A Deleuzian Reading on Hart's Internal Point of View

Harison Citrawan*

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Abstract

Reading H.L.A Hart's internal point of view or participant's self-understanding through Deleuzian philosophy suggests an alternate way of grasping Hart's refutation of John Austin's command-based theory of law. The study claims two main arguments. First, a Deleuzian investigation of participants' self-understanding asserts the way to understand not only what law *is* but also what is *about* law, or to be precise, what law can *actually* do. Therefore, Hart's participant's self-understanding is not simply a property of law but instead, it is a concept that uncovers the capacity of Deleuzian 'desiring-machines' in law's plane of immanence. Second, by putting Hart's concept to the initial proposition of refutation of Austinian mere habit of obedience, we can situate the participants as desiring-machine whose acceptance to rule is essentially a form of communications. That is, like a rhizome, it has no definite root/source. Self-understanding or acceptance does not stem from a particular sovereign power—it somehow reflects Deleuze's transcendental empiricism.

Keywords: Deleuze, Hart, internal point of view.

A. Introduction

H.L.A Hart's (1907-1992) *The Concept of Law* sets the stage from a refutation of the Austinian command-based perspective about law and legal system to describe necessary and sufficient condition of law and legal system.[1] Two interrelated Hart's arguments are crucial to this study. *First*, contrary to John Austin (1790-1859), who argues that law is merely command or order backed by the threat from the sovereign, Hart asserts the primacy of rules in a legal system. He claims law as the union between primary and secondary rules. *Second*, Hart argues that Austin's theory is inadequate to explain the relationship between law and legal subject or actor. Hart contends that instead of due to the mere habit of obedience to orders, people *actually* manifest acceptance to rules that could guide their conduct and behavior, from which he further distinguishes such acceptance into two attitudes of internal and external point of view.

Based on the two assertions, this study is focusing on rereading Hart's participant self-understanding claim, a methodological claim insisting legal theories to resonate with the actual experiences of legal subjects. Specifically, the study's

* Researcher (on leave), National Research and Innovation Agency, Jl. M.H Thamrin No. 8, Jakarta Pusat 10340, S.H. (Universitas Gadjah Mada), LL.M. (University of Groningen), SJD (The Pennsylvania State University, Dickinson Law), hmc5713@psu.edu.

1 H.L.A Hart, *The Concept of Law*, (Oxford: Oxford University Press, 2012), 18-25.

inquiry builds upon the long-standing critique about the lack of normativity in Hart's internal point of view, particularly on the equivocal explanation about the officials' practices ability to give rise to citizens' obligations in general.[2] However, instead of delving into the course of normativity debate, i.e., the intersection between law and morality,[3] the study takes a different route in understanding Hart's claim: an investigation of the internal point of view by denoting to its initial refutation of Austin's command-based theory. In that sense, the study aims to assess Hart's contentions against Austin by engaging with Deleuzian jurisprudence. It is a kind of jurisprudence inspired by critique posed by a French Philosopher, Gilles Deleuze (1925-1955), toward dogmatic jurisprudence. This stream of thought insists that law should be seen as a non-representational image; it is dynamic by nature. Law should be read from its expression side. Arguably, Deleuzian philosophy is relevant to this inquiry in two senses. *First*, it can navigate the dogmatic allegation against Hart's analytical jurisprudence. *Second*, it advances the urge to *liberate* internal point of view through a post-modernist critique. Thus, in essence, as a kind of Deleuzian aesthetical inquiry, this article situates Hart's participant's self-understanding in a way so that positivists could understand it as (1) purposeless, (2) a multiplicity of functions, and (3) capable of producing the unexpected.

The organization of this article is as follows. The *first* section is a brief depiction of Hart's legal subjectivity argument, sketching his rejection of the Austinian view that asserts law as a *species* of command. It is imposed upon the subjects irrespective of their attitude or conduct toward that command. The *second* section is about Deleuze's critique against the transcendental that asserts critically about the ontology of immanence. *Third* section will display several ideas based on Deleuzian reading of Hart's participant's self-understanding. It suggests that the internal point of view is both a critique against command-based theory and a univocal construction of law and legal subject. At this moment, considering both terms of internal point of view and participant's self-understanding, this article used the two terms interchangeably.

B. Death of The Sovereign

For Austin, law is derived from the sovereign's command. The sovereign exercises "supreme and subordinate *government*" to establish "the aggregate of the rules". It is called positive law. It is a signification or intimation of a wish of the sovereign to

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[2] Stephen Perry, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View", *Fordham Law Review.* 75, No. 1 (2006): 1171. See also Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence", *Am. J. Juris* 48, No. 1 (2003): 17.

