

*Andrzej Wróbel**

AN AXIOLOGICAL TURN IN EUROPEAN CONSTITUTIONALISM?*

Abstract: *Article 2 of the Treaty on European Union (TEU), stipulating that the Union was founded on the values common to its Member States (MSs), has led to a shift towards values in the drafting, application and interpretation of EU law. This can be seen as a significant paradigm shift in the discourse on European constitutional pluralism. It represents a transition, yet not a departure, from the “Union of law” to the “Union of values”, from a Union that is neutral towards values to one that is value-friendly. This paradigm shift is especially symbolised and illustrated by the reference to values in the case law of the Court of Justice of the European Union (known as Wertejurisprudenz), the promotion of values in the EU’s international relations and policies and the use of values to legitimise EU legislation and as a criterion for reviewing and assessing the MSs’ activity, even in domains that are within their exclusive purview.*

A characteristic feature of the values listed in Art. 2 TEU, on which the strength and scope of their impact on the EU legal and institutional system directly depend, is the fact that they are legal values forming – as internal values – an integral part of the founding Treaties. Due to their placement within the Treaty structure, they are fundamental values, and because of the Treaty’s role as a constitutional charter, they are also foundational values. The listing of these values in Art. 2 TEU has objectified them – their substance no longer depends on individual moral beliefs. They are legal norms that are legally binding on their addressees.

In the literature, Art. 2 TEU is often given the status and role of a homogeneity clause. However, with all due respect for this interpretative approach, I consider it inconsistent with both the meaning of this provision, which was intended to strengthen

* Professor, Kozminski University (Poland); email: and.wrobel@gmail.com; ORCID: 0000-0003-1007-847X.

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the Union's legitimacy, and with the premises of European constitutional pluralism, which safeguard and protect the pluralism of values while opposing their uniformity and hierarchisation. It seems, however, that turning values into homogenising clauses that would unify the quantitatively and qualitatively diverse MSs' constitutional value standards – with the CJEU monitoring their compliance with as-yet undetermined EU models – and deriving particular obligations for the MSs from these values in conjunction with other Treaty provisions is taking it too far.

Keywords: values of the European Union, general principles of EU law, European constitutional pluralism, rule of law, Court of Justice of the European Union, CJEU

INTRODUCTION

The recognition of and reference to values in constitutional discourse is not a new phenomenon. Certain values (a system of values) lie at the foundation of every state's legal order, including every constitution, as they justify that order and define the normative trajectory and framework of its development.¹ Values are taken into account in the legislative processes of drafting, applying and interpreting the law. Constitutional courts review statutory law for compliance with constitutional values. Constitutional rights and freedoms are interpreted not only in deontic terms, as subjective rights, but also in axiological terms, as values of the objective legal order.² Although some constitutional values are explicitly anchored in or derived from constitutional provisions (such as preambles), a characteristic feature of the constitutional discourse on values has been and continues to be the recognition of and reference to primarily undefined and uncodified extra-legal values, i.e. those that do not belong to a legal order, but rather to the axiological system.³ These values are therefore external to a given legal system and have been incorporated into it only through various interpretative processes. In the European constitutional discourse, there was no broad reference to values or value systems and their significance for integration processes.⁴ It was only once the Treaty of Lisbon incorporated values

¹ See Polish Constitutional Tribunal, judgment of the 30 September 2008, K 44/07: “we understand law not only as a set of provisions established in accordance with a formally defined procedure, but also as a system of norms that are axiologically and teleologically interrelated – a cultural construct rooted in the historical experience of the community and built upon a shared system of values specific to a given group of entities.”

² U. di Fabio, *Grundrechte als Wertordnung*, 1 Juristen Zeitung 1 (2004).

³ See L. Leszczyński, *Kryteria pozaprawne w sądowej wykładni prawa* [Extralegal Criteria in Judicial Interpretation of Law], Wolters Kluwer, Warsaw: 2022, p. 1.

⁴ For more on the history of the discourse on fundamental values in the process of European integration, see M. Avbelj, *Values, Constitutionalism and the Viability of European Integration*, in: M. Avbelj (ed.), *The Future of EU Constitutionalism*, Hart Publishing, Oxford: 2023, pp. 37–42.

into Treaty law that participants in this discourse were compelled – as it were – to address in a more extensive and methodologically responsible way issues such as the normative nature, status, validity and application of values and their role within the EU legal and constitutional order, particularly as regards reviewing the law’s conformity with these values, and so on. Changes in the approach to EU values in European constitutionalism are so significant and fundamental that the term “axiological turn” is justified in this context.⁵ By the axiological turn in EU constitutionalism, I generally mean a shift to values in the constitutional discourse.⁶

Below, I explain the concept of “shift to values” and highlight its relation to the idea of a paradigm shift in EU constitutionalism from a legalist to an axiological approach (section 1). In particular, I describe the consequences of incorporating values into EU primary law and expanding the scope of the Court of Justice’s axiological interpretation to include the values explicitly set out in the founding Treaties. Accordingly, I limit the subject and scope of my discussion to internal legal values, specifically those listed in the first sentence of Art. 2 of the Treaty on European Union (TEU). However, I do not address the significance or ways of invoking within the European constitutional discourse external extra-legal values or other legal norms recognised as values in judicial rulings.

In the following section (section 2), I discuss the legal nature of the values in question. I also posit that the values listed in Art. 2 TEU are legal values: they are binding, normative (i.e. they constitute norms) and legally enforceable. Consequently, I do not adopt the view that values belong solely to the axiological realm, while principles of law and legal rules belong to the legal order, even though this claim holds true for external values, which are taken into account in the process of interpreting and justifying the law.

Next, I argue that the classic dualism of norms-as-principles and norms-as-rules is complemented by values, but only by internal legal values, i.e. those explicitly set out in binding legislation and designated as values, as in the case of the first sentence of Art. 2 TEU. Therefore, based on this premise, it is necessary to examine the relations between norms-as-values and norms-as-principles. However, before discussing the legal nature of values, I first make certain preliminary assumptions

⁵ According to T.T. Konciewicz, “this loosely worded and full of conceptual ambiguity [sic] provision [Art. 2 TEU] marks a veritable Copernican moment in the history of EU law” – entry for *Values*, in: *Oxford Encyclopedia for EU Law*, available at: <http://opil.ouplaw.com> (accessed 30 June 2025).

⁶ For a new legal paradigm that initiates an axiological evolution compared with previous provisions of the Treaties, see C.J. Moreiro González, *Implementing the Rule of Law in the European Union: How Long Trapped in Penelope’s Spinning Wheel from Article 2 of the TEU?*, 25 *Cambridge Yearbook of European Legal Studies* 161 (2023); for the axiological turn in the Polish constitutional discourse, see K.J. Kaleta, *Rola i znaczenie wartości we współczesnym dyskursie konstytucyjnym* [Role and Significance of Values in Contemporary Constitutional Discourse], in: M. Dudek, M. Stępień (eds.), *Aksjologiczny wymiar prawa* [Axiological Aspect of Law], Nomos, Cracow: 2015, p. 122.

about values, convinced that the Treaty-based “positivisation” of values – through their reception from the constitutional orders of the Member States (MSs) – has not fundamentally altered their structure or role. When explaining the place and significance of values in EU constitutionalism, I use some simplification, drawn from value theory, which is necessarily arbitrary but essential for ensuring the clarity of the following discussion. In short, I assume that the values listed in the first sentence of Art. 2 TEU are intrinsic and hence non-instrumental, as well as objective rather than subjective. I believe that for defining the legal nature and significance of the values for EU constitutionalism, it is crucial to explain two statements in Art. 2 TEU: “The European Union is founded on the values” and “[t]hese values are common to the Member States”. I interpret the first phrase to mean that these values are fundamental values of the EU as an international organisation. The other phrase suggests that the values of the MSs inspired the Treaty framers to establish an exhaustive list of EU values. I devote some attention to the binding nature of these values, and also to the entities responsible for implementing, promoting and adhering to them. Additionally, I examine the legitimacy of the Court of Justice of the European Union (CJEU) in overseeing the MSs’ compliance with EU values.

Following that, I address the contentious issue of value pluralism (section 3), which is primarily an ethical and moral question, yet can serve as a useful tool for clarifying the relations among the legal values listed in Art. 2 TEU, particularly for arguing that these relations are non-hierarchical. However, this does not preclude the possibility that they can form a structured system based on substantive criteria.

The fact that legal values can fulfil a non-instrumental role in European constitutionalism largely depends on their analytical structure. My analysis of the legal nature of values is based on the premise that the classic dualism of legal norms, i.e. the distinction between norms-as-principles and norms-as-rules, is modified and supplemented by norms-as-values. Since both the legal scholarship and case law generally agree that norms-as-values do not share the characteristics of norms-as-rules and that, in terms of their structure and function, they are closely related to or even constitute norms-as-principles, I find it necessary and justified to indicate the similarities and differences between legal values and principles of law (section 4).

I then attempt to define the role of the legal values listed in the first sentence of Art. 2 TEU in shaping both the substance and form of European constitutionalism. I go beyond their commonly recognised role of justifying and legitimising the EU’s constitutional legal order and institutional system, which is widely and rightly considered the main purpose of the core constitutional values (section 5).

The concept of constitutionalism in general, and in particular of European constitutionalism, is highly controversial. For the purposes of this study, I adopt the definition proposed by Alec Stone Sweet:

In contrast to defining “constitution,” it may be impossible to define the concept of “constitutionalism” in a relatively consensual, straightforward way. My preferred definition of constitutionalism denotes the commitment on the part of any given political community to be governed by constitutional rules and principles. Thus, constitutionalism is a variable. The commitment to live under a constitution, rather than to seek to undermine or destroy it, varies. In any context, this commitment, as an indicator of a constitution’s social legitimacy, can be strong or weak and its character can change over time.⁷

Elsewhere, he argues: “I prefer to conceptualize constitutionalism as the commitment of a polity to govern itself in conformity with the meta-norms.”⁸ He also adds that “[c]onstitutionalism can be defined as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules.”⁹

1. AXIOLOGICAL TURN AS A PARADIGM SHIFT

The concept of an axiological turn is broader than that of an ethical turn, which is understood as a shift to moral values. The turn discussed herein, however, refers specifically to a shift towards legal values, where the focus is not on moral values but – as indicated in the list in the first sentence of Art. 2 TEU – on other values, political ones in particular. The shift towards values in the EU was not triggered by a single event, such as the normative change introduced by Art. 2 TEU. Rather, it has been part of an ongoing fundamental transformation of the European legal culture – one that acknowledges and emphasises the role of values in the European legal, political and socioeconomic integration.¹⁰ This is particularly evident in the legitimising, integrative and federalising role that values play in the rulemaking, application and interpretation of EU law, as well as in certain areas of EU policymaking and international relations. This axiological turn is exemplified by changes in the societal perception of the rule of law as a value that is crucial to the development and protection of the European integration, and that legitimises the actions of the

⁷ A. Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16(2) *Indiana Journal of Global Legal Studies* 621 (2009), p. 626.

