TAMING THE UNRULY HORSE:

THE TREATMENT OF PUBLIC POLICY ARGUMENTS IN THE COURTS

Kota Kinabalu, 19 February 2019

The Honourable Chief Justice Sundaresh Menon*

Supreme Court of Singapore

The Right Honourable Datuk Seri Panglima David Wong Dak Wah, Chief Judge of Sabah and Sarawak

Yang Berhormat Datuk Ahmad Abdul Rahman, Deputy Speaker of the Sabah State Legislative Assembly

The Honourable Justice Dato' Mary Lim Thiam Suan, Judge of the Malaysian Court of Appeal

Honourable Judges and Judicial Commissioners

Judicial officers, Members of the Bar

Distinguished guests, Ladies and gentlemen

I. Introduction

1. The legal scholar Ran Hirschl has argued that "[t]he judicialization of politics—the reliance on courts and judicial means for addressing core moral

---

* I am grateful to my former law clerks, Ho Jiayun and Torsten Cheong, and my colleague, Assistant Registrar Scott Tan, who assisted me with the research for and preparation of this address.

predicaments, public policy questions, and political controversies—is arguably one of the most significant phenomena of late twentieth- and early twenty-first-century government".[1] If one considers the lengthy and varied catalogue of examples cited in his article, one would be hard pressed to disagree.[2]

2. In Hungary, the Constitutional Court struck down one-third of all laws it reviewed in the 1990s, including the so-called Bokros Package of austerity measures which were deemed too harsh because they enacted drastic cutbacks on the post-communist welfare system.[3] In Canada, the Supreme Court was asked to consider the ultimate political question of whether the province of Quebec could secede from the State of Canada.[4] In the United States, the recognition of a right to privacy as an unenumerated constitutional right[5] has made the Supreme Court the epicenter of the Culture Wars, turning it into the principal battleground for debates over contraception,[6] abortion,[7] sodomy laws,[8] and – most recently – same sex marriage.[9] But it is perhaps in India where this trend has reached its zenith. The Indian Supreme Court was once a relatively technocratic creature,[10] but it has become an institution whose jurisprudence spans the gamut from fundamental matters such as whether the Indian Parliament has the power to make and unmake any law that it wishes[11] to mundane municipal questions like whether cars may have tinted windows.[12] In the space of just a few months last year, the Indian Supreme Court "decriminalized gay sex, told a Hindu temple it couldn't bar entry to women of menstruating age, and overturned a 158-year-old adultery

law".[13] These developments have led to what has been called the "juridification" of modern life,[14] where courts are increasingly being invited to resolve not only private disputes, but also issues traditionally addressed through the political process, such as matters of distributive justice, national identity, and religious freedom.

3. When such issues enter the court, they often assume the cloak of "public policy", which the great American jurist Oliver Wendell Holmes famously said was the "secret root from which the law draws all the juices of life."[15] Although most commonly associated with cases involving public law and human rights, almost every area of the law, from contract to tort to family law, incorporates some doctrine of "public policy". Public policy arguments may arise in different ways in different areas of the law, but what unites them is that they all require the court to have regard not only to the interests of the parties to the dispute, *but also* to those of the community at large.

4. The danger with this is that the court is *not* fundamentally in the business of formulating policy. In a constitutional democracy, that is the role of the elected branches. The role of the court is principally to find, and then to apply, the law to the facts which are before it.[16] It is only within the confines of that task, and only to the extent permitted by the law, that the court may sometimes have regard to general notions of community welfare and the public good. However, there is a danger that in attempting to *find* the law in a

domain that is dominated by public policy considerations, the court might, perhaps unintentionally, end up *making* it; and this can pose a real challenge to proper governance within the framework of the rule of law.

5. For this reason, I suggest there is a need to consider precisely *how* courts should grapple with issues of public policy in a manner which is principled and consistent with their institutional role. My lecture will be divided into three parts. First, I will consider the challenge posed to courts by public policy arguments. Second, I will analyse the recent decision of the Singapore High Court in *UKM v Attorney-General* that was decided in December last year,[17] in which the court discussed the role of public policy in judicial reasoning and set out a structured approach towards the treatment of public policy arguments in the courts. Finally, I will discuss the benefits of adopting a principled approach towards the treatment of public policy arguments.

II. The challenge presented

6. Let me begin with the particular challenge posed to courts by public policy. In the 19th century case, *Richardson v Mellish*, Justice Burrough famously remarked that public policy is a "very unruly horse, and when you get astride it you never know where it will carry you".[18] Courts are wary of relying on it openly because it is often seen as a "cover for uncertain reasoning"[19] and because, as Oliver Wendell Holmes suggested, "the moment you leave the path of merely logical deduction" – that is to say, the path of

deducing the result from principle and precedent – "you lose the illusion of certainty which makes legal reasoning seem like mathematics".[20] To understand why public policy was viewed in this way, one must first understand just what we mean when we speak of public policy.