[3] Richard Holton, "Positivism and the Internal Point of View," *Law and Philosophy* 17, No. 5/6 (1998): 597–625. See John Ferejohn, "Positive Theory and the Internal View of Law," *University of Pennsylvania Journal of Constitutional Law* 10, No. 1 (2007): 273. See also Brian Bix, "HLA Hart and the Hermeneutic Turn in Legal Theory," *SMU Law Review* 52, No. 1 (1999): 167. See also W Bradley Wendel, "Lawyers, Citizens, and the Internal Point of View," *Fordham Law Review* 75, No. 1 (2006): 1473.

the ruled: "to do or forbear from some act". Failure to comply may generate evil incurred by the sovereign.[4] Austin asserts that command should be comprehended as: "(1) A wish or desire conceived by a rational being that another rational being shall do or forbear; (2) An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish; and (3) An expression or intimation of the wish by words or other signs".[5] Therefore, law is a *species* of command.

Consequently, law is being imposed upon subject-citizens irrespective of their attitude or conduct toward the command. From this command-based theory, law and conduct are the subject's two extraneous elements: it asserts that "in every human society, where there is law, there is ultimately to be found latent beneath the variety of political forms, … this simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one".[6] Such a vertical relationship between the sovereign and its subjects exhibits two critical elements of the foundations of the legal system and the idea of legal validity: a general habit of obedience and the reducibility of obligation into the non-normative concept of threat and sanction.[7]

Contrary to this view, Hart's concept of law posits that rules are constitutive of conduct and the subject citizens use them to establish and evaluate conduct. Hart claims that Austinian habit of obedience fails, amongst others, to give light to the continuity of the sovereign in a legal system. Thus, there is no clear right conferring from the old legislators to their successor and that these habits cannot presume that the new legislators will also be obeyed. Hart then contends that there should have been an acceptance of the rule that confers the successor's entitlement of obedience. The way legal subjects could relate themselves to the legal system is through, in Hart's terminology, the internal aspect of rules. The habit of obedience requires mere generality of a particular behavior to be followed in society. The internal aspect is different. It entails certain behaviors as a general standard. It guides members of the society to act a certain way; and to have 'views about the propriety' manifested under the social rules. Hart notes,

> "What is necessary is that there should be a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands are justified, all of which find their characteristic expression in the normative terminology of "ought", "must" and "should," "right" and "wrong"."[8]

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4 John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995), 21.

5 Austin, 24.

6 Hart, *The Concept of Law*, 50.

7 Perry, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View."

8 Hart, *The Concept of Law*, 57.

Furthermore, to argue the continuity of a legal system, this kind of social rule has a Janus face in which they look back to the lifetime of the old sovereign and, unlike habit, they also look forward, that is, to the future lawgiver acknowledging that she has the right toward obedience by virtue of qualification reflected under the accepted general rules.[9] This sort of attitude of acceptance is better viewed, as Shapiro suggests, as "a specific kind of normative attitude held by certain insiders, namely, those who accept the legitimacy of the rules."[10]

Hart likewise clarifies that one takes the internal point of view toward a rule to conform to the rule, criticizes others for failing to conform, does not criticize others for criticizing, and expresses one's criticism using evaluative language. This kind of social rule, Hart proffers, transforms Austin's mere habits of obedience because the rule accepted does not only stipulate the sovereign's obligations. It also specifies the sovereign's right to determine what is to be done. Thus, in turn, it is "generally accepted that it is right to obey him."[11] Faced with the question of continuity of law, Hart continues the idea into a division between official and ordinary acceptance. The latter's acceptance of social rules is "largely by acquiescence in the results of" the former's acknowledgment of the rules conferring authority to the sovereign.[12] At this point, it can be said that the internal point of view is a complex phenomenon that involves both aspects of passive acceptance. It has been acknowledged under Austinian habitual obedience to orders backed by threats and, most importantly, active acceptance of the officials in a particular legal system. In this sense, it can be seen that the internal point of view involves a normative dimension as "the law is not simply sanction-threatening, -directing, or -predicting, but rather obligation-imposing."[13] It is based on the point of view that "those who understand and work with that complex set of normative conventions in terms of which we can use these artefacts to measure the passage of time and thus to synchronize and co-ordinate activities with each other to a remarkably high degree of accuracy."[14]

Bodies of literature have problematized this sort of subjectivity or self-consciousness claim. Some scholars argue that the internal point of view is unable (1) to explain the way in which obligation arises other from compulsion,[15] (2) to grasp the cognitive aspect of normative attitude,[16] and (3) to capture subjectivity

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9 Hart, 58.