⁸ *Ibidem*.

⁹ *Ibidem*, p. 628.

¹⁰ The process of values crystallising as important elements of the EU structure and legal system accelerated significantly during the constitutional crisis in Poland, when Polish courts sought protection in the CJEU against unconstitutional actions of the legislative and executive powers limiting the independence of courts and the impartiality of judges (*see e.g.* L. Pech, P. Wachowiec, D. Mazur, *Poland’s Rule of Law Breakdown: A Five-year Assessment of EU’s (In)action*, 13(1) *Hague Journal on the Rule of Law* 1 (2021)).

EU and its MSs to restore the rule of law¹¹ where it has been undermined or is at serious risk.¹² The EU not only refers to the rule of law in these actions, but also invokes other values enshrined in Art. 2 TEU, particularly respect for human rights and democracy.

It is crucial to emphasise that the shift to values, as discussed more broadly below, refers specifically to a shift towards legal values, i.e. values explicitly listed in the Treaties and designated as such, as in the first sentence of Art. 2 TEU (specified internal legal values). The values enumerated there are core constitutional values, comprising respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of members of minority groups. Another category of values referenced in European constitutionalism is secondary constitutional values, i.e. internal legal values which are not indicated as values. These are mentioned in the second sentence of Art. 2 TEU and include pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. Finally, the third group comprises other values which can be decoded based on the EU legal system or which derive from the constitutional traditions of the MSs, forming part of the common EU values shared by the MSs.

In this context, I understand the “shift towards values” as a partial, progressive paradigm shift in European constitutionalism from a fundamentally legalist approach to a partially axiological one. I interpret the term “paradigm” in a Kuhnian sense, as “universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners.”¹³ More broadly, it has various components: “(i) ‘symbolical generalizations’, (ii) beliefs or ‘metaphysical paradigms’, (iii) values, and (iv) ‘exemplars’, that is, concrete problem solutions applied and thereby shared by the entire community.”¹⁴ Regarding this understanding of the paradigm, it is assumed that the legal dogmatic paradigm has four components: “(1) philosophical background assumptions, (2) assumptions concerning the sources of law, (3) methodological rules and principles, and (4) values

¹¹ The EU executive authorities unlocked EUR 137 billion for Poland from recovery and cohesion policy funds, which had been frozen due to concerns about the rule of law (see A. Krzysztozek, *European Commission to Release Frozen €137bn for Poland*, Euractiv, 23 February 2024, <https://tinyurl.com/2m9p5zjh> (accessed 30 June 2025)).

¹² On the social perception of the principle of the rule of law, see e.g. J. Gutmann, J. Kantorowicz, S. Voigt, *How Do Citizens Define and Value the Rule of Law? A Conjoint Experiment in Germany and Poland*, 32(4) *Journal of European Public Policy* 899 (2025).

¹³ T.S. Kuhn, *The Structure of Scientific Revolutions*, The University of Chicago Press, Chicago: 1970, p. VIII.

¹⁴ T.S. Kuhn, *Postscript-1969*, in: T.S. Kuhn (ed.), *The Structure of Scientific Revolutions*, The University of Chicago Press, Chicago: 1970, pp. 182–187, cited by B. Fekete, *Paradigms in Modern European Comparative Law*, Bloomsbury Publishing, Dublin: 2021, p. 25.

common to the dogmaticians within the legal system.”¹⁵ Therefore, the shift of the legal paradigm refers respectively to: “(1) cultural change on a large scale. It implies the reorientation of a society towards changing fundamental norms and values, including economic and legal organization. This is a macrosociological event on a timescale; (2) change of perspective on legal theoretical questions. Such changes relate mainly to the epistemological aspects of the legal paradigm that transcends the individual human lifetime; (3) change of dogmatic methodology.”¹⁶

The pragmatic shift towards values in EU law consists, firstly, in incorporating both specified and unspecified values into Treaty provisions, particularly Art. 2 TEU (the normative turn). Secondly, it involves considerable and relatively wide recognition of and reference to the values under Art. 2 TEU when EU law is interpreted and applied by the CJEU (the judicative turn).¹⁷ Thirdly, it is seen in the fact that these values are invoked and taken into account in lawmaking procedures while adopting EU secondary law (the legislative turn). Fourthly, EU values are respected and promoted in the Union’s international activity as well as in strictly political activities undertaken by EU bodies and institutions (value-based policies). Fifthly, this shift entails the EU protecting the values on which it is founded (Art. 2 TEU) through the (ineffective) non-exclusive¹⁸ political mechanism provided for in Art. 7 TEU,¹⁹ as well as through the principles and criteria governing the accession of new states to the EU. Sixthly, it involves the Union’s protection and enforcement of the MSs’ compliance with the values enshrined in Art. 2 TEU through EU judicial procedures, as provided for in Arts 267 and 258 Treaty on the functioning of the European Union (TFEU).²⁰ Finally, it consists in the so-called Rule of Law Conditionality Regulation and other relevant measures (such as the Rule of Law Framework).²¹

¹⁵ J.M. Broekman, *Changes of Paradigm in the Law*, in: A. Peczenik, L. Lindahl, B.V. Roermund (eds.), *Theory of Legal Science*, Springer, Dordrecht: 1984, p. 138.

¹⁶ *Ibidem*, pp. 138–139.

¹⁷ See D.L. Spieker, *EU Values before the Court of Justice: Foundations, Potential, Risks*, Oxford University Press, Oxford: 2023; see also M. Potacs, *Wertkonforme Auslegung des Unionsrechts?*, 51 *Europarecht* 164 (2016), pp. 164–175.

¹⁸ See Case C-157/21 *Republic of Poland v. European Parliament and Council of the European Union*, EU:C:2022:98, para. 195: “in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values laid down in Article 2 TEU committed in a Member State.”

¹⁹ E.g. D. Kochenov, *Busting the Myths Nuclear: A Commentary on Article 7 TEU*, European University Institute, San Domenico di Fiesole: 2017; J. Bauerschmidt, *Rechtsstaatlichkeit in der EU und die Instrumente zu ihrer Verteidigung: Artikel 7 EUV, Rechtsstaatlichkeitsbericht und -dialog, Haushaltskonditionalität*, 59(3) *EuR* 300 (2024), pp. 311–315.

²⁰ E.g. Case C-791/19 *European Commission v. Republic of Poland*, EU:C:2021:596; Case C-204/21 *European Commission v. Republic of Poland*, EU:C:2023:442.

²¹ See *Rule of Law Framework*, European Commission, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en#process (accessed 30 June 2025).

The shift towards values means that the traditionally legalistic approach to critical discourse about EU constitutional pluralism²² is modified and supplemented by an axiological perspective. The dualistic, binary legal dogmatic framework defining what is lawful/unlawful or compliant/non-compliant with the law is being complemented, and in some cases even partially modified, by the good/bad and friendly/hostile dualism.²³ As a result of the cumulative application of axiological and non-axiological assessment criteria, any action by the EU or an MS may be considered not only potentially unlawful (a breach of EU law), but also “bad” or “hostile” to EU values.

As a result, there is a shift in constitutional discourse driven by a change in the philosophical stance of its participants from positivist to axiological. This shift involves recognising fundamental, intrinsic and objective values as sources of EU constitutional law; acknowledging the respect for and reference to values as a necessary element of the prevailing legal methodology; affirming that the EU’s fundamental, intrinsic and objective values are shared by the entities that formulate, apply and interpret EU law; and, finally, recognising constitutional values as an essential and constitutive element of both the EU’s identity and the constitutional identity of its individual MSs.

The normative turn involving values in the EU dates back to 2009, i.e. the Treaty of Lisbon’s entry into force. This Treaty introduced Art. 1a into the TEU, which states that “[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Additionally, the Treaty of Lisbon revised the former Art. 6(1) TEU, which read: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” This change is not merely linguistic, i.e. simply replacing the word “principles” with “values” in the Treaty provision that defines the foundations of the EU. Rather, the Treaty provisions explicitly reference the values listed in the first sentence of Art. 2 TEU – as seen in Arts. 7 and 49 TEU – or refer more

²² See K. Jaklic, *Constitutional Pluralism in the EU*, Oxford University Press, Oxford: 2013; M. Avbelj, J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing, Oxford: 2012.

²³ See e.g. J. Zajadło, *Wykładnia wroga wobec konstytucji* [Interpretation Hostile to the Constitution], 1 *Przegląd Konstytucyjny* 26 (2018); on the friendly and critical approach of the BVerfG to European integration, see T. Giegerich, *Zwischen Europafreundlichkeit und Europaskepsis Kritischer Überblick über die bundesverfassungsgerichtliche Rechtsprechung zur europäischen Integration*, 19 *Zeitschrift für Europarechtliche Studie* 3 (2016); K. Kos, *Theories and Limitations of EU-Friendly Interpretation of the Polish Constitution*, 12(1) *Polish Review of International and European Law* 47 (2023), pp. 48–56.

generally to values, as in the Preamble and other Treaty provisions.²⁴ The values constitute an integral part of the substance of the provision in question, and their weight, significance and role within EU constitutionalism depend not only on their substantive content, but also largely on whether the provision is programmatic, task-orientated, competence-based, legally substantive, procedural or sanctioning in nature. Moreover, Art. 2 TEU, due to its placement under Title I: Common Provisions, has an effect on other Treaty provisions that do not explicitly mention values or refer to them in some way. Therefore, the values enshrined in Art. 2 TEU – as constitutional values – affect the interpretation and application of EU primary law, thereby contributing to the ongoing constitutionalisation of European integration. The CJEU plays a proactive role in this process. Its judicial activism is reflected in its approach to Art. 2 TEU, i.e. treating the fundamental values it enumerates not only as interpretative guidelines for EU law, but also as a legal basis for judicial decisions. The fundamental constitutional values are primarily incorporated into EU judicial procedures through the CJEU regarding the Treaty provisions as a sort of “concrete expression” of fundamental values. As a result, Art. 2 TEU – and the values it enshrines – becomes a criterion in the judicial assessment of laws, particularly those of the MSs.²⁵

The term “value” appears in the Preamble to the Charter of Fundamental Rights of the European Union. However, the practical significance of Preamble is not particularly substantial. When applying and interpreting the provisions of the Charter, the CJEU does not directly refer to the relevant passages of the Preamble. Instead, it relies on the values enshrined in Art. 2 TEU, creating an intrinsic link between the essence of a fundamental right protected by the Charter and one of the values listed in Art. 2 TEU.²⁶ Among the regulations of EU secondary law that refer to values, Regulation 2020/2092 of the European Parliament and of the Council of

²⁴ For internal and external systemic context for Art. 2, see A. Wróbel, *Art. 2*, in: R. Grzeszczak, D. Kornobis-Romanowska (eds.), *Traktat o Unii Europejskiej. Komentarz* [Treaty on European Union: A Commentary], Wolters Kluwer, Warsaw: 2023, pp. 70–75.