A. The concept of public policy

7. As a starting point, it is useful to begin with the common law.[21] Historically, judicial discussion of public policy first arose in the context of cases on the law of contract. The earliest cases that employed the concept, if not the precise expression, "public policy", involved the invalidation of contracts that were regarded as constituting a restraint on trade. In the 1711 decision in *Mitchel v Reynolds*, Lord Macclesfield invalidated a contract on the basis that "to obtain the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of the law".[22] Gradually, the notion of "public policy" as a force which could interfere with individual rights for the sake of the public good extended to other areas of private law. It resulted in the creation of doctrines such as the rule against perpetuities, which prevents persons from exerting indefinite control over dispositions of their property after their passing; and the rules against the creation of contracts for the sales of offices, marriage contracts and wagers, all of which circumscribe an individual's freedom of contract for the sake of the greater good.[23]

8. Even in the early years of the common law, judges and writers expressed a fairly consistent understanding of the concept of public policy. In 1750, in *Earl of Chesterfield v Janssen*, Lord Hardwicke LC explained that a contract against public policy was void not because either of the parties had been deceived, but because it was a "public mischief".[24] Just over a century later, a similar conception of public policy was put forward by Lord Truro in *Egerton v Earl Brownlow*, where he held that public policy was "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed … the policy of the law or public policy in relation to the administration of the law".[25] In 1928, the great scholar of English contract law, Sir Percy Winfield, described public policy as "a principle of judicial legislation or interpretation founded on the current needs of the community".[26]

9. In short, arguments over public policy have been understood as arguments about the common good rather than arguments concerning the justice of the particular case that is before the court. As some commentators have put it, public policy refers to considerations which are directed "not at doing justice as between the parties to the immediate dispute before the court, but, rather, to further the interests of the community as a whole".[27] Once this is understood, one can discern at least two reasons why public policy has historically been seen as an "unruly horse".

10. First, the logic of public policy cuts against the essential nature of the judicial task, which is to decide the individual case before the court. Whereas public policy focuses on what is good for the *community at large*, most substantive principles of law focus on correcting the injustice between *the particular parties* in the *particular case* before the court. Take contract law as an example. Most of the recognised factors which vitiate a contract, such as misrepresentation, mistake, duress, undue influence, and unconscionability, impugn a contract on the basis of objectionable conduct on the part of one or both of the *contracting parties* that impinges on the legitimacy of their bargain. Public policy, by contrast, generally, operates in circumstances where there is nothing inherently wrong with the bargain – at least as far as the parties are concerned – yet the court nevertheless intervenes to override the contractual rights of both parties, and they do so on the basis that the contract would be harmful to the *greater public good*.[28] In the words of one scholar, public policy possesses an "exogenous nature vis-à-vis the logic of legal reasoning".[29]

11. The second reason why public policy may be termed "unruly" is because what does or does not further the public or common good is often contestable and changes with the times.[30] Take the rule against maintenance and champerty, for instance. The common law once set its face absolutely against all acts that savoured of maintenance or champerty in order to preserve the purity of litigation and to protect vulnerable litigants. Today, this position has been qualified in some respects by the courts[31] as well as by the

legislature[32] as the social utility of assisted litigation as a means of increasing access to justice has come to be recognised. Today, third-party funding has become a well-established feature of several areas of commercial practice in many parts of the world.[33]

12. Adding further to the complexity is the fact that there appears to be two ways in which public policy may arise in a given case. First, it may be invoked to *curtail* a right that would otherwise be capable of being asserted under the operative law.[34] This is exemplified by the rule that contracts that are illegal or contrary to public policy cannot be enforced.[35] Secondly, public policy may be employed positively to *justify* the existence and scope of a claimed right. For instance, when the court is deciding whether to recognise a new tort it considers whether doing so would be justified by considerations of public policy.

B. Common good and individual justice

13. Yet, despite its unusual features, the central challenge presented by public policy arguments is not really unique. After all, the courts are commonly called upon to weigh the common good as they strive to administer individual justice in their decisions.

14. Consider the example of criminal sentencing. In that context, the court's task is to impose a sentence that both protects society against possible future harm and yet is proportionate to the seriousness of the offence and the

culpability of the offender. There are times when these goals might be in tension, as is the case where the court has to sentence a mentally disordered offender who has committed a serious crime and is likely to reoffend in the future. In such a case, the same factor – the offender's mental impairment – may call both for the imposition of a substantial term of imprisonment for the sake of public protection and, at the same time, for an attenuation of punishment on the ground of the offender's diminished mental culpability.[36] Here, the court must hold the balance between the common good and its duty to do right by the particular offender who is before it.

15. Another example comes from the tort of negligence. In Singapore, a three-step approach is used to determine whether a defendant owes a plaintiff a duty of care. First, the court considers whether the defendant ought to have known or foreseen that the plaintiff would suffer damage from the defendant's carelessness; secondly, it considers whether the relationship between the parties was sufficiently proximate; and at the third step, which only arises if the first two questions are answered in the affirmative, the court considers whether there are policy considerations which militate *against* the imposition of a duty of care.[37] And through that third stage, considerations of "community welfare" are built into the fundamental structure of the law of negligence.[38]

16. These examples demonstrate that arguments about the common good are not relevant only to cases involving issues of public law, but instead

permeate every area of the law, including private law, albeit in different ways and to different degrees. While the predominant concern in private litigation is with doing justice between two or more opposing parties, the courts cannot, and do not, ignore the impact of the results of individual cases on the common good.[39] What is important is that judges must do so in a way that is transparent, clear, predictable, structured and consistent. The question, then, is one of method: How should judges do this?

C. Methods of reasoning

17. Generally speaking, there are three distinct methods of reasoning which may be used to balance the tension between individual justice and the common good. I shall refer to them respectively as the discretionary, formalist, and balancing approaches, and can explain the differences between them using an illustration from the doctrine of illegality in the law of contract.

18. There is presently no consensus in the common law world on how the court should decide whether to enforce a right claimed under a contract that is said to be either illegal or contrary to public policy.