10 Scott J Shapiro, "What Is the Internal Point of View," *Fordham Law Review* 75, No. 1 (2006): 1159.

11 Hart, *The Concept of Law*, 58.

12 Hart, 60–61.

13 Shapiro, "What Is the Internal Point of View," 1157.

14 Neil MacCormick, *Legal Reasoning and Legal Theory* (New York: Oxford University Press, 1978), 276.

15 Jeanne L Schroeder, "His Master's Voice: HLA Hart and Lacanian Discourse Theory," *Law and Critique* 18, No. 1 (2007): 117–42.

16 Perry, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View". See also Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts, London: The Belknap Press of Harvard University Press, 1986), 33-35.

within the separation between law and morality.[17] Dworkin argues that Hart's descriptivist project fails to capture the entirety of internal perspective of law. It is to establish duties and reason for action rules must weigh a certain normative state of affairs.[18] Hart already responded to Dworkin's criticisms in *Postscript*, showcasing that Dworkin's normative state of affairs is "far too strong". They demand "not only the participants to who appeal to rules as establishing duties or providing reasons for action must believe that there are good moral grounds or justification for conforming to the rules, but that there must actually be such good grounds."[19] Some other scholarly works have also been dedicated to 'defend' the internal point of view.[20] According to Dickson, for instance, many theorists tend to characterize Hart's internal point of view in an overly passive connotations and "view the factoring in of the participants' viewpoint in his theory as a mirroring or reproductive exercise."[21] In reading Hart's *Postscript*, Dickson argues that "Hart wanted to emphasize that it is possible to offer an understanding of law taking into account the internal point of view of those subject to and administering the law without sharing those views or, where those views have a moral content, without taking a stance on their moral correctness."[22]

Nonetheless, Perry normatively argues that there are several jurisprudential inquiries that could be made against law's claim to authority based on the participant's internal point of view.[23] One particular suggestion is one of Perry's claims that there is no clear indication of who must claim the authority and who should be the subject of the authority. It is the basic of Perry's argument that to adopt internal point of view is "to believe that a de facto authority's claim to be legitimate is justified."[24] Without having to delve into these lines of normativity critique any deeper, this claim would be extended from a completely different ontological viewpoint. The following analysis engages with Deleuzian philosophy that pivots on the immanence. It may provide "a basic toolbox with which one can commence to build one's own complete description of the world, and furthermore one's own world in which to live."[25] Should we want to *liberate* Hart's internal point

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17 David Gray Carlson, "Hart Avec Kant: On the Inseparability of Law and Morality," *Washington University Jurisprudence Review* 1, No. 1 (2009): 21. See Juan Vega Gomez, "The Hart-Fuller Debate," *Philosophy Compass* 9, No. 1 (2014): 45–53.

18 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), 28-31. See Dworkin, *Law's Empire*.

19 Hart, *The Concept of Law*, 257.

20 MacCormick, *Legal Reasoning and Legal Theory*. See Scott J Shapiro, *Legality* (Cambridge, MA: Belknap Press, 2011), 188-92. See also Jules L Coleman, "The Architecture of Jurisprudence," in *Neutrality and Theory of Law* (New York: Springer, 2013), 61–126. See also Julie Dickson, "Methodology in Jurisprudence: A Critical Survey," *Legal Theory* 10, No. 3 (2004): 117–56. See also Brian Leiter, "Back to Hart," *Anali Pravnog Fakulteta u Beogradu* 69, No. 4 (2021): 749–60.

21 Dickson, "Methodology in Jurisprudence: A Critical Survey," 140.

22 Dickson, 140.

23 Perry, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View".

24 Perry, 1202.

25 Martin Hardie, "Deleuze:'Had I Not Done Philosophy I Would Have Done Law,'" *International Journal for the Semiotics of Law-Revue Internationale de Sémiotique Juridique* 20, No. 1 (2007): 93.

of view seriously, instead of treating the concept philosophically, this approach could provide us the way to *do* it.

It is widely argued that Hart's claim on participant's self-understanding requires a certain degree of cognitive belief. One of the claimants of this is Perry. In his attempt to *liberate* internal point of view, Perry avers that "discarding Hart's implausible semantic analysis of normative statements" is to "accept the legitimacy of law have not simply adopted a certain normative attitude, but rather hold a certain belief, which could be either true or false, about the legitimacy of law."[26] Several studies further elaborates the argument from the lens of the eternal debate between positivism versus the natural theory of law, questioning the nexus between law and morality.[27] As an alternative to read Hart's internal point of view, nevertheless, we could say that these critiques are thinking of law in terms of the transcendent rather than of the immanent, in terms of 'space' instead of 'time.' In contrast, a route to the law's plane of immanence may take us to an entirely distinct yet clarificatory argument, specifically by situating Hart's internal points of view within Deleuze's immanence.

