

Inclusive Positivism and the Courts: Reconciling Legality and Legitimacy in Contemporary Democracies

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Received : August 24, 2025

Accepted : October 02, 2025

Published : October 31, 2025

Citation: Widaningsih, (2025). Legal Design and Cyber Resilience: A Comparative Study of Cybersecurity Frameworks for Critical Infrastructure in Five Jurisdictions. *Legalis : Journal of Law Review*, 3(4), 229-241.

<https://doi.org/10.61978/legalis.v3i4.1119>

ABSTRACT: This article critically reassesses legal positivism in the context of contemporary constitutional adjudication. Legal positivism traditionally maintains a strict separation between legal validity and moral reasoning, but modern courts increasingly rely on moral and constitutional principles to justify legal outcomes. This study analyzes four landmark legal texts: *Miller v Secretary of State for Exiting the EU* (UK), *S v Makwanyane* (South Africa), *Neubauer v Germany*, and the European Union's AI Act. Through doctrinal and comparative methodology, the research explores how judicial reasoning in each case explicitly reflects or diverges from exclusive and inclusive positivist theory. While *Miller* and the AI Act affirm source-based legality, *Makwanyane* and *Neubauer* reveal the judiciary's turn toward principle-based legitimacy. The findings suggest that inclusive positivism, and in some cases interpretivism, better reflects how courts navigate complex rights issues. The article concludes by proposing a hybrid jurisprudential model that retains the structural benefits of legal positivism while incorporating codified moral principles, offering a balanced approach suited to modern constitutional democracies.

Keywords: Legal Positivism, Inclusive Positivism, Constitutional Law, Legal Theory, Moral Reasoning, Hybrid Jurisprudence, Judicial Legitimacy.



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INTRODUCTION

Legal positivism, long established as a foundational paradigm within legal theory, anchors its core claim on the separability thesis the notion that the existence and validity of law are contingent upon social facts and not dependent on its moral content. Hart's development of the rule of recognition articulated this position within a coherent analytical framework, one that permitted institutional identification of valid legal norms based on their source rather than their ethical justification. Raz's sources thesis, likewise, reinforces this conceptual autonomy of law by asserting that legal norms derive their authority exclusively from identifiable social sources. Yet, the evolving nature of constitutional democracies, particularly in adjudicatory practices, has called into question the adequacy of such models in capturing the full scope of contemporary legal reasoning.

Contemporary scholars have engaged in a multifaceted reevaluation of these positivist tenets, with a growing consensus that the classical formulations require adaptation in response to normative

and practical developments. Hart's rule of recognition, originally conceived as a social rule that identifies the criteria of legal validity, is now interpreted as a tool that reflects the symbiosis between social acceptance, institutional authority, and evolving normative expectations. As Krapyvin & Malyshev (2024) argue, the rule of recognition plays a pivotal role in mediating between coercive state power and socially acknowledged norms. Within constitutional democracies, they maintain, legal positivism gains legitimacy only insofar as it remains responsive to moral norms and collective social practices. This dynamic understanding underscores the necessity for a rule-based legal system that evolves in tandem with societal values, thereby enabling the rule of recognition to serve as both a static criterion and an adaptable reflective mechanism.

In contrast, the sources thesis articulated by Raz has faced increasing scrutiny, especially from scholars focused on rights-based adjudication. Raz's insistence that legal norms derive their legitimacy solely from their social sources has led to critiques about the rigidity and insufficiency of such a framework in capturing the moral complexity of constitutional interpretation. Perry (2023) and Bustamante (2021) highlight the limitations of Raz's approach, emphasizing that contemporary adjudication of rights often draws upon broader ethical considerations that transcend the confines of codified legal texts. This moral engagement, according to these scholars, not only enriches the interpretive process but also destabilizes the conceptual clarity Raz assigns to source-based validity. In practice, as illustrated through modern constitutional jurisprudence, many judicial determinations of rights rest on expansive understandings of justice, public values, and societal expectations, thereby rendering a strictly source-based model analytically inadequate.