(a) One view, which was advanced by Lord Toulson in the UK Supreme Court's decision in *Patel v Mirza*, is that the court should reach its decision by considering three factors: first, the underlying purpose of the prohibition which has been transgressed; second, other relevant public policies which may be rendered ineffective or less

effective by reason of the denial of the claim; and third, what he referred to as the "possibility of overkill unless the law is applied with a due sense of proportionality".[40] No guidance was given on the interaction between these three factors, and the court appears to have free rein in deciding what weight to attach to each, and then to make such order as it considers to be most appropriate to the circumstances of the case.

(b) Another view, which was advanced by Lord Sumption in the same case, calls for clear rules. Lord Sumption held that there should be a strict rule, subject to limited exceptions, that precludes the enforcement of a contractual right where the plaintiff making the claim is obliged to *rely on* an illegal act on his part in the enforcement of the claim. This is the so-called "reliance test" which is favoured in the older authorities.[41]

(c) Yet another view, which was taken by the Singapore Court of Appeal in a case called *Ting Siew May v Boon Lay Choo*, is that no enforcement of a contract is permitted if the very contract is itself prohibited by statute or public policy.[42] However, if the contract is not illegal *per se* but had been entered into with the *object of* committing an illegal act, the court will allow the contract to be enforced if the refusal to enforce would constitute a disproportionate response to the illegality.

19. Three different methods of judicial reasoning are represented here:

(a) Lord Toulson's view embodies what I have called the discretionary approach, which essentially leaves it to the judge's good sense to assess whether to give effect to a claimed right in the face of a countervailing policy consideration. There is a set of considerations to be taken into account, but they are neither exhaustive, nor is the appropriate interplay between them prescribed.

(b) Lord Sumption's view, and the approach of the Singapore Court of Appeal towards contracts that are illegal *per se*, represent the formalist approach. This involves the formulation of strict rules that are applied to the facts to determine the outcome of the case, with limited, if any, discretion afforded to the court.

(c) Finally, the approach which the Singapore Court of Appeal took towards contracts which are not illegal *per se* but which are entered into for an illegal purpose embodies a principled balancing approach. This involves the formulation of conceptual criteria for attributing weight to the relevant competing considerations, which are then considered in the round to determine the outcome of the case.

20. Each of these three approaches has its strengths and weaknesses. The discretionary approach maintains a high degree of judicial flexibility, which gives the court latitude to do justice in the instant case. But it also infuses the

law with a high degree of subjectivity because one judge's sense of the right and good may differ from another judge's. The formalist approach, on the other hand, seems to prize clarity, certainty, and order in judicial reasoning. But the problem is that not all areas of the law are amenable to formalism. Some involve disputes over concepts that might seem inherently slippery, such as the concept of "reasonableness", which makes it difficult to formulate clear rules or to produce outcomes in a consistent way. As a result, formalism has been criticised for assuming a false pretence to objectivity and obscuring the role played by the policy preferences of the particular judge.[43]

21. The balancing approach endeavours to harness the best of the discretionary and formalist approaches. On the one hand, there is a degree of discretion afforded to the court to make a decision after taking account of a variety of competing considerations. On the other hand, it is formalist to the extent that it endeavors to set clear criteria by which the courts should weigh the various considerations. But just as it contains the strengths of both approaches, it also contains their weaknesses. If vague criteria are stipulated, the resulting approach will have the veneer of objectivity, but will in substance be arbitrary and unclear.

22. None of these approaches can always be held up as the best or the inherently correct approach for resolving the tension between individual justice and common good. Ultimately, much depends on the specific legal context in

which the decision is to be taken. For instance, it has been forcefully argued by one commentator that a formalist approach should be adopted in administrative law in order to allow a clear line to be drawn between law and politics, and to restrain judges from overstepping their constitutional role.[44] By contrast, a more open-textured approach might be preferable in family law, where the circumstances of each case can vary widely, and there is a need to grant the courts maximum flexibility to take all relevant considerations into account in the quest to deliver individualised justice.

23. The challenge of public policy therefore requires courts to be aware not only of the different methods by which they may balance the demands of the common good and individual justice, but also of the different legal contexts in which public policy arguments might arise. This brings me to the decision of the Singapore High Court in *UKM v Attorney-General*,[45] where an attempt was made to account for both these elements within a structured framework for the treatment of public policy arguments.

III. The decision in *UKM*

24. *UKM* involved an application by a gay man to adopt his biological son, whom I shall call the Child. The Child was conceived using the applicant's sperm and the egg of an anonymous donor, and then birthed by a surrogate mother in the United States. In accordance with her agreement with the applicant, the surrogate mother relinquished all her parental rights after the

birth of the Child and consented to his being brought to Singapore by the applicant and his male partner. Although both the applicant and his partner are Singapore citizens, the Child himself was not, because under the Singapore Constitution, a child born out of wedlock outside of Singapore will acquire Singapore citizenship by birth, only if his birth *mother* is a Singapore citizen.[46] Hoping to secure the Child's prospects of remaining in Singapore permanently, the applicant applied for him to be conferred Singapore citizenship, but this was denied. The applicant then applied to adopt the Child, hoping that the Child's prospects of obtaining citizenship would thereby be improved. The adoption application was denied by the District Court at first instance, and it then came before the High Court on appeal.

25. After careful consideration of the facts, the High Court concluded that an adoption order would promote the Child's welfare because it would increase his prospects of acquiring Singapore citizenship and thus of achieving long-term residence in Singapore.[47] However, this was not the end of the matter. The Director of Social Welfare of the Ministry of Social and Family Development, or the "MSF", appearing in her role as the Guardian-in-Adoption, argued that the appeal should nevertheless be dismissed because three distinct and independent heads of public policy would be contravened if an adoption order were to be made. The first was the policy of encouraging parenthood within marriage; the second was the policy against planned and deliberate parenthood by singles through the use of assisted reproduction

technology; and the third was the policy against the formation of same-sex family units.