C. Deleuze's *Immanence*

Deleuze is obviously not a legal philosopher himself. Therefore, it could be said that Deleuzian jurisprudence is 'other' jurisprudence: it comes from a distinct philosophy to escape from the traditional dualism in ontology that always installs a hierarchy in our way to understand the world.[28] Employing a hierarchical view evidently benefits philosophers to choose ontologies and label them as the transcendent, positing them as superior in the ontological system. According to Deleuze, this kind of dualism delimits creativity and potentiality, while simultaneously it suppresses the chance of the encounter.[29] Law in the common dogmatic view is characterized as generality. As an assertion to such generality, Deleuze propounds that "law determines to terms which it designates. Far from grounding repetition, law shows, rather, how repetition would remain impossible for pure subjects of law – particulars. It condemns them to change. As an empty form of difference, an invariable form of variation, a law compels its subjects to illustrate it only at the cost of their own change."[30]

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[26] Perry, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View," 1201.

[27] Brian H Bix, "Kelsen, Hart, and Legal Normativity", *Revus. Journal for Constitutional Theory and Philosophy of Law/Revija Za Ustavno Teorijo in Filozofijo Prava* 34 (2018): 25-42. See Torben Spaak, "A Challenge to Bix's Interpretation of Kelsen and Hart's Views on the Normativity of Law", *Revus. Journal for Constitutional Theory and Philosophy of Law/Revija Za Ustavno Teorijo in Filozofijo Prava* 37 (2019): 75–82.

[28] Russell Ford, "Humor, Law, and Jurisprudence: On Deleuze's Political Philosophy", *Angelaki* 21, No. 3 (2016): 89–102. See Andreas Philippopoulos-Mihalopoulos, "Critical Autopoiesis and the Materiality of Law", *International Journal for the Semiotics of Law* 27, No. 2 (2014): 389–418. See also Gilles Deleuze, "Immanence: A Life...," *Theory, Culture & Society* 14, No. 2 (1997): 3–7.

[29] Gilles Deleuze, *Difference and Repetition* (Columbia University Press, 1994). See Paul Patton, "Deleuze and Democracy," *Contemporary Political Theory* 4, No. 4 (2005): 400–413.

[30] Deleuze, *Difference and Repetition*, 2.

As an alternative, Deleuze is asserting a philosophy that gets away from transcendence, the ontology of immanence. As a rejection of the transcendent, the ontology of immanence pivots on viewing matter as univocal. In this sense, there would be nothing as a sort of hierarchy, differentiation, or multiple substances in Deleuze's plane of immanence. The plane of immanence, considered as his theoretical underpinning, is the image of thought. It "implies a strict division between fact and *right*: what pertains to thought as such must be distinguished from contingent features of the brain or historical opinions."[31] The image of thought, as Deleuze and Guattari argue, "retains only what thought can claim by right. Thought demands 'only' movement that can be carried to infinity. What thought claims by right, what it selects, is infinite movement or the movement of the infinite."[32] The image of thought is, therefore, built upon this movement of the infinite. Elements of thought are always moving, turning back-and-forth and coming-and-going.[33]

Through the idea of movement of the infinite, Deleuzian philosophy denies dogmatic objects as it proffers the becoming.[34] The immanence denounces the transcendence in several steps: referring to Descartes and Kant's philosophy, the immanence is a field of conscientiousness and immanent to a pure subject that thinking which they call transcendental. In Kantian view, the transcendental is not to be perceived as a transcendence of something, but rather "that of a Subject to which the field of immanence by belonging to a self that necessarily represents such a subject to itself (reflection)."[35] However, it faces difficulty in reconciling difference and identity understood as basic ideas of philosophical inquiry. To ask it in another way, how it may "attain the necessary distance that enables it to be critical of the present?"[36] Deleuze sees that the fact that inclination to differentiate is because we are thinking in terms of spatial, whereas he argues to think univocally, what we need is to think temporally. Borrowing from Bergson's philosophy of duration, Deleuze asserts that temporal thinking insists that we grasp time as a passage or flux. The present should be seen as a realm where past and future meet—the present actualizes the virtual past.[37]

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31 Gilles Deleuze and Félix Guattari, *What Is Philosophy?* (Columbia: Columbia University Press, 1994), 37.

32 Deleuze and Guattari, 37.

33 Deleuze and Guattari, 38.

34 Elizabeth Grosz, "Bergson, Deleuze and the Becoming of Unbecoming," *Parallax* 11, No. 2 (2005): 4–13. See Elizabeth Grosz, *The Nick of Time: Politics, Evolution, and the Untimely* (Durham & London: Duke University Press, 2004), 215-223.

35 Deleuze and Guattari, *What Is Philosophy?*, 46.

36 Paul Patton, "Immanence, Transcendence, and the Creation of Rights," in *Deleuze and Law* (Edinburgh: Edinburgh University Press, 2012), 15-31.