²⁵ Judgments of the Court of Justice are emblematic for this approach in cases of a “rule of law crisis”, in which the CJEU uses the idea of concrete expression – see e.g. Case C-430/21 *RS (Effect of the decisions of a constitutional court)*, EU:C:2022:99, para. 39: Art. 19(2) TEU, “which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice”; see Spieker, *supra* note 17, p. 264.

²⁶ M. Wendel, *Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM*, 15(1) *European Constitutional Law Review* 17 (2019), pp. 27–29; see Case C-216/18 *PPU Minister for Justice and Equality v. LM (Deficiencies in the system of justice)*, EU:C:2018:586, para. 48: “the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.”

16 December 2020 on a general regime of conditionality for the protection of the Union budget is particularly significant. It not only references the values mentioned in Art. 2 TEU, but also provides a legal definition of one of these values, namely the rule of law (Art. 2(a)). Furthermore, it specifies actions or conditions that may indicate an MS's breach of the "principles" of the rule of law.²⁷

The shift towards values in the CJEU case law²⁸ is the result of the Court's activist interpretation²⁹ of Art. 2 TEU, which not only emphasises these values as fundamental values within the EU legal order and substantively links them to the general principles of EU law and the Treaty provisions, but also operationalises them by treating them as a basis for judicial decisions, a criterion for the judicial review of laws and a guideline for the interpretation of EU law. A key ruling exemplifying this shift towards values is the CJEU judgment in the case *Associação Sindical dos Juízes Portugueses (ASJP)*, in which the Court stated that

[a]ccording to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails." The Court further noted that "mutual trust between the Member States, and in particular between their courts and tribunals, is based on the fundamental premise that the Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU."³⁰

This judgment transformed the value of "the rule of law" into a legally actionable and enforceable standard, making it a reference point for the structure and functioning of the judiciary in the MSs.³¹ In its judgment in *Minister for Justice and Equality v. LM (Deficiencies in the system of justice)*, the CJEU clarified its stance, stating that the said premise "implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected."³² This case law is interpreted

²⁷ I. Staudinger, *The Rise and Fall of Rule of Law Conditionality*, 7(2) European Papers 721 (2022).

²⁸ See Spieker, *supra* note 17.

²⁹ Activist interpretation is a manifestation of the judicial activism; M. Dawson, B. De Witte and E. Muir (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, Cheltenham: 2013; K. Maleson, *The New Judiciary: The Effects of Expansion and Activism*, Routledge, London: 1999.

³⁰ Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, EU:C:2018:117, para. 30; M. Bonelli, M. Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16 Associação Sindical dos Juízes Portugueses*, 14(3) European Constitutional Law Review 622 (2018); L. Pech, D. Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments Since the Portuguese Judges Case*, Swedish Institute for European Policy Studies, Stockholm: 2021.

³¹ F. Schorkopf, *Der Wertekontitutionalismus der Europäischen Union*, 10 Juristen Zeitung 477 (2020), p. 481.

³² Case C-216/18 PPU *Minister for Justice and Equality v. LM*, EU:C:2018:586, para. 35.

in legal doctrine as operationalisation of the values of Art. 2 TEU, which thus can be directly applied by EU and national courts in connection with other Treaty provisions (e.g. Art. 2 in conjunction with Art. 19(1) TEU).³³

A characteristic feature of this line of case law is the practical application of Art. 2 TEU by the CJEU as a criterion for the review (assessment) of the MSs' actions, even in areas that come within their exclusive purview. This is in contrast to what one might infer from the wording of Art. 2 TEU, which provides for the "values on which the Union is founded" as a criterion for the review/assessment of actions of EU institutions and bodies,³⁴ which are required to "implement" these values through appropriate legal measures and instruments, as well as political actions. The Court's involvement in protecting these values from infringements by the MSs is justified by the ineffectiveness of the political review and sanctioning mechanism laid down in Art. 7 TEU and the lack of political will within the EU institutions³⁵ to take the necessary measures, among other reasons. Nevertheless, the CJEU is competent to review (assess) the compliance of the MSs' actions with the values on which the Union is founded, based on the general mandate under the first subparagraph of Art. 19(1) TEU, according to which the Court shall ensure that the law is observed in the interpretation and application of the Treaties. The phrase "ensure that the law is observed" implies that the Court's tasks of interpreting the Treaty provisions, rationally applying these provisions and ensuring their uniform enforcement were conceived by the Treaty framers as a primary task of constitutional significance.³⁶ The phrase is also general enough, which means that, firstly, the EU body authorised to define "law" in the meaning of this provision is the CJEU, which in turn means that the concept of "law" is open-ended, allowing the Court to consider or refer to non-Treaty sources of law as well. Secondly, in fulfilling the task outlined in the first subparagraph of Art. 19(1) TEU, the Court is empowered to define the nature and meaning of Treaty law,³⁷ for example, by emphasising its constitutional significance and role in achieving the goals of the European integra-

³³ See L.D. Spieker, *Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis*, 20 German Law Journal 1182 (2019), pp. 1204–1206; A. von Bogdandy, L.D. Spieker, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, 15(3) European Constitutional Law Review 391 (2019).

³⁴ See Cases C-542/18 RX-II and C-543/18 RX-ITS *Simpson v. Council of the European Union* (T646/16 P) and *HG v. European Commission* (T693/16 P), EU:C:2020:232, para. 71.

³⁵ K.L. Scheppele, D.V. Kochenov, B. Grabowska-Moroz, *EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 39(1) Yearbook of European Law 3 (2020).

³⁶ Cf. S. O'Leary, *Employment Law at the European Court of Justice: Judicial Structures, Policies and Processes*, Hart Publishing, Oxford: 2002, pp. 75–76.

³⁷ L. Corrias, *The Passivity of Law: Competence and Constitution in the European Court of Justice*, Springer, Dordrecht: 2011, p. 14.

tion process,³⁸ which include ensuring the autonomy and uniformity of EU law.³⁹ In light of the above, there is no doubt that it was also the Court's responsibility to make it clear whether the values on which the Union is founded constitute law within the meaning of the first subparagraph of Art. 19(1) TEU. It is no coincidence that legal writings attribute to the Court the status of guardian of common values (*Hüter gemeinsamer Werte*),⁴⁰ which additionally legitimises and strengthens its political position as the main driver of constitutionalisation and federalisation of the EU legal order.⁴¹ The shift towards values in the CJEU case law is noticeable in legal writings and commentary, which define this judicative trend as "value-based adjudication" (*Wertejurisprudenz*).⁴²

A significant step in the development of the doctrine of fundamental values is the CJEU's judgment in *Repubblica*, in which the Court supplemented the value of the rule of law with a new element: the principle of non-regression. According to this principle,

A Member State cannot [...] amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU. The Member States are thus required to ensure that, in light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary.⁴³

In general, Art. 2 TEU, in conjunction with other Treaty provisions, prevents changes in the legal systems of the MSs that would result in the lowering (or dete-

³⁸ As stated by the CJEU in its judgment in *Les Verts*, "the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty" (Case C-294/83 *Parti écologiste „Les Verts“ v. European Parliament*, EU:C:1986:166, para. 23).

³⁹ Opinion 2/13 of the CJEU of 18 December 2014, EU:C:2014:2454, paras. 174 and 176.

⁴⁰ S.-P. Hwang, *Judikativer Werteschutz in der Europäischen Union: Eine verfassungsvergleichende Perspektive*, 3 *Europarecht* 240 (2024), p. 240.

⁴¹ M. Nettesheim warns that "Gerichtshof der EU gegenwärtig eine konstitutionelle Transformation vorantreibt, die das Potential hat, die Demokratizität des im Verbund von EU und EU-Mitgliedstaaten angelegten Regierungssystems zu beschädigen" (M. Nettesheim, *Die föderale Homogenitätsklausel des Art. 2 EUV*, 3 *Europarecht* 269 (2024), p. 273). See also D.V. Kochenov, *Dialogical Rule of Law in the Hands of the Court of Justice: Analysis and Critique*, Central European University, Wien: 2023.

⁴² F.C. Mayer, *Judikativer Werteschutz in der Europäischen Union: Grundlagen und Chancen*, 3 *Europarecht* 219 (2024).

⁴³ Case C-896/19 *Repubblica v. Il-Prim Ministru*, EU:C:2021:311, paras. 62 and 63; O. Mader, *Wege aus der Rechtsstaatsmiserie: Der neue EU-Verfassungsgrundsatz des Rückschrittsverbots und seine Bedeutung für die Wertedurchsetzung*, 21 *Europäische Zeitschrift für Wirtschaftsrecht* 917 (2021), pp. 917–922; J. Scholtes, *Constitutionalising the End of History? Pitfalls of a Non-regression Principle for Article 2 TEU*, 19(1) *European Constitutional Law Review* 59 (2023).

rioration) of the standards of the values referred to in this provision, which allowed the MS to join the Union.

Alongside the normative and judicative turn, one can note a shift towards values in EU policies, particularly in the Union's external relations (Art. 8(1) TEU – area of prosperity and good-neighbourliness; and Arts. 3(5) and 21(2)(a) TEU – international relations of the Union).⁴⁴ As a result, the shift towards values in the EU is all-encompassing, affecting essentially all areas within the Treaty competencies of the Union, and is a core element of the majority of EU goals and tasks.