26. To evaluate this submission, the Court considered that it had to determine (a) *whether* public policy could be taken into account;[48] (b) *what* role public policy should play in the court's analysis;[49] and (c) just *how* that analysis should be carried out.[50] The first question – the "whether" question – concerns the question of whether there is any *legal basis* for the court to consider matters of public policy in arriving at its decision. After careful examination of the legislative history of the Adoption of Children Act, the Court concluded that the statute conferred on the court not only a power to make an adoption order, but also a general discretion to determine whether to do so once the relevant statutory conditions have been satisfied.[51]

27. In exercising this discretion, the court concluded that it *could and should* take public policy into account. Against that background, the court turned its attention to considering the way in which this should be done. This required consideration of the second and third questions. The second – the "what" question – was directed at ascertaining how far *the court could go in formulating public policy* in the given case, and this required a consideration of the *legal context* of the case and the implications that this had on the court's constitutional role. The third – the "how" question – concerned methodology: how was the court to develop an *analytical framework* to determine whether a

given formulation of the common good is authoritative, persuasive, and capable of influencing the outcome of a case? I will discuss the Court's approach to the second and third questions in greater detail.

A. Legal context: determining the proper role of the court

28. Let me start with the legal context. The court explained that the two principal determinants of the legal context are what we might loosely refer to as the "type of law" which is before the court and the "type of public policy" which the court has been asked to consider.

29. On the "type of law" of law, the court drew a distinction between judge-made law – such as the law of contract and the law of torts – and statutory law – such as land law, where most of the substantive rules may be found in written legislation. Where judge-made law is concerned, the courts have effectively been delegated the role of law-maker by the Legislature and therefore bear the responsibility of developing the law, not only with the individual case in view, but also in the light of the common good.[52] By contrast, the role of the courts in identifying and giving effect to public policy is far more circumscribed where statutory law is involved, because, in that context, the Legislature has already enacted a statutory framework that embodies the public policy goals which *it* has identified and promulgated through a process of democratic debate. In that context, the role of the courts is neither to supplement nor to alter the framework that has been set by the Legislature,

but simply to interpret and apply it faithfully.

30. As for the "type of public policy" involved, the court drew a distinction between what it termed "socio-economic policy" on the one hand, and "legal policy" on the other. Socio-economic policy relates to general concerns of societal welfare and the common good viewed especially from a social, economic, cultural and political perspective.[53] Where such issues are implicated, the court held that it should proceed cautiously, because courts have no special expertise or information with which to pronounce on what would be in society's best interest.[54] Unlike the Legislature, which can commission studies, appoint committees and has at its disposal a sophisticated civil service to research, draft, and consider a range of different views, the court is limited by the adversarial process and is typically confined to receiving just the material that parties choose to place before it.[55] Legal policy, by contrast, relates more narrowly to matters arising out of the conduct of legal practice.[56] These are matters over which the court enjoys a degree of expertise and it may competently consider broader questions of the common good.[57]

31. Taken together, the two factors – "type of law" and "type of public policy" – form what may be termed a matrix of legal contexts.† The first axis –

† See Annex A for a diagrammatic representation of the matrix of legal contexts.

the judge-made versus statutory law axis – serves to identify constitutional constraints upon judicial policy-making; the second axis – the socio-economic versus legal policy axis – identifies practical constraints on the scope of judicial policy-making. Depending on where a case is classified in this matrix, the court will face a combination of constitutional and practical constraints on its ability to formulate and pronounce upon public policy, and its approach towards the treatment of public policy arguments should be appropriately tailored.

32. On the facts, *UKM* fell within the most challenging quadrant of the matrix, which it referred to as "Category 2A". Not only did the policies raised by the Guardian relate to controversial matters of social policy – such as the notion of the family, the sanction of parenthood by persons of homosexual orientation, and the ethics of commercial surrogacy – but they were also invoked in the context of a dispute arising out of a statute, namely, the Adoption of Children Act. *UKM* was therefore a case in which the court should *not* be in the business of making public policy.[58]

33. That said, public policy was not to be completely ignored, because there is a difference between *formulating* public policy and *taking it into account* as an element of the legal analysis, where it has been found to have been propounded by the appropriate constitutional actors. The former would seem to have been precluded because of the legal context, but the latter remained something which the court was not only *empowered*, but was

required to do. In addition, it should be noted that *UKM* was a case in which public policy was being relied upon to curtail a right, that is, the appellant's right to adopt to the Child, which he enjoyed in the sense that the court had found it to be in the Child's welfare to be adopted by him.[59] So if public policy could be relied upon, it had somehow to be balanced against this.

34. Hence, the answer to the "whether" and the "what" questions I mentioned earlier[60] was this: The court could take public policy into account, but not public policy of its own formulation. That then left the "how" question: What was the appropriate framework for the analysis?

B. From context to methodology: the analytical framework

35. The court explained that in a Category 2A case like *UKM*, the court should consider the impact of public policy arguments in two steps.[61]

(a) The first step is a *forensic exercise*, where the court determines whether the evidence put forward supports the claimed existence of a particular head of public policy.

(b) The second step is a *balancing exercise*, where it weighs the need to prevent a violation of public policy against the need to give effect to the claimed statutory right.

Forensic exercise: whether the claimed of public policy exists

36. In undertaking the forensic exercise of determining whether a claimed head of public policy actually exists, the court explained that three criteria – authority, clarity, and relevance – should be applied.

