress that there could be illegitimate law. What remains unjustified within Raz's legal theory is the methodological switch that gives us the theoretical space to reach that conclusion.

34. Raz, "The Relevance of Coherence", *supra* note 3 at 281.