37 Deleuze, *Difference and Repetition*. Such mode of thinking allows us to refer to Deleuze's thought on Spinoza's philosophy of expression that exhibits three elements of substance, attribute, and mode. Substance expresses itself through attribute (the essence of things); attribute expresses itself through mode (property of things). Deleuze claims that this movement allows something that does not exist before without the help of the transcendental as expression creates something from within—it is univocal.

In relevance to the inquiry on Hart's jurisprudence, specifically on the legal subjectivity idea, Deleuzian jurisprudence states that "law can only operate on a plane of immanence that nurtures the possibility of encounters between law and other bodies. … bodies of discourse or material bodies, natural or artificial, undefined, or future bodies."[38] Consequently, it would be fair to submit that Hart's rejection of Austin's mere habit of obedience to elude the transcendent: the sovereign who gives or imposes command and thus generates a sort of hierarchical structure in legal system. Hart's theory is examining law's plane of immanence, something that he descriptively argues under the social practice thesis in *The Concept of Law*. Social practice thesis is described as a general pattern of behavior, in which "the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great."[39] Based on the idea of law as univocal, the concept of law of the transcendent can be deprived. It locates rules *immanent* to law, or, in Leiter's claim, "norms are legally valid in a particular society are those treated as such in the purely conventional practice of officials in a legal system when they converge on certain criteria of legal validity and accept them from an internal point of view, and so on."[40] In other words, there is a clear relationship between internal point of view and internal aspect of rules. The existence of law is when the general pattern toward social rules involves the reflective critical attitude of acceptance.[41] To construe upon such a way of thinking, we may now proceed to the examination to the internal point of view as part of the law's univocal ontology in Deleuzian framework.

D. Legal Subjectivity and The Becoming

The command-based theory of law fails to provide a comprehensive understanding of law for three reasons (1) they are myopic in that they ignore or obscure one of the motivations that people might have for obeying the law; (2) they are unable to account for the existence of legal systems; and (3) they cannot account for the intelligibility of legal practice and discourse.[42] The reading on the internal point of view through Deleuzian philosophy can embark from those three statements. Based on Hart's internal point of view into this philosophical framework, there shall be an alternative argument that could fit into the descriptive, non-normative approach subscribed to Hartian positivism—since they are grounded on the view that Hart is agnostic to any bad/good normativity.[43] Relevant to this suggestion,

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38 Andreas Philippopoulos-Mihalopoulos, "Law, Space, Bodies: The Emergence of Spatial Justice," in *Deleuze and Law* (Edinburgh: Edinburgh University Press, 2012), 90-110.

39 Hart, *The Concept of Law*, 86. See Leiter, "Back to Hart."

40 Leiter, "Back to Hart," 754.

41 George Pavlakos, "Practice, Reasons, and the Agent's Point of View," *Ratio Juris* 22, No. 1 (2009): 74–94.

42 Shapiro, "What Is the Internal Point of View," 1158.

43 Hart, *The Concept of Law*. Hart insists that "[O]f course a conventional rule may both be and be believed to be morally sound and justified. But when the question arises as to why those who have accepted conventional rules as a guide to their behaviour or as standards of criticism have done so I see no reason for selecting from

observation on the ontology of immanence precipitates Deleuze's theory of Body without Organ. Then, we could profess that Hart's internal point of view as a machine in Lefebvre's *Law without Organ*, implying a philosophical rejection toward a teleological framework in law.[44] In this sense, there is no assigned purpose derived from any presupposed principles claimed by moral normativity critiques on Hart's point of view.

Based on Deleuzian jurisprudence, Hart's claim on participant's self-understanding surreptitiously exerts two characteristics that law is (1) basically a multiplicity of functions, and (2) capable of producing the unexpected; later we could say it operates 'rhizomatically.' The rest of this section elucidates some critical notions related to these two characteristics.

The *first* characteristic is that if a legal person, as a 'desiring machine' in Deleuzian term, has multiple functions, so does an ordinary citizen (who endures an internal point of view in legal system). Deleuze's philosophy underpins the centrality of subject in jurisprudence, assigning *who* to a certain thought instead of asking *what* is in it. In this case, Deleuze is more interested in 'legal person' query rather than law and the legal system. Undertaking Deleuzian lens into Hart's internal point of view propounds a way to think of law and legal system not only in the sense of positivistic framework but also as a condition of lived experience or as a network desiring machines. History shows us that the concept of subject derives from the question of what persons instead of by what rights a particular subject is 'recognized' by law and legal system. In a way, a person is not necessarily a subject, understood under Austinian or other command-based theory contours, but rather a 'contrivance'. It is an instrument for pragmatic purposes.[45] Nevertheless, the significant thing is that this person is a desiring machine that is productive and not mechanical.[46] Seeing legal persons as desiring machine is part of our way in

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the many answers to be given a belief in the moral justification of rules as the sole possible or adequate answer." 257.