(a) "Authority" refers to the requirement that the sources cited in support of the existence of the claimed head of public policy must be constitutionally *authoritative* in the sense that the sources used to support the existence of a particular head of public policy must emanate from either the Legislature or the Parliamentary Executive, which, in Singapore, are the organs of the State which are constitutionally empowered to create public policy in this context.[62]

(b) "Clarity" refers to the requirement that the public policy in question must be *clearly* expressed in the source and should, as far as possible, be *consistently* expressed across multiple sources.[63]

(c) "Relevance" refers to the requirement that the sources cited articulate the policy in the form of a proposition which is framed at a sufficient level of specificity and precision.[64]

37. The methodology is formalistic, and it is deliberately so, because the goal is not only to bring clarity and certainty to the court's task, but also to restrict the scope of the court's discretion to *make* policy under the guise of

finding what the other branches have said.

Balancing exercise: weighing the competing considerations

38. If the court finds that the claimed heads of public policy exist and also that it would be violated, it then has to *balance* the need to give effect to the claimed right against the concern not to violate the public policy which has been proved to exist. To do so, the court must first determine the weights to be accorded to the value underlying the claimed right and the countervailing public policy by applying three objective criteria, namely, rational connection, salience, and magnitude of infringement.

(a) The criterion of "rational connection" is commonsensical. It requires that greater weight be attached to public policies which are rationally or directly connected to the issue being determined. For instance, a policy that bears directly on adoption should be given greater weight in the context of an adoption application.

(b) The criterion of "salience" calls for the court to place greater weight to a public policies or values that emanate from the applicable statutory regime. For instance, in *UKM*, the applicable statutory regime required the court to regard the welfare of the child to be adopted as the "first and paramount" consideration,[65] and therefore the need to promote the Child's welfare would be accorded greater weight.[66]

(c) The criterion of “magnitude of infringement” is also simple and logical. It just means that the greater the degree to which the public policy would be violated if the claimed right were given effect, the less willing the court would be to give effect to that right. Conversely, the greater the degree to which the value underlying the claimed right would be advanced if the right were given effect, the more willing the court should be to give effect to it.

39. These criteria are deliberately designed to be value-neutral, and are agnostic as to whether the claimed right or the public policy should prevail. These rules (a) constrain the influence of extrinsic community interests only to circumstances where they are relevant to the dispute and (b) discipline the process of judicial reasoning by confining the court to the task of interpreting and applying the statutory framework established by Parliament, rather than giving play to its own subjective preferences.

Application to the facts

40. Applying these frameworks, the court found that only two of the public policies cited by the MSF were supported by the evidence. Those were the policy in favour of parenthood within marriage and that against the formation of same-sex family units. Having regard to the evidence, the court determined that the former would not be violated by the making of an adoption order because there was no indication that public policy countenanced parenthood

within marriage as being the *only permissible* form of parenthood, or that it necessitated the discouragement of other forms of parenthood. In fact, the court observed that the fact that the Adoption of Children Act contemplated adoption by singles indicated that single parenthood was not presumptively contrary to the public policy in favour of parenthood within marriage.[67]

41. However, the court found that making an adoption order *would* constitute a "positive affirmation of the [applicant's] attempt at forming a same-sex family unit" and thereby violate the public policy against that.[68] The court also held that this head of public policy should be given significant weight as it was "very closely connected" to the issue at hand, and would be substantially infringed by the making of an adoption order, which would have the effect of formalising the relationship between the applicant and the Child in circumstances where the court knew that the applicant intended to care for the Child together with his same-sex partner as the child's parents.[69]

42. Ultimately, however, the court found that the goal of promoting the welfare of the Child outweighed the concern to give effect to the public policy against the formation of same sex family units because the former is the overriding imperative in all cases involving children and takes primacy in the analysis. For this reason, the court allowed the appeal and granted the adoption order.[70]

IV. Lessons

43. *UKM* is a somewhat unusual judgment because it is self-reflexive in a way that few other judgments are. Throughout its judgment, the court was very conscious of its institutional role and method of reasoning. This was a function not only of the way that the parties had placed public policy at the core of their submissions, but also of the powerful arguments over the proper role of the court that were canvassed, which prompted the court to develop a principled framework to rationalise its approach to public policy arguments.[71] The approach it decided on is by no means the only one available, but the point I want to make is that *it is not only possible* to tame the unruly horse of public policy using the reins of principle, but that it is *necessary* to do so.

A. A principled approach to the treatment of public policy arguments is possible

44. Let me start with why I think that principled reasoning about public policy is possible. To some, the very notion of a "principled" approach to "policy" is a contradiction in terms because "principle" and "policy" are sometimes seen as antonyms in the legal lexicon. The former is seen as the domain of careful logical reasoning about legal concepts which the common law excels in and should primarily be about, while the latter is viewed with suspicion as a "shifting and variable notion appealed to only when no other argument is available".[72]

45. It should be clear by now that this is a view that I do not share. For a long time, the problem with public policy has been its opacity. It has long been seen as a “black box” or a “peculiar thread that link[s] vast and incongruent cases” running the gamut from those about the freedom to trade to cases involving national security.[73] However, the moment attention is trained on the *concept* of public policy, rather than the substantive *content of particular public policies*, the veil is lifted, because it becomes clear that the essence of policy-based reasoning is the act of balancing the dictates of the public good against the demands of private rights. While this is different from orthodox analogical case-based reasoning, it would be wrong to conclude from this that it is impossible to introduce structure and objectivity to the process.