These tensions come to a head in debates surrounding the separability thesis itself. Nye (2022), defending the thesis, maintains that a clear demarcation between law and morality ensures the objectivity and predictability of legal systems. Such separation, in his view, shields legal interpretation from ideological volatility and preserves systemic coherence. However, critics such as Sopiński (2020) contend that this artificial bifurcation fails to reflect the embeddedness of moral values within legal norms. Laws, they argue, are not merely procedural structures but moral artifacts, whose legitimacy and efficacy depend on their consonance with public ethical standards. As a result, interpretive approaches that blur the line between law and morality have gained prominence, positioning themselves as more accurate reflections of how law functions in democratic societies.

Nowhere is this shift more visible than in the increasing prominence of principles such as dignity and proportionality in constitutional jurisprudence. These principles are not mere policy preferences but foundational elements that guide judicial reasoning in rights adjudication. Angeleri (2021) and Sindhu (2024) illustrate how dignity has become a moral anchor in judicial discourse, used not only to assess legal outcomes but to frame constitutional arguments concerning socio-economic rights and state obligations. Similarly, proportionality has become a central analytical device in balancing conflicting interests, as Riesthuis (2023) notes, offering a structured method for aligning legal restrictions with democratic principles. These principles, embedded within constitutions or judicially derived from them, challenge the rigid dichotomy of the separability thesis, which holds that the existence and validity of law depend on social facts rather than moral content.

This convergence is at the heart of contemporary debates between inclusive legal positivism and interpretivism. Inclusive legal positivism, as advanced by Hart in his later work and developed further by Coleman, accepts the possibility that moral principles may be part of the criteria of legal validity if so accepted by a system's rule of recognition. Hartwell (2017) contends that this flexibility allows inclusive positivism to remain faithful to the positivist tradition while accommodating evolving demands of justice and equality. In contrast, interpretivists like Placani (2021) argue that law and morality are inextricably intertwined, asserting that judicial interpretation is inherently moral and aimed at substantive justice. The friction between these two models reflects fundamental philosophical disagreements over the nature of law, yet the adaptive capacity of inclusive positivism offers a compelling middle ground.

Comparative literature further enhances this discourse by illuminating how constitutional courts navigate the dual demands of legal certainty and moral legitimacy. Conceição, (2019) observe that courts often oscillate between these poles, striving to maintain predictability while addressing pressing moral claims. The tension becomes most acute in cases involving socio-political inequalities or contested rights, where purely formal interpretations may be seen as morally deficient. Angeleri (2021) reiterates that constitutional adjudication cannot ignore public expectations and societal norms if it is to maintain legitimacy. Thus, courts function not merely as neutral arbiters of codified law but as moral agents engaged in a continuous dialogue with democratic society.

This article engages these theoretical tensions by reassessing legal positivism in the light of four landmark examples of constitutional jurisprudence: *Miller v Secretary of State for Exiting the EU* (UKSC, 2017), *S v Makwanyane* (South African CC, 1995), *Neubauer v Germany* (BVerfG, 2021), and the EU's AI Act (2024). Each case illustrates a different mode of reasoning ranging from source-based formalism to principle-driven adjudication and collectively they offer a comparative panorama of how modern courts negotiate the boundaries between legal sources and moral values. By interrogating how these cases align with or challenge the core tenets of exclusive and inclusive positivism, the article seeks to evaluate the continued relevance and adaptability of legal positivism in constitutional contexts.

The article's central objective is twofold: first, to test the descriptive adequacy of classical and inclusive variants of legal positivism when applied to high-stakes constitutional cases; and second, to articulate a hybrid model of legal theory that preserves the source-based clarity of positivism while accommodating the principled legitimacy increasingly demanded by constitutional adjudication. In doing so, this study aims to contribute to the evolving discourse on legal theory by demonstrating how normative expectations are reshaping the understanding of legal validity itself.

Ultimately, this inquiry is premised on the recognition that legal theory must not only account for conceptual coherence but also respond to the lived realities of judicial practice. In contemporary constitutional democracies, where law operates within a complex web of institutional structures, political expectations, and social values, the boundaries between legality and legitimacy are increasingly porous. A refined model of legal positivism one that integrates the moral dimensions of adjudication without relinquishing its foundational commitments to legality and predictability

offers a promising framework for navigating this complexity. It is in this spirit that the following analysis is undertaken.