In a broader perspective, the shift towards values involves the Treaty framers' shifting, yet not departing, from the concept of a Union based on the principles of law (*Rechtsgemeinschaft/Rechtsunion*) to an endorsement of a Union based on values (*Wertegemeinschaft/Werteunion*).⁴⁵ In pragmatic terms, this means establishing and developing the EU's constitutional legal and institutional system based on the values listed in Art. 2 TEU. From a subjective perspective, this is tantamount to the EU legislative and interpretive authorities fully identifying with these legal values.

2. EU LEGAL VALUES AS FUNDAMENTAL CONSTITUTIONAL VALUES COMMON TO THE MEMBER STATES

As mentioned above, the values listed in the first sentence of Art. 2 TEU are legal values, that is, values explicitly set out in the Treaty provision and indicated as such. In contrast to extralegal values, which belong to the extralegal axiological system, EU legal values are part of the binding European law. The extralegal values can become legal values by being normatively transcribed into the legal order, either through the adoption of relevant provisions, the appropriate interpretation of existing provisions or the application and interpretation of provisions that refer to values. Therefore, although these are not non-legal values, their juridical characteristics should refer to the status, meaning and functions that are assigned to non-legal values within value theory. In this regard, formal classifications of values within this theory can be helpful, including the breakdown of values into objective and subjective, intrinsic and extrinsic, internal and external, and fundamental and instrumental values. As

⁴⁴ On the EU promoting values in international relations, see e.g. E. Herlin-Karnell, *The EU as a Promoter of Values and the European Global Project*, 13(11) German Law Journal 1225 (2012).

⁴⁵ D. Blumenwitz, G.H. Gornig, D. Murswiek (eds.), *Die Europäische Union als Wertegemeinschaft*, Duncker & Humblot, Berlin: 2005; M. Niedobitek, K.-P. Sommermann (eds.), *Die Europäische Union als Wertegemeinschaft. Forschungssymposium zu Ehren von Siegfried Magiera*, Duncker & Humblot, Berlin: 2013.

these issues are highly controversial, having made some simplifying assumptions, I posit that EU legal values are internal, fundamental, objective and intrinsic values.

The legal values listed in Art. 2 TEU are internal values because they are part of the Treaty, which serves as the constitutional charter of the Union; they are not, obviously, external values, i.e. extralegal criteria for reviewing EU law. Internal values not only provide the axiological justification for the legal norms being established, but can also be used when assessing the application and interpretation of the law. As Jerzy Wróblewski pointed out, these assessments can be systemically or instrumentally relativised. In the former case, they are assessed according to the internal values specified in the legal norms being applied, where the assessment is about determining whether and to what extent the application of the law is consistent with these values. In the latter case, the assessment concerns whether and to what extent the decisions regarding the application of the law are appropriate means for achieving these internal values.⁴⁶ In cases where such a decision is not determined by legal norms, the authority applying such a law is given some discretion to choose among different decisions that either prescribe, prohibit or permit particular behaviour, preferring certain actions to others. The basis of such preference, however, is an assessment (*Beurteilung*) of the chosen alternative as the better one, and thus a certain rating (*Wertung*).⁴⁷ In this case, the authority applying the law is bound by internal legal values, which serve as the criterion for choosing a better solution among possible alternatives.⁴⁸ However, unlike rules that determine the choice, values do not determine but (only) influence it.⁴⁹ The enactment of EU secondary legislation and its implementation into the legal systems of the MSs can also be assessed from the perspective of internal legal values.⁵⁰

The legal values listed in Art. 2 TEU are intrinsic values. Intrinsic value is generally understood as what “is valuable for its own sake, in itself, on its own, in its own right, as an end, or as such”. The opposite is extrinsic value, which is typically characterised as “what is valuable as a means, or for something else’s sake.”⁵¹ Accord-

⁴⁶ J. Wróblewski, *Wartości a decyzja sądowa* [Values Versus Judicial Decision], Ossolineum, Wrocław: 1973, p. 48; A. Von Bogdandy, *Founding Principles of EU Law: A Theoretical and Doctrinal Sketch*, 16(2) *European Law Journal* 95 (2010).

⁴⁷ R. Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Suhrkamp, Frankfurt am Main: 1983, p. 29.

⁴⁸ From a pragmatic point of view, the authority applying EU law does not need to seek values outside the law or derive them from a given legal system, as these values are provided, “visible” and binding by virtue of their inclusion in Art. 2 TEU.

⁴⁹ Cf. T. Kuhn, *Objectivity, Value Judgment, and Theory Choice*, in: *The Essential Tension: Selected Studies in Scientific Tradition and Change*, The University of Chicago Press, Chicago: 1977, p. 320.

⁵⁰ On the axiology of lawmaking from the perspective of the theory of rational lawmaking, see J. Wróblewski, *Teoria racjonalnego tworzenia prawa* [Theory of Rational Lawmaking], Ossolineum, Wrocław: 1985, ch. 12.

⁵¹ T. Rønnow-Rasmussen, *Intrinsic and Extrinsic Value*, in: I. Hirose, J. Olson (eds.), *The Oxford Handbook of Value Theory*, Oxford University Press, New York: 2015, p. 29.

ing to this approach, something is intrinsically valuable if and only if it is valuable in itself or as an end. A value is considered intrinsic if and only if it serves as justification for other values, while not being justified by any other value.⁵² However, this does not mean that intrinsic values cannot derive from other values. As Toni Rasmussen points out, it is quite possible for a derivative valuable object to derive its value from that of its constituent elements.⁵³ This is the case with the intrinsic value of the rule of law, which is not justified by any other legal or extralegal value, but derives its value from the sum of the values of its constituent elements, such as legitimacy and judicial independence.⁵⁴

The legal values enumerated in Art. 2 TEU are fundamental values. Referring to Kant's claims, they are values seen as ends in themselves, which means they are non-relativised, as opposed to instrumental values that are assessed as a means to an end.⁵⁵ Fundamental values do not require justification. The obligation to act in accordance with these core values arises from their analytical structure as legal values. The processes of legislating, applying, interpreting and implementing EU law can be assessed instrumentally as means to achieve these fundamental legal values, particularly by deciding whether these means help accomplish the goals embedded within those values.

The values specified in the first sentence of Art. 2 TEU are referred to as fundamental values or foundational values.⁵⁶ The wording of the provision ("The Union is founded on the values") indicates that it refers to foundational values, i.e. those that constitute the (axiological) foundation and characterise the Union's constitutionalism.⁵⁷

I posit that the fundamental legal values in question are, in terms of value theory, objective values, i.e. independent of the emotional state of the person making the assessment. Even if one accepts that moral attitudes of some dominant social groups at a given time play a role in developing the values and defining their substance, the fact that those values were incorporated into the founding Treaties objectified them as fundamental legal values, protected by the EU legal system. Unlike sub-

⁵² *Ibidem*, p. 32.

⁵³ *Ibidem*, p. 37.

⁵⁴ See Spieker, *supra* note 17, p. 163–164.

⁵⁵ Wróblewski, *supra* note 46, p. 52.

⁵⁶ J. Přibáň, *Constitutional Values as the Normalisation of Societal Power: From a Moral Transvaluation to a Systemic Self-Valuation*, 11 *Hague Journal on the Rule of Law* 451 (2019), p. 454; D. Pellegrini, *I controlimiti al primato del diritto dell'Unione europea nel dialogo tra le Corti*, Firenze University Press, Firenze: 2021, p. 152: "valori 'fondanti' realtà giuridica sovranazionale".

⁵⁷ See G. Nolte, *European and U.S. Constitutionalism: Comparing Essential Elements*, in: G. Nolte (ed.), *European and U.S. Constitutionalism*, Cambridge University Press, New York: 2005, p. 4: "Constitutionalism is about the fundamental rules and the identity, or better: the self-understanding (*Selbstverständnis*) of any particular political community."

jective values,⁵⁸ they are not susceptible to charges of arbitrariness, manipulation of preferences or elitism.

The key to explaining the legal nature, role and significance of values in EU constitutionalism is the phrase “the Union is founded on the values”. This statement – understood as a descriptive rule, i.e. one that establishes an empirical regularity or generalisation⁵⁹ – boils down to affirming the existence of a real state of affairs, namely that the Union is based on these values. According to this concept of the descriptive rule, it is used to describe the world, and not to exert pressure on it. Descriptive rules do not mandate, prohibit or allow particular behaviour. The descriptive rule of “the Union is founded on the values” is not normative in nature, but it is empirically verifiable.

The statement “the Union is founded on the values” is not a descriptive statement with purely descriptive meaning, but rather an evaluative statement with normative meaning. The assertion that “the Union is founded on the values”, as an evaluative statement, means that “the Union is valuable”; as a normative statement, it also commands, prohibits or permits particular behaviour of its addressees. The behaviour required by the norm “the Union is founded on the values” includes respect for/adherence to the values on which the Union is founded, their implementation into EU law and their protection;⁶⁰ the minimum obligation is to not lower the existing standard of the values. The requirement to respect, implement and protect the values listed in Art. 2 TEU refers both to the values integrated into a coherent axiological domain and to individual values, such as the rule of law. The statement “the Union is founded on the values”, where value means a fundamental, non-instrumental value, can be understood in a broader sense as an obligation of EU bodies and institutions to achieve the goals covered by the values listed therein.

The normative, descriptive and evaluative approach to the content of Art. 2 TEU is also relevant for the meaning of the phrase “values common to the Member States.” The expression “values common to the Member States” in a descriptive sense refers to a verifiable empirical reality: that the values listed in Art. 2 TEU are part of the legal orders of all the MSs and are equally characteristic of these systems, or that they are in fact respected, implemented and protected by all the MSs. Considering the purpose of Art. 2 TEU, it should be accepted that the “values common to the Member States” are the generalised values of the EU, derived from particular constitutional values of the MSs and transposed into the EU legal order. According to this

⁵⁸ See G. Gaus, *Subjective Value and Justificatory Political Theory*, 28 *Nomos* 241 (1986).

⁵⁹ F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Press, Oxford: 1991, p. 2.