46. This was precisely what the court tried to do at the third and perhaps most difficult step of the *UKM* framework, which involves weighing the concern to promote the value underlying the claimed right, which in the context of that case was the welfare of the child, against the concern to prevent the violation of the public policy that ran against the assertion of that right, namely, the policy against the formation of same-sex family units. Even though the values that underlie these two imperatives will often be philosophically incommensurable in the sense that there is no single index of value against which both can be measured and ranked, it nonetheless remains possible to apply objective criteria to enable them to be *compared*.[74] That was what the court in *UKM* set out to do by articulating three criteria – of rational connection,

salience, and magnitude of infringement – that it used in the balancing exercise.[75]

47. These criteria might not command universal assent, but the point is that it proved possible in this way to develop a stable framework for the resolution of similar cases, that is objective and should generally transcend the discretionary preferences of the individual judge. In *UKM*, the court devised a framework that took into account both the limits of its own institutional competence and the need to preserve respect for the democratic institutions of the Government. The development of that framework is an example of what Lord Goff, in his famous 1983 Maccabaean Lecture, described as a "search for principle".[76] This has always been a feature of common law reasoning, and I submit that there are two reasons why such a search for a principled approach towards the treatment of public policy arguments must be undertaken.

B. A principled approach is essential to judicial legitimacy

48. The first is that a principled approach towards the treatment of public policy arguments is essential to maintaining the legitimacy of the Judiciary. To explain this, it is necessary first to consider the source of Judiciary's legitimacy and why it is crucial that we strive to protect it.

49. Broadly speaking, legitimacy is a quality of a political actor which refers to its right to exercise political power. When an institution or actor is

described as “legitimate”, what we generally mean is that there is common acceptance of its authority and the need to obey its commands.[77] It is legitimacy that secures general obedience to laws and judicial rulings even when people disagree with their content or when its substance does not attract universal approval.[78] In a constitutional democracy, the touchstone of legitimacy is the constitution, which is the source of all legal power, including judicial power. The exercise of judicial power is legitimate only if it is authorised by the Constitution and carried out under the conditions that it lays down. Murray Gleeson, former Chief Justice of Australia, said, “The quality which sustains judicial legitimacy … is not bravery, or creativity, but *fidelity*.” It is “fidelity to the Constitution, and to the techniques of legal methodology,” he said, “which is the hallmark of [judicial] legitimacy.”[79]

50. So what does it mean to be faithful to the constitution? As a starting point, it is helpful to begin by bearing in mind that the essence of judicial power is the adjudication of disputes impartially according to law. To carry out its mandate, the court must determine cases presented to it by finding the facts and applying the relevant legal rule or principle, without being influenced by extra-legal considerations. It is the subjection of the individual dispute to superior norms that grants the law its legitimacy because that ensures that cases are resolved in accordance with the law, and not according to the whims of the individual judge.

51. Viewed in this context, public policy presents a two-fold challenge to judicial legitimacy. First, it is an avenue by which ordinary legal results, produced through the application of default rules, are subordinated to an external consideration – the public good – the ambit of which is determined by judges. Second, it involves the application of a legal concept – public policy – which is of uncertain ambit, and whose boundaries are also subject to judicial determination. A judge who is temperamentally inclined to activism will find this the ultimate temptation because it provides a means by which the judge can make his perceptions of the good the measure of the outcome of the case.

52. It is to address these two challenges that a principled approach to public policy is so important to maintaining judicial legitimacy. A principled approach allows the court carefully to *reason through*, and then to *explain*, how and why a departure from the ordinary position is warranted. Indeed, this is the essence of the judicial function, of which the giving of reasons is a central part. To paraphrase Alexander Hamilton,[80] it is neither by force nor by will that the court derives its legitimacy, but through reason.[81] It is for this reason that the court must explain its decisions in a manner that is intelligible and rational, as this demonstrates respect for the dignity of the disputing parties as intelligent and rational agents who are capable of comprehending the law, and of ordering their lives according to its precepts.[82]

53. Furthermore, a principled approach helps the court to discern, and

thereby to fulfil, the demands of its constitutional mandate. The matrix of legal contexts in *UKM* which I described earlier is an example of this.[83] The matrix serves as a roadmap for courts to determine when they are capable of being the *authors* of public policy and when they may only be *discoverers* of policy articulated by the other branches. When it is seen that the court holds itself back from the formulation of public policy because of the legal context of the case, it signals its respect for the elected branches and an awareness of its own constitutional limitations, and that strengthens its legitimacy.

C. A principled approach cultivates the proper relationship between the branches of Government

54. A second benefit of adopting a principled approach towards public policy arguments is that it encourages the Legislature and the Executive to confront questions of policy when they arise, and not to leave those questions to be settled by the courts. This promotes constructive interaction between all the branches of Government and contributes to good governance.

55. The facts of *UKM* provide a good example. In the court below, the District Judge had dismissed the application mainly because she was concerned that to grant an adoption order would be to lend judicial imprimatur to commercial surrogacy, which she regarded as being contrary to public policy. The High Court rejected this line of reasoning because it found no clear statement from the Government supporting a public policy against surrogacy.

However, the court did not stop there. Instead, it took pains to urge the Government to clarify its position on what it described as an "ethically complex and morally fraught issue" with "profound moral and social implications" on "family, intimacy, parenthood, gender relations, sexuality and the creation of life".[84]

56. The judgment appears to have initiated a response from the Government. Two days after the judgment was published, the MSF stated in a press release that it would "review [Singapore's] adoption laws and related policies, to see if they should be amended and further strengthened".[85] Less than a month later, the Minister confirmed in Parliament that such a review was being undertaken.[86] By expressly declining to decide the case on the basis of its own policy preferences, the court kept the space open for debate and discussion by the appropriate constitutional actors. By contrast, if the court had decided the case based on its own perception of what public policy should be, it might have removed the question from the realm of democratic decision-making, which could have denied the people the opportunity to contribute to the discussions that need to take place on such an issue of deep societal and moral importance.