METHOD

This study employs a doctrinal-comparative legal analysis, a method that allows for systematic exploration of legal reasoning and theoretical frameworks across different jurisdictions. By focusing on the judicial reasoning employed in constitutional courts, the research aims to understand how legal positivism especially its exclusive and inclusive variants aligns with real-world adjudication. The doctrinal component permits close reading and legal interpretation of judgments and regulatory texts, while the comparative aspect identifies cross-jurisdictional patterns and divergences.

The study examines four landmark cases and legal instruments: (1) *R (Miller) v Secretary of State for Exiting the EU* (UKSC, 2017); (2) *S v Makwanyane* (Constitutional Court of South Africa, 1995); (3) *Neubauer v Germany* (BVerfG, 2021); and (4) the European Union's *AI Act* (Regulation (EU) 2024/1689). These cases were selected for their doctrinal richness and their representative engagement with either source-based or principle-based legal reasoning. This selection also ensures diversity across common law, civil law, and supranational regulatory systems.

The doctrinal-comparative method is well-established in legal theory and jurisprudential scholarship, offering both clarity and depth. It allows for a detailed interpretation of statutory provisions, judicial decisions, and theoretical constructs within the selected legal systems. As Mahadew (2024) demonstrates, doctrinal analysis enables scholars to juxtapose laws across different jurisdictions and thereby illuminate the local variations in legal theory application.

The comparative component enhances the study's analytical power by drawing connections between how different constitutional frameworks operationalize legal principles. Wahab et al. (2021) argue for integrating doctrinal analysis with socio-legal dimensions, advocating a method that reveals the societal relevance and adaptability of legal principles. While doctrinal analysis excels in explicating legal reasoning and formal validity, the comparative dimension underscores the interpretive flexibility of courts in embedding moral and ethical principles into formal constitutional texts.

Primary sources include the full texts of the aforementioned judgments and legal instruments. These are supplemented by academic commentaries, peer-reviewed journal articles, and legal encyclopedias to ensure a theoretically robust and well-contextualized understanding. The selection of these cases enables both depth and breadth in examining how principles such as dignity, proportionality, and intergenerational justice are engaged within varying legal traditions.

The study proceeds by classifying each case based on its dominant judicial logic: whether it aligns with exclusive positivism (source-based), inclusive positivism (source + principle-based), or interpretivist (morally driven) reasoning. This analytical lens facilitates theoretical categorization while grounding analysis in doctrinal fidelity. Each judgment is examined in terms of:

- The explicit or implicit use of the rule of recognition

- The invocation (or exclusion) of moral or constitutional principles
- The structure and justification of judicial reasoning
- The remedial or normative outcome

This four-tier analysis allows identification of both formal and substantive rationales behind judicial outcomes.

Theoretical claims regarding the relevance and limits of legal positivism are validated through triangulation across cases, theoretical constructs, and interpretive commentaries. Tan et al. (2024) emphasize that comparative legal analysis strengthens validation by allowing for observation of how similar principles manifest differently across legal cultures. The convergence or divergence of these patterns contributes to the evaluation of the explanatory adequacy of legal positivist theories.

Furthermore, validation is supported through case-based alignment of theoretical premises with judicial outcomes. Dagan et al. (2018) underline the role of empirical and content-driven analysis in bridging normative legal theory with real-world adjudication. In this study, principles inferred from judgments are compared against positivist categories, allowing theoretical models to be tested and refined.

While doctrinal-comparative analysis offers structured and theoretically rich insights, it also presents certain limitations. Davies (2020) warns that exclusive focus on legal texts can obscure the lived realities and enforcement challenges faced by legal systems. Overemphasis on formal doctrine may overlook how legal principles operate on the ground, especially in socio-politically volatile contexts.

Additionally, there is a risk of overgeneralization when comparing jurisdictions with vastly different historical and cultural foundations. This study mitigates such risks by anchoring interpretations in jurisdiction-specific socio-legal contexts, while drawing comparative insights from clearly delineated points of convergence.