44 Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford: Stanford University Press, 2008), 144-152.

45 Edward Mussawir, *Jurisdiction in Deleuze: The Expression and Representation of Law* (London: Routledge, 2011), 23. See Edward Mussawir, "The Activity of Judgment: Deleuze, Jurisdiction and the Procedural Genre of Jurisprudence", *Law, Culture and the Humanities* 7, No. 3 (2011): 463–483.

46 Leonard Hoeft, "The Force of Norms? The Internal Point of View in Light of Experimental Economics," *Ratio Juris* 32, No. 3 (2019): 339–362. Even if laboratory experiments are yet to be conclusive, it would be worthy to note Hoeft's argument regarding shared patterns of cooperation among the citizens, which is arguably more complex than hierarchical obedience. Hoeft states that "[p]eople are not prosocial out of some indifferent habit. Social dilemmas evoke empirical expectations, but also normative beliefs about what one ought to do and what others might think one will and ought to do. These correspond closely, and participants are successful at predicting the beliefs of others, indicating that they succeed in a shared understanding of a situation even in abstract and new laboratory settings. The most plausible interpretation of the (still indeterminate) laboratory evidence is that participants try to create shared norms. In any case, compliance has a social component: People are sensitive to the situation of others and how they will perceive their actions. Since participants do not behave entirely selfishly, even in dilemmas that pit group welfare against personal incentives, law can interact with existing social norms. In problems where everybody has an incentive to synchronize their behavior, law can enable coordination. … Sanction, constraints, and incentive schemes were shown to enable inferences about the behavior of others and to coordinate (normative)

thinking of Hart's attempt to dethrone the structure, which is, in our case, the Austinian sovereign-based command. Legal person is a desiring machine under the functionalism framework. Mussawir states,

> "… the fact that the function of legal persons is to construct neither identity nor subjectivity in an absolute sense—both of which remain entirely transcendent to the field of civil relations that 'persons' sketch or map out in jurisprudence. The legal person does not hide a 'true' identity or an internal subjectivity but offers only a fragmented or non-totalized identity linked to a discrete civic function."[47]

Thus, the internal point of view is not merely viewed as one of the salient properties of law. It also gives an emphasis on the capacity of subject-citizens not to be mechanical or to merely obey commands/orders habitually but, rather, to produce something new and unexpected. It is a process of perpetual becoming that expects the unexpectable, in Hart's term "complex phenomenon", which therefore could be perceived as an interaction between machines: active and passive aspects of a legal system's internal and external participants.[48] It is then fair to say that there is a kind of multiplicity in a univocal law's plane of immanence.

Our *second* characteristic is that the internal point of view could be seen essentially as *desire*, a tacit dimension of law. Why is a discussion about desire relevant at this point? I would argue that internal point of view or participant's self-understanding is a rejection of desire under Austin's command-based theory. Austin declares that *command* is "a signification of desire".[49] It is distinguished from other significations of desire in the sense that "the party to whom it is directed is liable to evil from the other, in case he complies not with the desire."[50] There are correlative expressions, in Austinian terms, between command and duty that each implies the other. Likewise, in a candid explication, Austin writes, "[H]e who will inflict an evil in case his desire be disregarded, utters a command by expressing or intimating his desire: He who is liable to the evil in case he disregard the desire, is bound, or obliged by the command."[51]

Hart does not explicitly give notions about desire. Nevertheless, for our current purpose, a brief philosophical explication of the characteristic of desire in internal point of view could be rewarding. Rodriguez-Blanco investigates that Hart's

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perceptions. Even if the values and beliefs of society shift away from what the law prescribes, witnessing others obeying the law, because they too believe it is the best predictor of what others expect or what social norms demand, leads to the norm being a self-enforcing signal." Hoeft, 356.

47 Mussawir, *Jurisdiction in Deleuze: The Expression and Representation of Law*, 31.

48 Hart, *The Concept of Law*. See Geoffrey Samuel, *Epistemology and Method in Law* (London & New York: Routledge, 2016), 38-46.

49 John Austin, *The Province of Jurisprudence Determined*, 21.

50 Austin, 22.

51 Austin, 22.

participant observation is based on both explanatory and normative reasons.[52] The former, viewed also as participant reason, simply means that if there is a reason for one is doing what she did, it is "a matter of motives, desires or beliefs."[53] The latter, or what we may call practical reasons, implies thinking about whether such a reason is a "good, right, dutiful, obligatory, moral, reasonable or wise reason."[54] In reading Hart's internal point of view, there should be, according to Rodriguez-Blanco, a distinction made between the participant and practical reasons. At some point, Hart's theoretical assertion from Winch, as Rodriguez-Blanco does, on participant/practical reasons persuades us to think in terms of Deleuze and Guattari's schizoanalysis view about law's role in repressing desire.[55] In *Anti-*Oedipus, the two French philosophers bring into conversations Freud's psychoanalysis and Nietzsche's will to power as follows.