57. That dynamic calls to mind the notion of a "constitutional dialogue",[87] which posits that each branch of Government can speak to and influence the others in the discharge of their respective constitutional functions. Through its

judgment, the High Court was able to highlight the complexities surrounding the practice of surrogacy. But even as it did this, the court made it clear that its role was "to expound, and not to expand" public policy,[88] and that it was not for the court to "fill a space in deliberative social policy-making that the other branches of government, in which the legislative imprimatur lies, have not stepped into".[89] The fundamental conviction that underlies the dialogic approach is that all three branches of Government ought to cooperate with and complement each other for the sake of good governance.[90] The unique contribution of the Judiciary to this process is the transparency and rigour of its reasoning, as well as its expertise as a fact-finding tribunal, which enables it to identify and thoughtfully explicate the policy concerns implicated with clarity and purpose. What the Judiciary cannot do, as the court in *UKM* stressed, is be "the vanguard of social reform".[91]

58. In my view, such is the form of constitutional dialogue that is critical in modern society. Society is changing faster than laws can adapt. Rapid developments in technology have created possibilities for treatment and therapy that raise complex ethical issues. Commercial surrogacy, which *UKM* involved, is just one example. Globalisation – accelerated also by technology – has allowed political values and messages to be transmitted from one society to another with alarming speed. The global "Me Too" movement, which derives its name from a Twitter hashtag, is an obvious recent example.

59. In these circumstances, those who are impatient at the pace of democratic progress might be tempted to seek relief in the courts. But save in exceptional cases, the message of *UKM* is that the courts are not the right forum for the formulation of public policy, particularly where the issues at stake are likely to be the subject of vibrant and impassioned public debate. The exercise of judicial restraint in such cases enlarges the space for democratic debate and civic participation, and enriches the public life of the country. And, in this way, the Judiciary stays faithful to its constitutional mandate and contributes to the furtherance of the common good.

V. Conclusion

60. Let me close with a final thought. Those who celebrate the transfer of power from representative institutions to judiciaries often cite the possibility for decisive action that courts can sometimes offer. They say that progress of the sort that followed *Brown v Board of Education*,[92] for instance, would not have been possible – or at least would have taken far longer – had the matter been left to the democratic process, which can sometimes be frustratingly slow. As a citizen, I can sympathise with this; but as a judge, I cannot agree with the prescription that courts should therefore have an expanded role in policymaking. When courts transform into policy-making bodies and "make" law in an area that is not for them, they aggrandise the judicial power at the expense of the power of the people to decide, through their elected representatives, the laws they will be governed by. This has profound

consequences both for the rule of law and democracy, is likely to erode the legitimacy of both the Judiciary and the elected branches, and may leave each of them much the weaker.

61. In the years to come, the tides of social, economic and political change will continue to ebb and flow, and the allure of simply riding with them will be a temptation that courts all over the world will regularly have to confront, as I said at the beginning of this lecture. In these changing times, judges can and must continue to act courageously within their sphere, but they must also respect the constitutional prerogatives of the elected branches with their own spheres. This is sometimes a difficult road to walk, but it is only when armed with the discipline of principle that judges can discharge their fundamental oath to administer justice and protect the constitution while keeping within their rightful place.

62. Writing in 1928, Sir Percy Winfield observed that since Justice Burrough's metaphor about public policy being an unruly horse, many have refused to mount it, and he lamented that "none [had] looked upon it as a Pegasus that might soar beyond the momentary needs of the community".[93] *UKM* might once again have disappointed Sir Percy's latter expectation, because it gave public policy none of the wings that might have enabled it to change the course of social policy; but it has made an attempt at Sir Percy's former hope, which was to mount that unruly horse and to tame it.

63. Thank you all very much.

ANNEX A: MATRIX OF LEGAL CONTEXTS

Matrix of legal contexts		**Type of public policy**	
		Socio-economic	Legal
Type of law	Judge-made law	Category 1A	Category 1B
	Statutory law	Category 2A	Category 2B

[1] Ran Hirschl, "The Judicialization of Politics", in *The Oxford Handbook of Law and Politics* (Caldeira, Kelemen, and Whittington gen eds) (Oxford University Press, 2008) at p 253.

[2] Hirschl (n 1) at p 256.

[3] Nathan J Brown and Julian G Waller, "Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges" (2016) International Journal of Constitutional Law 817 at pp 823–825; István Stumpf, "The Hungarian Constitutional Court's Place in the Constitutional system of Hungary" (2017) 13 Civic Review 239 at p 242.

[4] *Reference Re Secession of Quebec* [1998] 2 SCR 217.

[5] In *Griswold v Connecticut*, 381 US 479 (1965).

[6] See ibid and *Eisenstadt v Baird*, 405 US 438 (1972).

[7] See *Roe v Wade*, 410 US 113 (1973).

[8] See *Bowers v Hardwick*, 478 US 186 (1986), later reversed in *Lawrence v Texas*, 539 US 558 (2003).

[9] See *Obergefell v Hodges* 135 S Ct 2584 (2015).

[10] Madhav Khosla, "Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate" (2009) 32 Hastings International and Comparative Law Review 55.

[11] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

[12] *Avishek Goenka v Union of Indian & Another* (2012) 5 SCC 321.