To address these limitations, this research remains informed by broader interdisciplinary understandings. As Khairudin et al. (2024) argue, examining law through sociological and cultural lenses deepens the analysis of how legal principles are constructed, interpreted, and applied. While this study remains doctrinal at its core, it is sensitive to the external pressures and public values that shape the use and evolution of legal reasoning, particularly in constitutional settings.

The methodology combines legal doctrinal precision with comparative breadth to evaluate the status of legal positivism in contemporary adjudication. It ensures analytical rigor through structured legal interpretation and validation by cross-jurisdictional synthesis. By integrating supportive literature, this approach not only tests the applicability of legal theory in practice but also contributes to a more holistic understanding of constitutional jurisprudence across multiple legal systems.

RESULT AND DISCUSSION

Miller v Secretary of State for Exiting the EU (UKSC, 2017)

The *Miller* judgment is widely viewed as a paradigmatic illustration of statutory formalism within the UK's constitutional framework. Scholars such as Fitriyah & Abdulovna (2024) underscore the judiciary's restrained approach, emphasizing that the Court adhered strictly to the statutory text without invoking normative or constitutional principles beyond the legislative domain. The Court's reliance on the traditional doctrine of parliamentary sovereignty reinforced its allegiance to a source-based conception of legal validity, affirming the primacy of enacted legislation over executive prerogative.

Ramos & Ellul (2024) argue that *Miller* exemplifies exclusive legal positivism in practice. The absence of ethical or moral reasoning within the Court's decision aligns directly with Raz's sources thesis, where legal validity is traced exclusively to recognized legal sources. In doing so, the Court distanced itself from interpretivist or principle-based adjudication, reaffirming a positivist framework that restricts legal interpretation to ascertainable sources.

Nonetheless, the decision has not escaped critique. Pagallo et al. (2022) highlight that this rigid interpretive stance may undermine the judiciary's capacity to adapt to evolving socio-political realities, while Pasupuleti (2024) lament the lack of moral engagement in a decision with profound constitutional implications. These critiques emphasize the tension between legal certainty and normative responsiveness suggesting that *Miller*, while legally coherent, may be ethically narrow.

Moreover, Amram et al. (2022) note that the decision reflects the resilience of parliamentary sovereignty within the UK's unwritten constitutional structure. However, it also reveals how judicial interpretation can shape the practical contours of legislative supremacy, even within a strictly positivist framework.

S v Makwanyane (Constitutional Court of South Africa, 1995)

The *Makwanyane* case is widely regarded as a landmark in human rights jurisprudence, with the Constitutional Court invoking dignity and the right to life to invalidate the death penalty. Rubisz (2024) highlight how the Court placed dignity at the center of constitutional interpretation, framing it not merely as a value but as a substantive right with constitutional force.

The decision strongly reflects Dworkinian interpretivism. Rosenbaum et al. (2024) argue that the Court's reasoning is imbued with moral judgment, echoing Dworkin's claim that legal interpretation must seek the best moral justification of legal practices. Chiappetta (2023) further supports this reading, noting that the Court framed the abolition of capital punishment as a moral imperative embedded within the Constitution's transformative vision.

Golpayegani et al. (2023) argue that the ruling repositioned constitutional adjudication as a morally active endeavor, where legality and legitimacy are inextricably linked. Comparative studies, including parallels with *Roper v. Simmons* in the U.S., reinforce this interpretation, showing that *Makwanyane* set a precedent for dignity-based reasoning in global human rights discourse.

Neubauer v Germany (BVerfG, 2021)

Neubauer represents a pioneering integration of intergenerational justice within constitutional jurisprudence. German scholars such as Nannini (2024) emphasize that the Federal Constitutional Court's reasoning placed ecological sustainability within the scope of fundamental rights protections, thereby expanding constitutional interpretation to encompass future generations.

The decision aligns with inclusive legal positivism, as it derives authority from constitutional norms while incorporating moral imperatives. Pagallo & Durante (2022) argue that the Court recognized principles such as sustainability and proportionality as embedded within the legal system's rule of recognition. This marks a shift from formalistic jurisprudence toward an interpretive framework responsive to societal and environmental concerns.