⁶⁰ For more on EU value protection measures, see e.g. R. Hofmann, A. Heger, *Instrumente zum Schutz der Werteunion*, 104(4) *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 340 (2021).

interpretation, the constitutional values of the MSs would only serve as a source of inspiration for the catalogue of fundamental values listed in Art. 2 TEU. Therefore, this provision would solely lay down the EU values – or more precisely, the legal values binding on the EU as a supranational organisation – while the expression “values common to the Member States” would merely indicate the origin of the values set out in Art. 2 TEU.

The phrase “values common to the Member States” can also be understood in a normative sense to mean legal values that, under Art. 2 TEU, have been defined as legal values common to the MSs. Thus, while these are the values on which the Union is founded, they are also common values for the MSs, legally binding not only on EU institutions and bodies, but also on the MSs themselves.⁶¹ This approach clearly prevails in the CJEU case law. In the opinion 2/13, the CJEU affirmed that the constitutional structure of the EU is based on the fundamental premise that, firstly, each MS shares with all the other MSs (and recognises that they share with it) a set of common values on which the EU is founded, as specified in Art. 2 TEU, and secondly, that this premise implies and justifies a mutual trust between the MSs that these values will be recognised, and that the EU law implementing them will therefore be respected.⁶² In its judgment, the CJEU also added that “national legal systems are capable of providing equivalent and effective protection for the fundamental rights recognised in the Charter, including Arts 1 and 4 of the Charter, which enshrine one of the fundamental values of the Union and its MSs, namely human dignity, which includes, inter alia, the prohibition of inhuman or degrading treatment.”⁶³ In its judgment in *Achmea*, the CJEU explained that, thirdly, “it is precisely in that context” that the MSs are obliged – by reason of the principle of sincere cooperation set out in the first subparagraph of Art. 4(3) TEU, among other things – “to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure the fulfilment of the obligations arising from the Treaties or resulting from the acts of the EU institutions.”⁶⁴ The Court’s argument essentially follows this reasoning: the EU legal system is based on the normative

⁶¹ See T. Rensmann, *Grundwerte im Prozeß der europäischen Konstitutionalisierung Anmerkungen zur Europäischen Union als Wertegemeinschaft aus juristischer Perspektive*, in: D. Blumenwitz, G.H. Gornig, D. Murswiek (eds.), *Die Europäische Union als Wertegemeinschaft*, Duncker & Humblot, Berlin: 2005, p. 57: “Wenn im Verfassungsentwurf festgestellt wird, daß die Werte der Menschenwürde, Menschenrechte, Demokratie und Rechtsstaatlichkeit allen Mitgliedstaaten der Union gemeinsam sind, so wird nicht nur auf die Genese dieser Prinzipien aus den Verfassungsüberlieferungen der Mitgliedstaaten abgestellt, sondern es wird gleichzeitig auch ein Sollensgebot im Sinne grundlegender Homogenitätsanforderungen an die Beitritts- und Mitgliedstaaten normiert.”

⁶² Opinion 2/13 of the CJEU of 18 December 2014, EU:C:2014:2454, para. 168.

⁶³ Joined Cases C-185/24 *RL* and C-189/24 *QS v. Bundesrepublik Deutschland*, EU:C:2024:1036, para. 30.

⁶⁴ Case C-284/16 *Achmea v. Slovak Republic*, EU:C:2018:158, para. 34.

premise that, firstly, an MS shares the values defined in Art. 2 TEU with the other MSs. The phrase “shares with the other Member States” should not be understood in a descriptive sense as a statement of actual adherence to these shared values, but rather as an obligation for the MS to respect and implement them. Secondly, an MS acknowledges that all the other MSs share with it the values set out in Art. 2 TEU, which means that common values are not shared by the MSs on the basis of reciprocity, but because the fact constitutes a legally enforceable obligation for each MS. Thirdly, the premise that an MS shares common values with the other MSs justifies the “existence” of some constitutional principles, such as the principle of mutual trust;⁶⁵ since the MSs are equal before the law and because they all share the same values, they have an equal right to trust from the EU and the other MSs.⁶⁶

This line in case law is based on an implicit assumption that the statement “the Union is founded on the values” implies that these values not only underpin the law and actions of the EU institutions and bodies, and are legally binding on the Union as a supranational organisation, but also that the values set out in Art. 2 TEU serve as the foundation for the law and actions of institutions and authorities of the MSs, for which these values (as EU values) are legally binding. This interpretation of the first sentence of Art. 2 TEU is supported by both the case law of the CJEU, which is considered competent to review the compliance of the MSs’ laws and constitutional systems with EU legal values – and which in fact performs such reviews – and by juristic interpretation of the provision, which is regarded as a “homogeneity clause”. This clause in European constitutionalism signifies similarity, though not uniformity, of particular principles/values applicable in relations among the MSs (horizontally) as well as in their interactions with the European Union (vertically).⁶⁷ Ensuring such homogeneity is the responsibility of the CJEU, which must continue to safeguard the common, core constitutional values for the sake of integrity of the EU legal order. With regard to these values, the CJEU has no choice but to adopt a hierarchical approach.⁶⁸ Based on this approach to the

⁶⁵ See K. Lenaerts, *La vie après l’avis: Exploring the Principle of Mutual (yet not Blind) Trust*, 54(3) Common Market Law Review 805 (2017), p. 808, who believes that “the principle of equality of Member States before the Treaties is [...] the constitutional basis for the principle of mutual trust in the EU legal order.”

⁶⁶ M. Claes, *The Equality of Member States, Research Handbook on General Principles*, in: K.S. Ziegler, P.J. Neuvonen, V. Moreno-Lax (eds.), *EU Law: Constructing Legal Orders in Europe*, Edward Edgar Publishing, Cheltenham: 2022, p. 115.

⁶⁷ M. Hilf, F. Schorkopf, in: E. Grabitz, M. Hilf, M. Nettesheim (eds.), *Das Recht der Europäischen Union*, C.H. Beck, München: 2021, Art. 2 TEU, Rn. 9; for a narrower interpretation of this clause, see S. Mangiameli, *The Homogeneity Clause*, in: H.-J. Blanke, S. Mangiameli (eds.), *The Treaty on European Union (TEU): A Commentary*, Springer, Heidelberg: 2013, Art. 2 TEU, p. 143Nb: “Homogeneity aims to regulate the relationships between the Union and the MS. First of all, between the European Treaties and the constitutions of the MS, it expresses supremacy of the European constitutional order over those of the MS.”

⁶⁸ M. Claes, *The Primacy of EU Law in European and National Law*, in: D. Chalmers, A. Arnull (eds.),

function and significance of Art. 2 TEU and the values listed in its first sentence, the homogeneity clause becomes a federalising clause, due to the subject matter of these values that are fundamental to the systems of the MSs.⁶⁹ The CJEU, which safeguards respect for these values in the MSs, strengthens its existing role as a driving force for European integration by acting as a stimulant to European federalisation. However, the federalising effect of Art. 2 TEU, resulting from the CJEU case law, raises serious constitutional concerns, given the shortcomings in the democratic legitimacy of the Court.⁷⁰

The non-pluralistic interpretation of Art. 2 TEU as a homogeneity clause understood in such a way goes beyond its wording and purpose. After all, it stipulates that it is the Union, not the MSs, which is founded on the values mentioned therein. Since the statement that the Union is based on values does not describe the actual state of affairs and, moreover, the Union as a supranational organisation shows deficiencies and deficits in terms of democracy and legal protection, the teleological and functional interpretation of Art. 2 TEU should lead to the conclusion that its aim is not to ensure axiological homogeneity of the MSs' laws and constitutions under the supervision of the CJEU – as, in this respect, they are constitutionally homogeneous⁷¹ – but rather to pursue further redevelopment of the EU law and organisation towards a fuller alignment with the values on which the Union is supposed to be founded.

3. PLURALISM OF LEGAL VALUES

The first sentence of Art. 2 TEU lists the following values upon which the Union is founded: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” Because it specifies several values, it raises the question of the formal

The Oxford Handbook of European Union Law, Oxford University Press, Oxford: 2015, p. 203.

⁶⁹ Hilf, Schorkopf, *supra* note 67, Art. 2 TEU: “Als Homogenitätsklausel soll Art. 2 EUV den Konsens zwischen den Mitgliedstaaten als Voraussetzung für die Integration vergegenwärtigen, die Legitimationsgrundlagen der EU sichern, den materiellen Gehalt für eine europäische Identitätsbildung stärken und generell die Funktionsfähigkeit der Union sicherstellen.”

⁷⁰ See D. Grimm, *The Constitution of European Democracy*, Oxford University Press, Oxford: 2017, pp. 38–42; J. Mazák, M. Moser, *Adjudication by Reference to General Principles of EU Law: A Second Look at the Mangold Case Law*, in: M. Adams, H. de Waele, J. Mrrusen, G. Straetmans (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart Publishing, London: 2013, p. 85; G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press, Cambridge: 2012.

⁷¹ In each MS, the rule of law holds the status of a constitutional principle of governance. The differences in the substance of this principle across individual states are not significant enough to necessitate harmonisation practices. The review of compliance with this principle in the national legal systems is within the purview of the constitutional courts of these states.

relationships among them, particularly whether they are hierarchical or non-hierarchical, with one possibility being value pluralism.

The idea of value pluralism is based on the following key propositions: (1) Value pluralism is not relativism; the distinction between what is good and what is bad has objective grounds and can be reasonably justified. (2) Objective goods cannot be fully ordered hierarchically. This means that there is no single evaluation criterion for all goods which are qualitatively distinct. Additionally, there is no *summum bonum*, i.e. the ultimate good for all individuals. (3) Some goods are fundamental or basic in the sense that they are part of any concept of human life that is worth choosing. (4) Outside the catalogue of basic goods, there is a broad range of justified diversity – individual ideas of a good life, as well as public cultures and public goals. This range of justified diversity defines the realm of individual freedom, deliberation and democratic decision-making. (5) Value pluralism is essentially distinct from value monism, i.e. the theory that either reduces goods to one fundamental value or creates a comprehensive hierarchy or order among goods.⁷²

Regarding these claims of value theory, it should be pointed out that the first sentence of Art. 2 TEU does not establish a hierarchy of the values listed therein, nor does it define the relationships among them in any other way, which corresponds to the basic premise of value pluralism. However, this does not imply relativism of the legal values referred to in Art. 2 TEU, because these have objective grounds and can be reasonably justified, although it is not necessary. As mentioned above, the values in Art. 2 TEU are intrinsic, non-instrumental, fundamental and objective, and such values cannot be ordered hierarchically. This claim is supported by paragraph 6 of the Preamble to Regulation 2020/2092 on the general system of conditionality for the protection of the Union budget,⁷³ which reads: “While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect

⁷² W.A. Galston, *The Implications of Value Pluralism for Political Theory and Practice*, Cambridge University Press, Cambridge: 2004, pp. 5–6.

