Chapter 2

Subsidiarity and Proportionality and the Balance of Power between the EU and the Member States

1 Introduction

This chapter introduces the concepts of subsidiarity and proportionality as twin constitutional principles and rules¹ for mediating the balance of power between the EU and the Member States in the context of the development of EU law and the European integration process.² They were adopted by the EU as legal rules to guide the EU law-making institutions when law-making in shared competence areas following the Treaty of Maastricht.³ The current law is located in Article 5(3) TEU.⁴

The key aim of this chapter is to argue that despite the principle of subsidiarity being a key constitutional concept alongside proportionality in EU law-making for mediating the balance of power between the EU and the Member States in areas of shared competence that the principle of subsidiarity is also an essentially contested concept using Gallie’s theory of essentially contested concepts.⁵ Such conceptual dissonance, it will be argued, favours judicial discretion on how it should be applied.⁶ Gallie’s idea also helps elaborate on

¹ Article 5 (3) TEU, in conjunction with the Protocol on subsidiarity and proportionality. See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) and House of Commons European Scrutiny Committee ‘Subsidiarity, National Parliaments and the Lisbon Treaty’ Thirty-third Report of Session 2007–08 <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf> last accessed 12.7.12. for a discussion of this Protocol.


⁶ This is related to the distinction drawn by R. Dworkin, ‘The Model of Rules’, in: idem, Taking Rights Seriously (Harvard University Press Cambridge 1987) 14 at 25–26 between rules and
the more problematic character of principles and the difficulties this poses in adjudication.

Legal reasoning by the CJEU needs to address this issue of discretion. A subsequent chapter will then consider how subsidiarity, as a contested concept, could be anchored in EU law by the CJEU to help ensure the proper respect for the division of power between the EU and the Member States in areas of shared competence and what could be agreed upon at European level. For by anchoring subsidiarity by using exemplars in order to demonstrate what is nearer to the heart of subsidiarity, this helps to minimise the risk of a dispute as to how it should be operationalised in adjudication. Such an approach would directly address a key concern raised by Gallie that essentially contested concepts are at continual risk of being disputed\(^7\) and provides a useful conceptual framework in this book for helping to identify the core of subsidiarity.

2 Subsidiarity as a Legal Principle and Rule

Subsidiarity as a principle in EU law has featured in academic literature from both from a legal and an economic perspective. From an economic perspective, Pelkmans has pointed out, economists have enjoyed a ‘long tradition in studying subsidiarity as a functional principle’\(^8\) and have welcomed the principle as a useful one in determining what is best in terms of the overall welfare of a particular federal body in a multi-tier setting.\(^9\) For, as Pelkmans points

---