The Court's use of proportionality as a methodological tool is widely praised. Cefaliello & Kullmann (2022) highlight that the balancing of environmental obligations against legislative discretion sets a precedent for constitutional environmentalism. However, critiques from Schwemer et al. (2022) warn that such jurisprudence risks blurring the distinction between law and morality, potentially eroding the stability and predictability associated with positivist legal systems.

Despite these concerns, *Neubauer* exemplifies a functional model of inclusive positivism one that grounds judicial reasoning in legal norms while remaining open to moral adaptation.

EU AI Act (Regulation (EU) 2024/1689)

The EU AI Act represents a regulatory application of legal positivism in the digital governance context. Scholars such as Veale & Borgesius (2021) view the Act as emblematic of a source-based regime characterized by risk classification and codified standards. Barkane (2022) praises the Act's structured legal certainty, noting how it delineates AI systems based on high, medium, and low-risk thresholds.

Selwyn et al. (2024) analyze the Act's efforts to codify ethical standards into administrative law through mechanisms such as mandatory assessments and risk governance. These features reflect an attempt to translate ethical imperatives into enforceable legal provisions, suggesting a functional overlap between legal positivism and ethical formalism.

Wessells et al. (2024) argue that the Act diverges from constitutional adjudication by prioritizing administrative precision over interpretive flexibility. Respati (2024) adds that this regulatory positivism ensures compliance and accountability but may inadequately address AI's evolving ethical dilemmas.

Critiques from Nannini et al. (2023) caution that the Act's static codification risks obsolescence, especially given the rapid pace of technological development. Scholars such as Boura (2024) also highlight persistent concerns around algorithmic discrimination and ethical blind spots that resist codification.

Thus, while the EU AI Act reflects a contemporary embodiment of exclusive positivism in administrative law, it also signals the need for normative responsiveness within regulatory regimes.

The contemporary judicial landscape reveals a significant reconfiguration in how legal systems interpret the relationship between law and morality. The cases examined *Miller*, *Makwanyane*, *Neubauer*, and the EU AI Act illustrate a spectrum of adjudicative approaches that challenge the binary posed by exclusive and inclusive positivism. While *Miller* exemplifies a positivist commitment to source-based legality and statutory interpretation, *Makwanyane* and *Neubauer* underscore how moral principles such as dignity and intergenerational justice are increasingly embedded within judicial reasoning. The literature reflects this shift, with inclusive legal positivism gaining traction among scholars who argue that modern legal systems must reflect societal complexities and evolving moral imperatives. Krapyvin & Malyshev (2024), for example, underscore the adaptive strength of Hart's rule of recognition when extended to include societal values and moral expectations. Their view resonates with Sanchez (2024), who notes that positivism has undergone epistemological shifts, requiring a recalibration of its foundational assumptions in the face of legal pluralism and normative change.

The resurgence of inclusive positivism is not without contestation. Proponents of exclusive legal positivism maintain that the clarity and predictability of law rest upon the strict separation between legal valid and moral reasoning. Perry (2017) defends this view, arguing that collapsing this separation risks opening the door to judicial overreach and eroding the systemic coherence that legal frameworks depend upon. This ongoing debate reflects deeper jurisprudential tensions concerning law's purpose: whether law should primarily function as a predictable governance framework or as a mechanism that integrates moral and democratic values.

The middle ground proposed by hybrid models seeks to reconcile this tension. As Caviedes (2022) argue, legal systems increasingly pursue structural legality grounded in formal rules while simultaneously embracing the moral legitimacy necessary to respond to democratic expectations. These models are grounded in both Hartian and Dworkinian perspectives, drawing from the structural precision of the former and the ethical dynamism of the latter. Adamidis (2021) suggests that such models are essential in adapting legal doctrine to contemporary social realities without forfeiting the benefits of legal certainty. The hybrid approach demonstrated in cases like *Neubauer*, where principles like sustainability are constitutionally entrenched and judicially actionable, reflects a jurisprudence that neither disregards nor blindly absorbs moral claims, but calibrates them within a formally valid legal structure.