> "The law tells us: You will not marry your mother, and you will not kill your father. And we docile subjects say to ourselves: so that's what I wanted! Will it ever be suspected that the law discredits—and has an interest in discrediting and disgracing—the person it presumes to be guilty, the person the law wants to be guilty and wants to be made to feel guilty? One acts as if it were possible to conclude directly from psychic repression the nature of the repressed, and from the prohibition the nature of what is prohibited. There we have a typical paralogism—yet another, a fourth paralogism that we shall have to call displacement. For what really takes place is that the law prohibits something that is perfectly fictitious in the order of desire or of the "instincts," so as to persuade its subjects that they had the intention corresponding to this fiction. This is indeed the only way the law has of getting a grip on intention, of making the unconscious guilty. In short, we are not witness here to a system of two terms where we could conclude from the formal prohibition what is really prohibited. Instead, we have before us a system of three terms, where this conclusion becomes completely illegitimate. Distinctions must be made: the repressing representation which performs the repression; the repressed representative, on which the repression actually comes to bear; the displaced represented, which gives a falsified apparent image that is meant to trap desire."[56]

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52 Veronica Rodriguez-Blanco, "Peter Winch and HLA Hart: Two Concepts of the Internal Point of View," *Canadian Journal of Law & Jurisprudence* 20, No. 2 (2007): 453–473.

53 Rodriguez-Blanco, 453–454.

54 Rodriguez-Blanco, 454.

55 Rodriguez-Blanco, "Peter Winch and HLA Hart: Two Concepts of the Internal Point of View". See Eugene W Holland, *Deleuze and Guattari's Anti-Oedipus: Introduction to Schizoanalysis* (London, New York: Routledge, 1999), 4-14.

56 Gilles Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (France: Viking Press, 2009), 118–119.

According to the passage, the law-desire nexus is another image of a complex phenomenon represented by characteristic expression in the normative terminologies of "ought," "must," and "should," "right," and "wrong." These terminologies have fictitious objects to persuade. The active and passive aspects of the participant's self-understanding would then be seen as a form of communication for law to 'getting a grip on intention, of making the unconscious guilty.' In that sense, *desire* as participant's self-understanding or reason is a tacit dimension of, in Deleuzian metaphor, 'rhizome.' At the moment, it seems to be too complicated to vividly argue about desire in Deleuzian rhizomatic thinking. However, an epistemological twist that may help us out. MacLean's work is critical to address.[57] MacLean exerts five essential points that characterize rhizome.

> "First, the rhizome involves a way of bringing together diverse elements. Second, those elements that are brought together are not usually thought of as belonging together: the rhizome is founded on heterogeneity. Third, the rhizome is not reducible to a series of points or individual parts: it is neither singular nor multiple. Fourth, the rhizome is liable to unspecified and ubiquitous fractures, tears and interruptions whilst always retaining its essential self-configuring composition. Fifth, it is never possible to trace the rhizome back to a principal root or source: it is nomadic forever traversing the landscape without encircling the land."[58]

Under this framework, MacLean's main thesis is that law and legal reasoning is a process in which it is determined by some sets of mode of knowledge, in a way that "… to function properly law depends on explicitly formulated rules, but legal expertise and the law-specific distinctions that judges internalize in and through their socialization in the institutional practice of judging is something that is learned within the context of this discursive practice."[59] Referring to Polanyi's work on (personal) knowledge, MacLean argues that tacit dimension in law and legal system could be grasped as "the unarticulated and inarticulable background that undergirds a judge's representation of her decisions."[60] Furthermore, he suggests that "judicial decision making derives essentially not from rules, and rules about rules, but from meanings that are shared collectively within a network of relations; that is, rhizomic systems of communication. This type of continual movement

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57 James MacLean, "Rhizomatics, the Becoming of Law, and Legal Institutions," in *Deleuze and Law* (Edinburgh: Edinburgh University Press, 2012), 151. See also James MacLean, *Rethinking Law as Process: Creativity, Novelty, Change* (Oxon, New York: Routledge, 2012).