⁷³ See W. Sadurski, *Constitutional Democracy in the Time of Elected Authoritarians*, 18(2) International Journal of Constitutional Law 324 (2020), p. 328: “a fully-fledged definition of democracy, even in its narrow, procedural sense, must incorporate these four characteristics: (1) free, fair, and regular elections which generate a government; (2) civil and political rights, in particular those which are instrumental to unconstrained political communication necessary for a democratic electoral choice; (3) separation or dispersion of powers which guarantees, at a minimum, that the entire political authority is not concentrated in a single person or small group of persons; (4) and the rule of law which requires the government to comply with legal rules, and in particular with constitutional rules which it cannot change at will whenever political expediency so demands.”

for the rule of law and vice versa.” This provision, while emphasising the lack of hierarchy among the Union values, makes the rule of law an instrumental value along with the related values, which is inconsistent with the nature of these values as fundamental, basic, intrinsic and objective. It is not possible to identify among the internal legal values one that is superior to all the others. Although respect for human dignity could be such a value, its role is essentially that of the source from which another internal legal value is derived, namely respect for human rights.⁷⁴ However, respect for human dignity is not a value from which it is possible to deduce a hierarchy of the values from Art. 2 TEU, or to claim that this value would hold the highest position in such hierarchy.

In accordance with the pluralistic approach, basic values are diverse, at least in the sense that none of them is an element of the substance of another value. From this perspective, the rule of law and respect for human rights – as values in themselves – are not part of the substance of the value of democracy, although they are strongly related therewith. The opposite view, which holds that the value of democracy embraces these two values, leans more towards a monistic position, according to which there is only one fundamental value that “permeates” other fundamental values;⁷⁵ according to this view, the only fundamental value would be democracy.⁷⁶

The fundamental values listed in Art. 2 TEU are intrinsically and inseparably interconnected and integrated to the extent that they form a unity. The relations among these values are not formal but substantive. There is no doubt that the values are substantively interrelated and, in this sense, systemically organised. The assessment of effective law, its application process and its interpretation should, whenever possible and necessary, take all of these values into account as assessment criteria.⁷⁷

The EU values set out in Art. 2 TEU serve not only as the axiological foundation for the development of the Union as a supranational organisation and the axiological justification for the EU legal system, but they are also, as legal values, essential components of the Treaty provisions. The latter, together with Art. 2 TEU, form the Union’s constitutional charter and provide justification for the body of secondary law. They are applied in the process of interpreting and implementation the Treaties, and they serve as assessment criteria for existing law.

⁷⁴ See A. Wróbel, in: A. Wróbel (ed.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz* [Charter of Fundamental Rights of the European Union: A commentary], C.H. Beck, Warsaw: 2020, Legalis – commentary on art. 1 CFREU.

⁷⁵ C. Blum, *Value Pluralism versus Value Monism*, 38 *Acta Analytica* 627 (2023), p. 628.

⁷⁶ The key components of democracy are considered to include the rule of law and respect for fundamental rights – see e.g. Sadurski, *supra* note 73.

⁷⁷ R. Dworkin argues that we must try to “understand them holistically and interpretively, each in the light of the others, organized not in hierarchy but in the fashion of a geodesic dome” – R. Dworkin, *Justice in Robes*, Belknap Press, Cambridge: 2006, pp. 160–161.

4. EU LEGAL VALUES V. PRINCIPLES OF EU LAW

The axiological shift brought about by the Treaty amendments does not signify a replacement of the existing principles on which the Union was founded (Art. 6(1) TEU-Amsterdam)⁷⁸ with the values referred to in the first sentence of Art. 2 TEU. These constitutional principles of the EU remain in force within the Union's legal order, and Art. 2 TEU does not weaken their previous role or significance in European constitutionalism. It is therefore crucial to define the legal nature of the values set out in Art. 2 TEU and their relation to principles, especially those with identical names, such as the rule of law, democracy, human rights, etc. It should also be remembered that, as a result of constitutionalising the values listed in Art. 2 TEU, these are legal values of constitutional rank and significance. Art. 2 TEU does not refer to values outside the EU legal system, but rather incorporates them into this system, rendering it largely unnecessary to invoke their moral or natural-law origins and meaning. Furthermore, the values that inspired the Treaty framers and were incorporated into EU law are constitutional values common to the MSs, forming part of their constitutional traditions and identity.⁷⁹ Although the *Wertesprudenzen* of constitutional courts and the axiological discourse on some MSs' constitutionalism are criticised,⁸⁰ it is primarily directed at the invocation in case law and constitutional legal scholarship of values that do not correspond substantively to constitutional principles – more precisely, at the use of extralegal values which are not listed and whose meaning is not defined by law. Ultimately, the criticism concerns the reliance in the legal discourse on values that are not listed in Art. 2 TEU.

The “legal nature” of the values set out in Art. 2 TEU eliminates the need to resolve the complex ontological and axiological issues that are generally associated with values. It is sufficient to recognise that the values on which the Union is founded are legally binding, just like the principles of EU law. Their legally binding force stems from their status as legal values of constitutional rank and significance, irrespective of whether EU law provides effective legal mechanisms for implementing them into secondary law and for protecting them against infringements by both EU bodies and MSs, to the extent that they apply EU law. On the other hand, the “positivisation” of values in Art. 2 TEU does not strip them of the elements that define them as values in non-legal discourse, nor does it erase the differences between values and principles that pertain to their analytical structure, function and

⁷⁸ The CJEU used this provision sparingly – see Spieker, *supra* note 17, p. 32.

⁷⁹ For a debate on the notion of “constitutional identity” and its instrumentalisation by illiberal governments to resist compliance with EU law, see J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford University Press, Oxford: 2023.

⁸⁰ E.-W. Böckenförde, *Zur Kritik der Wertbegründung des Rechts*, in: E.-W. Böckenförde (ed.), *Recht, Staat, Freiheit*, Suhrkamp, Frankfurt am Main: 2006, pp. 67–91.

justification.⁸¹ It is important to emphasise that clarifying the relationship between the values in Art. 2 TEU and the general principles of EU law does not entail ethical or moral considerations. Even a cursory examination of these values suggests that they do not have the characteristics of moral values, and they therefore cannot be defined as individual fundamental, moral beliefs. The legal values set out in the first sentence of Art. 2 TEU are not moral values, which are inherently subjective in both their origin and application. “Legal values (*Rechtswerte* or *rechtliche Werte*) are not subjective attitudes (*Einstellungen*), but rather intersubjective legal substance. Legal values are positive legal statements concerning the desired state of affairs.”⁸² Therefore, the relationship between legal values and the principles of law is not an external, substantive relationship between morality and law, but rather a formal relationship between two legal modalities within the EU legal system – and to some extent external to it, but only with respect to other legal systems, particularly the domestic law of the MSs and international law. Thus, it is not the case, as it is sometimes claimed, that “principles are distinguished from values, the latter being fundamental ethical convictions whereas the former are legal norms”⁸³: both legal values and principles are legal norms. The fundamental constitutional values listed in the first sentence of Art. 2 TEU, as legal norms, belong to the EU legal order to the same extent as the general principles of EU law; still, they do not form a separate axiological system that is distinct from the EU legal system. Nevertheless, the values enumerated in the first sentence of Art. 2 TEU are binding in both axiological and thetic (prescriptive) terms.⁸⁴ Their legally binding force is equal to that of the general principles of EU law.

In the legal literature, the legal nature of the values listed in the first sentence of Art. 2 TEU is primarily justified by the fact that EU law provides legal (and politi-

⁸¹ *Contra* D. Kochenov, who thinks that “it is absolutely clear that what is meant by ‘values’ in this context is actually ‘principles’ – fundamental principles – of EU law” (D. Kochenov, *The Acquis and Its Principles: The Enforcement of ‘Law’ versus the Enforcement of ‘Values’ in the EU Law*, in: A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values Ensuring Member States’ Compliance*, Oxford University Press, Oxford: 2017, p. 9).

⁸² R. Luther, *Überlegungen zu einer positivistischen Integrationslehre. Die Bedeutung menschlicher Wertvorstellungen für die Interpretation des nationalen und europäischen Verfassungsrechts*, Duncker & Humblot, Berlin: 2023, p. 24.

⁸³ A. von Bogdandy, *Founding Principles*, in: A. von Bogdandy, J. Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing, C.H. Beck, Oxford: 2009, p. 22.

⁸⁴ “A norm is thetically valid if it has been established or recognized by an entity having specified authority over its addressee, particularly the authority of abstract nature based on competence-based legitimacy. On the other hand, a norm is axiologically valid if the behaviour it mandates (either in itself or together with its consequences) is right in someone’s assessment, while the behaviour it prohibits (either in itself or together with its consequences) is wrong according to the same assessment” (S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa* [Outline of the Theory of Law], Ars Boni et Aequi, Poznań: 2001, pp. 39–40, cited by M. Kordela, *Teoria prawa Zygmunta Ziemińskiego* [Zygmunt Ziemiński’s Theory of Law], 4(1) *Filozofia Publiczna i Edukacja Demokratyczna* 230 (2015), p. 247.

cal) instruments for their implementation and protection, such as Art. 7 TEU, EU judicial procedures and, more recently, the conditionality mechanism.⁸⁵ In other words, the normativity of values as legal norms largely depends on the existence of sanctioning norms within the legal system, namely, those that require that EU institutions and bodies, and to some extent the MSs, take legally prescribed actions so as to prevent infringement of these values or to impose legal sanctions on entities that breach the values.⁸⁶ This approach to justifying the legal nature of values is linked to the idea that these values are legal norms because they can be operationalised through the procedures for EU institutions and bodies, particularly the CJEU, applying and interpreting the law. This operationalisation occurs through the application of a specific and directly effective Treaty provision interpreted in light of Art. 2 TEU. As Luke Dimitrios Spieker points out, this underscores the significance and weight of Art. 2 TEU; at the same time, Art. 2 is interpreted in conjunction with a specific provision that makes it more precise.⁸⁷

According to Spieker, Art. 2 TEU is a provision that is “suitable” for application by the courts, yet the application of Art. 2 TEU faces three options:

First, Article 2 TEU could be perceived as mandatory *and* unconditional and thus apply as a self-standing provision.⁸⁸ Second, Article 2 TEU could lack a mandatory effect but still be unconditional. In this case, Article 2 TEU could be considered by the CJEU or national courts through some sort of (non-binding?) value-oriented interpretation of EU and national law. A third option would be that Article 2 TEU is mandatory but not unconditional. It would need to be applied with a more specific provision giving concrete expression to the values enshrined in Article 2 TEU.⁸⁹

⁸⁵ A. Baraggia, M. Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, 23(2) German Law Journal 131 (2022), p. 154: “It is evident that conditionality represents an appealing solution especially where ordinary tools of EU law enforcement cannot ensure adequate compliance with EU values, law and objectives, and it can contribute to ensuring the smooth functioning of key EU policies. At the same time, conditionality could exercise a divisive impact on the EU integration structure, and it also seems to push the EU back on the trail of international organizations rather than of a composite constitutional space.”