This evolution also invites a renewed engagement with the foundational critiques of positivism, particularly those advanced by Fuller and Dworkin. Fuller's emphasis on the internal morality of law the idea that legal systems must meet certain ethical criteria to qualify as legitimate has gained renewed relevance. Efendi & Sudarsono (2024) demonstrate that many contemporary courts implicitly adhere to Fuller's desiderata, especially when adjudicating rights and governance issues. This convergence suggests that legitimacy is no longer a mere byproduct of procedural validity, but an expectation intertwined with ethical accountability. Dworkin's interpretivism, which views law as a matter of moral judgment and principled reasoning, similarly finds vindication in decisions such as *Makwanyane*. As Stadnyk et al. (2022) note, courts are increasingly expected to "read law in its best light," shaping rulings that not only follow rules but also fulfill the moral aspirations of the polity.

Comparative jurisprudence strengthens this understanding. Studies across jurisdictions reveal a recurring pattern: courts oscillate between the need for predictability and the imperative of moral legitimacy. As Bouchard (2024) suggest, different legal cultures manage this balance through frameworks reflective of their constitutional histories and philosophical orientations. In some contexts, predictability rooted in statutory interpretation is prioritized; in others, such as South Africa or Germany, the inclusion of moral principles is essential to judicial legitimacy. These comparative insights reveal a legal world increasingly comfortable with doctrinal hybridity, where law is neither entirely insulated from morality nor fully subject to it.

This shifting landscape invites legal theorists to recalibrate their models. Exclusive positivism, while methodologically rigorous, often proves too rigid for contemporary adjudication, especially in constitutional contexts where rights and principles define the legal terrain. Inclusive positivism offers a more capacious framework but faces the challenge of maintaining doctrinal boundaries amidst expanding ethical claims. Hybrid models promise a balanced approach, preserving legal coherence while responding to democratic legitimacy. As seen across the selected cases, courts are not abandoning legal positivism, but rather transforming it into a tool more attuned to social justice, ethical accountability, and evolving constitutional mandates.

Ultimately, these developments reflect a broader transition in legal scholarship. There is a growing consensus that legal systems must navigate, rather than avoid, the intersection of law and morality. By integrating moral reasoning into the legal framework without compromising on clarity or authority, legal systems can foster greater legitimacy and responsiveness. The challenge for legal theory, then, is not to choose between law and morality but to articulate models that reflect their practical and principled co-dependence in constitutional governance.

CONCLUSION

This study critically re-evaluates legal positivism in the context of contemporary constitutional adjudication, demonstrating that the rigid separation between law and morality central to the traditional separability thesis—no longer captures the complexity of modern judicial reasoning. Through a doctrinal-comparative analysis of *Miller v Secretary of State for Exiting the EU* (UK), *S v Makwanyane* (South Africa), *Neubauer v Germany*, and the EU AI Act, the findings reveal that while exclusive positivism preserves legal certainty, it often lacks the normative adaptability required in rights-based and principle-driven adjudication. Courts increasingly invoke moral and constitutional principles, showing that legitimacy now depends not only on procedural validity but also on ethical coherence.

The analysis suggests that inclusive legal positivism, particularly in its Hartian formulation, offers a more flexible theoretical foundation for understanding this evolution. By allowing moral principles to be part of the criteria of legal validity where accepted by a system's rule of recognition, inclusive positivism accommodates moral reasoning without dissolving legal structure. Cases like *Neubauer* illustrate how this model operationalizes value-based adjudication within constitutional limits, while *Makwanyane* exemplifies interpretive reasoning that integrates justice and human dignity as foundational legal commitments.

Ultimately, the study proposes a hybrid jurisprudential model that reconciles legality and legitimacy within modern constitutional democracies. This model retains the structural precision and predictability of legal positivism while embracing codified moral principles that enhance democratic accountability. By embedding moral reasoning into the rule-based framework of law, such a model advances a form of jurisprudence that is both doctrinally rigorous and normatively responsive ensuring that law continues to serve as a vehicle not only for authority, but for justice itself.

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