58 MacLean, "Rhizomatics, the Becoming of Law, and Legal Institutions," 160.

59 MacLean, 161.

60 MacLean, 161. See Mussawir, "The Activity of Judgment: Deleuze, Jurisdiction and the Procedural Genre of Jurisprudence".

already permeates the practice of law, at all levels".[61] Read that way, since the concept of participant's self-understanding attempts to dismantle the sovereign from the concept of law, thereby it is necessary to perceive self-understanding as a network of relations (of desiring machines) whose movements permeate law and legal system. At the core of rule governed conduct is therefore, "the manifestation of critical attitudes, the appraisal of actual performance against a conceived standard performance, which is manifested by the use of terms such as 'correct' and 'incorrect'."[62]

The *third* characteristic is that the active and passive aspects of participant's acceptance allow for law to recognize the encounter. The encounter in Deleuzian philosophy is essentially an interruption to the spontaneous linkages between perception and recollection of memory.[63] By recognizing the encounter, Hart's internal point of view is the process of becoming in line with Deleuzian ethics that emphasize on creativity and the unexpected. It would be worth to note a brief explication of Deleuzian ethics based on the following Lorraine's passage.

> "Deleuze–Guattarian ethics is an ethics of novelty, one that does not look to the representable past in order to model a future we could implement, but rather an ethics that sounds out the present through experimental encounter and that through affective as well as cognitive attunement attempts to unfold the tendencies of the present most congenial to the living creatures involved. This is not an ethics that attempts to apply rules or principles that would hold for a universal subject, but rather an ethics of the event that entails being as true to the singularity of unique situations as possible and experimenting with the intensities that might enhance life's flourishing. The resources for such flourishing are not to be found in already constituted, regulated, and represented subjects, but in the fluxes of life from which those subjects are formed."[64]

Rereading Hart's internal point of view through this kind of ethics is somewhat congruent with dignitarian strand of Rule of Law. According to Waldron, "conceives of the people who live under it as bearers of reason and intelligence. They are thinkers who can grasp and grapple with the rationale of the way they are governed and relate it in complex but intelligible ways to their own view of the relation between their actions and purposes and the actions and purposes of the state."[65] Furthermore, It is also contended that Deleuze's philosophy may help

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61 MacLean, "Rhizomatics, the Becoming of Law, and Legal Institutions," 161. See Mussawir, "The Activity of Judgment: Deleuze, Jurisdiction and the Procedural Genre of Jurisprudence."

62 MacCormick, *Legal Reasoning and Legal Theory*, 280.

63 Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza*, 175–176.

64 Tamsin Lorraine, *Deleuze and Guattari's Immanent Ethics: Theory, Subjectivity, and Duration* (Albany: State University of New York Press, 2011), 169.

65 Jeremy Waldron, "The Rule of Law and the Importance of Procedure," *Nomos* 50, (2011): 19.

situate Hart's claim on participant's self-understanding in the context of the immanence insofar since both frameworks operate under transcendental empiricism, an intertwining between the transcendental and the empirical.[66] According to Rolli, as a refutation of Austin's mere habitual obedience, such a transcendental empiricism approach in Hartian lens is substantially an effort to "show that transcendental structures of experience do not originate in the banality of object-oriented recognition, but rather out of a domain of experience that precedes the empirical givens of consciousness and is not already subject to the rules of common sense."[67] Indeed, it is enticing to elaborate more on the experiential character of internal point of view. However, it is certainly outside the scope of this study. At this point, it would be sufficient to yield that the idea of active and passive aspects of participant's acceptance to rule entails singularity in law, compelling the participants to recognize the experimental and inventive character of law.[68]

E. Conclusion

Rereading H.L.A Hart's internal point of view or participant's self-understanding through Deleuzian philosophy suggests an alternative way to understanding Hart's refutation of Austin's command-based theory. Deleuze idea simply mean that the investigation "refers not to an individual but to an assemblage, a multiplicity and a series of connections."[69] A Deleuzian reading of Hart's internal point of view brings us to the view that "the 'proximate enemy' is the representation, the foreground illusion of the signifier, the tyrant and Oedipus."[70] It is then an attempt not only to situate the concept but also to *liberate* it from law's dogmatic image. There are two arguments that can be proposed. *First*, a Deleuzian framework could yield a way to understand not only what law *is* but also what is *about* law, or perhaps, what law can *actually* do, to be precise. Hart's claim on participant's self-understanding is therefore not simply a property of law. Instead, it unrolls the capacity of Deleuzian 'desiring machines' in law's plane of immanence. *Second*, since Hart's theorization have been reinstated back to its initial proposition of his refutation of Austin's mere habit of obedience, the participants or subject-citizens could be seen as 'desiring machines' whose acceptance to rule is basically a form of communication. It has no definite root or source. Acceptance to the rule does not simply stem from a particular sovereign power. It does not believe in the transcendental. It is a network that traverses the landscape of law and legal system.

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66 Marc Rolli, *Gilles Deleuze's Transcendental Empiricism: From Tradition to Difference* (Edinburgh University Press, 2016).

67 Rolli, 282.

68 Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza*. See Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (London: Bloomsbury Publishing, 2020).

69 Hardie, "Deleuze:'Had I Not Done Philosophy I Would Have Done Law'", 86.

70 Hardie, 90.

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