⁸⁶ Scheppele, Kochenov, Grabowska-Moroz, *supra* note 35, pp. 3–121.

⁸⁷ Spieker, *supra* note 17, pp. 68–89.

⁸⁸ L.D. Spieker, *Defending Union Values in Judicial Proceedings: On How to Turn Article 2 TEU into a Judicially Applicable Provision*, in: A. von Bogdandy, P. Bogdanowicz, I. Canor, Ch. Grabenwater, M. Taborowski, M. Schmidt (eds.), *Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions*, Springer, Berlin: 2021, p. 245; cf. Scheppele, Kochenov, Grabowska-Moroz, *supra* note 35, pp. 3–121; Opinion of Advocate General Ćapeta to Case C769/22 *European Commission v. Hungary*, EU:C:2025:408, para. 218.

⁸⁹ Spieker, *supra* note 88, p. 245.

Spieker regards the judgment in *Associação Sindical dos Juizes Portugueses (ASJP)* as seminal. He believes that the Court's stance in *ASJP* could be "interpreted as making the values in Article 2 TEU judicially applicable through a mutual amplification with specific provisions of EU law." He notes that

the decisions [of the CJEU] following *ASJP* reveal a twofold development. First, the Court is willing to scrutinize and sanction Member State actions under the operationalised Article 2 TEU. [...] Second, the CJEU seems to develop the diffused and decentralized EU judicial network into a value monitoring and enforcement mechanism. Today, violations of operationalised Union values can reach the CJEU not only via infringement proceedings initiated by the Commission [...] but also through preliminary reference procedures – either by "brave" national courts directly against national measures [...] or by courts in other Member States assessing cooperation with backsliding Member States under mutual recognition regimes.⁹⁰

Whether the values listed in the first sentence of Art. 2 TEU are legal norms depends on whether legal norms can be reconstructed from these legal values. Unlike in the process of reconstructing a legal norm from a provision, this involves deriving a legal norm from a legal value embedded in that provision. The starting point for decoding a legal norm based on a legal value – such as human dignity – is the conviction that the value of human dignity, even if it is not explicitly formulated in a specific provision, is a norm in the sense that it mandates, prohibits or permits behaviour assessed as right or wrong from the viewpoint of respect for, implementation and protection of that value. This reasoning is in line with the institutional concept of law, which holds that:

"Norms" are propositions that we formulate with reference to, and as singled-out elements of, normative order. In primary form, they are either exclusionary provisions (i.e., negative duties or prohibitions) that rule out certain ways of acting on all occasions on which such action might otherwise be contemplated, or provisions of the converse type (i.e., positive duties or obligations) that call for, or insist upon, certain ways of acting as required of a person despite any contrary temptation, or countervailing reason for action.⁹¹

Based on this premise, the task of an entity applying and interpreting EU law is essentially to translate the language of values into the language of law, that is, to recreate the substance of a legal norm from the substance of an axiological norm. Values

⁹⁰ *Ibidem*, p. 253.

⁹¹ N. MacCormick, *Institutional Normative Order: A Conception of Law*, 82 Cornell Law Review 1051 (1997), p. 1054.

are not only criteria for assessing behaviour; they also serve as norms that prescribe particular behaviour. “[T]he evaluative and the normative bear an intimate relation: value is normative. This can be said to be one of value’s fundamental properties.”⁹² The normativity of values means that “[v]alues are the normative patterns defining, in universalistic terms, the pattern of desirable orientation for the system as a whole, independent of the specification of situation or of differentiated function within the system.”⁹³ “Values’ are not merely the de facto purposes, aims, goals, or ends actually pursued from time to time by individual persons or institutional agencies. They are actually pursued or possibly pursued states of being or of affairs which are conceived to be legitimate, desirable, worthy, or even (the scale ascends by degrees) mandatory for pursuit as standing purposes, aims, goals, or ends.”⁹⁴

In the process of decoding a legal norm from the fundamental EU values set out in Art. 2 TEU, one can draw inspiration from the respective fundamental principles of the EU specified in Art. 6 TEU-Amsterdam, the corresponding constitutional values of the MSs and values of international (both universal and regional) law. The recognition of and reference to the fundamental principles of the EU while reconstructing legal norms from fundamental values is justified by the substantive coherence of particular principles and values – for example, the principle of the rule of law and the value of the rule of law. Reference to the fundamental principles of the EU does not mean that these principles legitimise the fundamental values, as these values, by their nature, do not require any legitimacy. Nor does it mean that the fundamental principles of the EU hold a higher position than the fundamental values in the hierarchy of EU legal norms; on the contrary, the highest rank in the EU legal system is held by the fundamental values.

The formal relations between values and general principles of law are based on various philosophical, legal and theoretical premises: for instance, “a general principle expresses a core value”,⁹⁵ “general principles reveal the values which inspire the whole international legal order”,⁹⁶ “in the legal system, principles of law are the normative forms of

⁹² F. Orsi, *Value Theory*, Bloomsbury Publishing, London: 2015, p. 9.

⁹³ T. Parsons, E. Shils, K.D. Naeyele, J.R. Pitts (eds.), *Theories of Society: Foundations of Modern Sociological Theory*, vol. 1, Free Press, New York: 1961, p. 44.

⁹⁴ N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford University Press, Oxford: 2005, p. 192; see J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge: 1996, p. 255: “principles or higher-level norms, in the light of which other norms can be justified, have a deontological sense, whereas values are teleological.”

⁹⁵ T. Tridimas, *The General Principles of EU Law*, Oxford University Press, Oxford: 2007, p. 1.

⁹⁶ U. Linderfalk, *General Principles as Principles of International Legal Pragmatics: The Relevance of Good Faith for the Application of Treaty Law*, in: M. Andenas, L. Chiussi (eds.), *General Principles and the Coherence of International Law*, Brill, Leide: 2019, pp. 101–102.

values”,⁹⁷ “principles which would reflect the fundamental values of the legal system”,⁹⁸ “principles – are normative propositions that translate values into general ‘constitutional’ standards for policy action”⁹⁹ or “più diretta ed immediatamente espressiva forma di positivizzazione dei valori.”¹⁰⁰

When defining the relationship between the fundamental values (of the first sentence of Art. 2 TEU) and the general principles of EU law, one should take into account the fact that while the fundamental values constitute a uniform analytical category, the general principles of law are differentiated. It is possible to distinguish among them basic principles of EU law as a separate category, which includes the principles listed in Art. 6(1) TEU-Amsterdam, and thus the fundamental principles of EU law that correspond in name and substance to the values on which the Union is founded. It should even be posited that these values and principles are identical, i.e. that the fundamental principles corresponding to the fundamental values should have the same meaning as these values. It does not seem correct for the fundamental principle of the rule of law to have a different meaning and substance from the fundamental value of the rule of law. In this sense, the fundamental principles of EU law can be conceptualised as legal forms of fundamental values. However, this does not imply that values and principles hold an equivalent position within the EU legal order, because the values on which the Union is founded justify and legitimise the entire EU legal and institutional system, including the fundamental principles of the EU. These values are the source of EU law and institutional structure.

5. ROLE OF VALUES

Under Art. 2 TEU, the primary role of values is to provide foundation, justification and legitimacy. The statement “the Union is founded on the values” means that values serve as the foundation of the law, organisation and functioning of the EU. These are internal foundations in the sense that they are identified with internal values. The internal nature of these foundations highlights their ontological status as

⁹⁷ M. Kordela, *Zasady prawa jako normatywna postać wartości* [Principles of Law as a Normative form of Values], 1 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 39 (2006).

⁹⁸ U. Šadl, J. Bengoetxea, *Theorising General Principles of EU Law in Perspective: High Expectations, Modest Means and the Court of Justice*, in: S. Vogenauer, S. Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives*, Hart Publishing, Oxford: 2017, pp. 41–52.

⁹⁹ S. Luciarelli, *Introduction*, in: S. Luciarelli, I. Manners (eds.), *Values and Principles in European Union Foreign Policy*, Routledge, London: 2006, p. 10.

¹⁰⁰ A. Ruggeri, *Valori e principi costituzionali degli Stati integrati d’Europa*, 2–3 *Teoria del Diritto e dello Stato* 292 (2009), p. 296.

legal values. In other words, the foundations of law, organisation and functioning of the EU are not external, i.e. part of an extralegal axiological system. On the contrary, the values on which the Union is founded are explicitly set out in EU primary law, as mentioned above, and are therefore internal legal values. The values listed in Art. 2 TEU are more than just fundamental values; due to their inclusion in the Treaties, which have the rank and nature of the Union's constitutional charter, they are constitutional foundational values.¹⁰¹ As the CJEU stated in its opinion (*Avís*) 1/17,

The Union possesses a constitutional framework that is unique to it. That framework encompasses the founding values set out in Article 2 TEU, which states that the Union “is founded on values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights”, the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU treaties, which include, inter alia, rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas, structured in a way as to contribute to the implementation of the process of integration described in the second paragraph of Article 1 TEU.

The national legal systems can ensure equivalent and effective protection of the fundamental rights recognised in the Charter, particularly in Arts 1 and 4, which establish one of the core values of the Union and its MSs: human dignity, which implies the prohibition of inhuman or degrading treatment.¹⁰²

According to recent case law, these values “define the very identity of the European Union.”¹⁰³ The CJEU adopted a measure in this regard that legitimised the federalising approach to values in the following way: first of all, it emphasised that “the values contained in Article 2 TEU have been identified and are shared by the Member States”; secondly, in the Kelsenian spirit, it identified the Union with the legal order; and thirdly, it defined the legal order as a “common legal order”. As a result of this interpretation of Art. 2 TEU, the values on which the Union is founded are not values of the Union as an international organisation, but values of the Union as a common legal order, i.e. a legal order common to both the EU

¹⁰¹ See L.S. Rossi, *Il valore giuridico dei valori. L'articolo 2 TUE: relazioni con altre disposizioni del diritto primario dell'UE e rimedi giurisdizionali*, 19 *Federalismi.it*, 17 June 2020, pp. iv–v, available at: <https://www.federalismi.it/nv14/editoriale.cfm?eid=562> (accessed 30 June 2025): “i valori [...] elencati nella prima frase dell'articolo 2 del TUE [...] possono non soltanto essere definiti come ‘fondamentali’, similmente ai principi contenuti nel titolo I del TUE. Essi rappresentano anche i valori ‘fondanti’ dell’Unione, veri pilastri della costruzione europea.”; cf. Přibáň, *supra* note 56, p. 453: “Modern society cannot exist without values and their imaginaries, yet these cannot guarantee its existence and evolution. Values make sense, not foundations.”

¹⁰² Opinion 1/17 of the CJEU of 30 April 2019, EU:C:2019:341, para. 110.

¹⁰³ Case C-157/21 *Republic of Poland v. European Parliament and Council of the European Union*, EU:C:2022:98, para. 145.

and its MSs. Based on these premises, the Court concluded that “the Union must be able to defend these values, within the limits of its powers as laid down by the Treaties”. It is worth noting that the term “Union” in this sentence does not refer to the Union as a common legal order, but to the Union as a supranational organisation authorised to defend these values when they are breached or threatened by actions or omissions of the MSs. There is no room here for the MSs to defend the values of Art. 2 TEU, which would be required by a common legal order based on the values that are common to and shared by all the MSs.

The values listed in Art. 2 TEU define the identity of the EU as a supranational organisation, rather than, as mistakenly assumed by the CJEU, the identity of a common legal order. Although the identity of the common legal order defined by the values of Art. 2 TEU has strong federalising and integrating connotations, the common legal order construct adopted by the Court does not take into account the essence of EU law as a “new legal order”, independent from the legal orders of the MSs and international law,¹⁰⁴ whose defining feature is the autonomy that EU law enjoys in relation to the laws of the MSs and international law.¹⁰⁵ Moreover, the descriptive statement that “the values on which the Union is founded define the very identity of the European Union” does not imply how universal values, such as those listed in the first sentence of Art. 2 TEU, can identify the Union and its legal order and distinguish them from other legal orders and organisations based on the same set of values. These values, characterised as shared, universal and global, cannot be regarded as defining for the core of the EU constitutional identity. Properly understood identity requires and leads to diversity¹⁰⁶ and is protected as one of the elements of that diversity. Neither the CJEU’s declared concept of the EU’s identity, nor its case law limiting that identity, ensure or protect this diversity. The MSs base their legal orders on the same or similar sets of constitutional values. These values, often explicitly or implicitly stipulated in constitutional provisions, also define the constitutional identity of the MSs.¹⁰⁷ However, the identity is not shaped by the values on which the Union is founded (in the meaning assigned by the CJEU), but rather by the values specified in the constitutional law of the MSs and determined by their constitutional courts.¹⁰⁸ The values of the rule of law,

¹⁰⁴ Case C-26/62 *van Gend en Loos*, EU:C:1963:1.

¹⁰⁵ Opinion 2/13 of the CJEU of 18 December 2014, EU:C:2014:2454, para. 170.

¹⁰⁶ F. Schorkopf, *Staat und Diversität. Agonaler Pluralismus für die liberale Demokratie*, Brill Schöningh, Boston: 2017, p. 21.

¹⁰⁷ C. Calliess, G. van der Schyff, *Constitutional Identity Introduced*, in: C. Calliess, G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, Cambridge: 2019, p. 7: “Constitutional identity is [...] defined as the core or fundamental elements or values of a particular state’s constitutional order as the expression of its individuality.”

¹⁰⁸ See Judgment of the Belgian Constitutional Court on the Fiscal Stability Treaty handed down on 28 April 2016 – the Court ruled that the Belgian Constitution does not permit the Union to infringe, in

democracy and respect for fundamental rights form the core of the constitutional identity of each EU MS. These values are both universal and global in nature, as they underpin the law and organisation of states and international organisations, and they are recognised and protected by both universal and regional international law. As a result, the constitutional values corresponding to the values listed in the first sentence of Art. 2 TEU not only do not individuate the constitutional legal order and system of a given MS, but they also do not distinguish this legal order from the constitutional legal orders of other states and international organisations. On the contrary, they are common values not solely to the MSs, but also to third countries (except for authoritarian states) and supranational and international organisations.

The reference to and recognition of values in the complex processes of legislating, applying and interpreting law guarantee the internal coherence of EU law and, with certain reservations, the external coherence of EU law and the law of the MSs. The coherence of any legal system, including the multifaceted EU legal system, always involves moral/axiological choices; a system of law that is immoral or devoid of values cannot be considered coherent. Adherence to the legal values set out in Art. 2 TEU is a necessary condition for ensuring axiological as well as formal coherence of law. The latter involves legitimising the norms of a given system through appropriate legislative authorisation, while the former requires justifying the norms of the system by means of the values they are meant to serve. In both contexts, i.e. democratic legitimisation and axiological justification, the legal values of Art. 2 TEU serve not only as reference but, above all, as legally binding norms addressed to lawmakers, law enforcement bodies and interpreters. It should be emphasised that the values are not instrumental in nature; it is not the values that are a means to ensure the coherence of a legal system, but rather the legal norms of that system – established, applied and interpreted in accordance with these values – that are instrumental to it. The greater the conformity between norms and values, the greater the coherence of the legal system to which these norms belong.

Ensuring the external coherence of EU law with the law of the MSs through the obligation to recognise, refer to and protect the values of Art. 2 TEU presents a challenge. On the one hand, it can be argued that the legal values upon which the EU is founded are values of the Union as a supranational organisation, which constitute the foundation of its identity, and therefore are legally binding only on the EU rather than its MSs. Furthermore, the argument for axiological coherence between the law of an MS and EU law is in fact raised in the reasoning of constitutional courts' rulings concerning the relation between these legal subsystems,

a discriminatory manner, upon "the national identity, inherent in the fundamental structures, political and constitutional, or the fundamental values of the protection conferred by the constitution upon the legal subjects"; Cloots, *supra* note 107, pp. 41–58.

particularly between a constitution and the Charter of Fundamental Rights of the European Union.¹⁰⁹ In light of this approach, Art. 2 TEU is not a homogeneity clause that would oblige solely the MSs to align their legal systems with values specific to the EU, which are safeguarded by the CJEU.¹¹⁰ This clause, supported by the principle of primacy of EU law, has strong federalising characteristics¹¹¹ that are largely incompatible with European constitutional pluralism, where each MS's legal system and structure are in fact based on a set of diverse constitutional values, the protection of which is within the purview of the MS's bodies and institutions (courts). Undoubtedly, this set includes constitutional values corresponding in substance and meaning to the values set out in Art. 2 TEU, but the mere similarity or even identity of these values does not constitute sufficient and justified grounds for using them as review and assessment criteria for an MS's activity, particularly in domains that are within its exclusive competence.

CONCLUSION

Art. 2 TEU, stipulating that the Union is founded on the values common to its MSs, as introduced in the TEU, has led to a shift towards values in the processes of drafting, applying and interpreting EU law. This can be seen as a significant paradigm shift in the discourse on European constitutional pluralism. It represents a transition, yet not a departure, from the "Union of law" to the "Union of value", from a Union that is neutral towards values to one that is value-friendly. This paradigm shift is symbolised and illustrated by the reference to values in the case law of the CJEU (*Wertejurisprudenz*), the promotion of values in the EU's international relations and policies and the use of values to legitimise EU legislation and as a criterion for reviewing and assessing the MSs' activity, even in domains that are within their exclusive purview.

A characteristic feature of the values listed in Art. 2 TEU, on which the strength and scope of their impact on the EU legal and institutional system are directly dependent, is the fact that they are legal values and internal values, and as such they form an integral part of the founding Treaties. Due to their placement within

¹⁰⁹ For more on the "significant axiological coherence of Polish and EU law", see Polish Constitutional Tribunal, judgment of the 16 November 2011, SK 45/09, para. 2.10.

¹¹⁰ *Contra* K. Lenaerts, who assumes that the ECJ must – in absence of harmonisation – ensure uniformity within "a core nucleus of shared values" (K. Lenaerts, *The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice*, in: M. Adams H. de Waele, J. Mrusen, G. Straetmans (eds.), *Judging Europe's Judges*, Hart Publishing, Oxford: 2013, p. 29).

¹¹¹ *Cf.* S. Weatherill, *Law and Values in the European Union*, Oxford University Press, Oxford: 2016, pp. 218–223, who recognises the principles of primacy and direct effect as fundamental principles that ensure the external coherence of EU law and the law of the MSs, the principles that shape EU constitutionalism.

the Treaty structure, they are fundamental values, and because of the Treaty's role as a constitutional charter, they are also foundational values. The listing of these values in Art. 2 TEU has objectified the values – their substance no longer depends on individual moral beliefs. They are legal norms that are legally binding on their addressees.

In the literature, Art. 2 TEU is often given the status and role of a homogeneity clause. However, with all due respect for this interpretative approach, I consider it inconsistent with the meaning of this provision, which was intended to strengthen the Union's legitimacy, and with the premises of European constitutional pluralism, which safeguards and protects the pluralism of values while opposing their uniformity and hierarchisation. It seems, however, that turning values into homogenising clauses that would unify the MSs' quantitatively and qualitatively diverse constitutional value standards – with the CJEU monitoring their compliance with as-yet undetermined EU models – as well as deriving particular obligations for the MSs from these values in conjunction with other Treaty provisions is taking it too far.