[13] Shashank Bengali, "With a String of Historic Judgments, India's Top Court Nudges the Country Forward – Sort Of" (*Los Angeles Times*, 2 October 2018) <www.latimes.com/world/asia/la-fg-supreme-court-explainer-20181002-story.html> (accessed 30 January 2019).

[14] Hirschl (n 1) at p 256.

[15] Oliver Wendell Holmes Jr, *The Common Law* (Macmillan & Co, 1882) at 35.

[16] *Prentis et al. v Atlantic Coast Line Company*, 211 US 210 (1908) at 226 *per* Holmes J.

[17] *UKM v Attorney-General* [2018] SGHCF 18.

[18] [1824–34] All ER Rep 258 at 266.

[19] James D Hopkins, "Public policy and the formation of a rule of law" (1971) 37 Brooklyn Law Review 323 at pp 332–333.

[20] Oliver Wendell Holmes Jr, "Privilege, Malice and Intent" (1894) 8 Harvard Law Review 1 at p 7.

[21] See generally Farshad Ghodoosi, "The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements" (2016) Nebraska Law Review 685 at pp 691–695.

[22] (1711) 24 ER 347 at 349.

[23] Percy Winfield, "Public policy in the English Common Law" (1928) 42 Harvard Law Review 76 at pp 85–86.

[24] (1750) 2 Ves Sen 125 at 156.

[25] (1853) 10 ER 359 at 437.

[26] Winfield (n 23) at p 92.

[27] Ross Grantham and Darryn Jensen, "The Proper Role of Policy in Private Law Adjudication" (2018) University of Toronto Law Journal 187 at p 191.

[28] See the decisions of the Singapore Court of Appeal in *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 at [23]–[25] *per* Andrew Phang Boon Leong JA and *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 at [25] *per* Andrew Phang Boon Leong JA.

[29] Ghodoosi (n 21) at p 695.

30 As Kekewich J observed in *Davies v Davies* (1887) 36 Ch D 359 at 364, "[p]ublic policy does not admit of definition and is not easily explained … One thing I take to be clear, and it is this – that public policy is a variable quantity; that it must vary and does vary with the habits, capacities, and opportunities of the public".

31 See, generally, the decision of the Singapore High Court in *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 at [32]–[44] *per* Chua Lee Ming JC (as he then was), the decision of the New South Wales Court of Appeal in *Fostif Pty Limited v Campbells Cash and Carry* [2005] NSWCA 83 at [90]–[101] *per* Mason P, and the decision of the Hong Kong Court of Final Appeal in *Unruh v Seeberber and anor* [2007] 2 HKC 609 at [89]–[98] *per* Ribeiro PJ.

32 This can be seen in the abolition of the tort of maintenance and champerty in many jurisdictions, which was achieved through the passage of legislation permitted third party funding of litigation in limited circumstances: see, eg, Civil Law (Amendment) Act 2017 (No 8 of 2017) (SG).

33 *Fostif* (n 31) at [91].

34 See also Kent Murphy, "The Traditional View of Public Policy and *Ordre Public* in Private International Law" (1981) 11(3) Georgia Journal of International and Comparative Law 591 at p 592

35 Winfield (n 23) at p 99.

36 This tension has been recognised in many cases: see, for example, the decision of the Singapore Court of Appeal in *Public Prosecutor v Aniza bte Essa* [2009] 3 SLR(R) 327 at [28] *per* Chan Sek Keong CJ.

37 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [75], [77] and [83] *per* Chan Sek Keong CJ.

38 Andrew Robertson, "Justice, Community Welfare and the Duty of Care" (2011) 127 LQR 370.

39 See James Goudkamp and John Murphy, "The Failure of Universal Theories of Tort Law" (2015) 21 Legal Theory 47.

40 [2017] AC 467 at [101].

41 ibid at [234].

42 *Ting Siew May* (n 28) at [66] *per* Andrew Phang Boon Leong JA; see also *Ochroid Trading* (n 28) at [22]–[40] and [64] *per* Andrew Phang Boon Leong JA.

43 Felix Cohen, "Transcendental nonsense and the functional approach" (1935) 1 Current Legal Thought 502.

44 See Christopher Forsyth, "Showing The Fly Out Of The Way Of The Flybottle – The Value of Formalism And Conceptual Reasoning In Administrative Law" (2007) 66 Cambridge Law Journal 325.

45 [2018] SGHCF 18.

46 See Constitution of the Republic of Singapore (1999 Reprint), Art 122(1) read with paragraph 15(1) of the Third Schedule.

47 *UKM* (n 45) at [84].

48 ibid at [85].

49 ibid at [103] and [110].

50 ibid at [135]–[136].

51 ibid at [89]–[99].

52 ibid at [112]; Robertson (n 38) at pp 269–270.

53 *UKM* (n 45) at [111]

54 ibid at [111].

55 See Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353 at pp 394–395; Beverly McLachlin, "Judicial Power and Democracy" (2000) 12 SAcLJ 311 at p 322.

56 *UKM* (n 45) at [111].

57 ibid at [111], citing *Willers v Joyce and another* [2016] 3 WLR 477 at [134] *per* Lord Mance.

58 ibid at [130].

59 ibid at [129].

60 See para 26 above.

61 ibid at [136].

62 ibid at [138]–[143].

63 ibid at [144]–[145] and [162(a)(ii)].
64 ibid at [146] and [162(a)(iii)].
65 Guardianship of Infants Act (Cap 122, 1985, Rev Ed) s 3; *UKM* at [50] and [155].
66 *UKM* at [155] and [244].
67 *UKM* (n 45) at [192].
68 ibid at [207].
69 ibid at [245].
70 ibid at [248].
71 See ibid at [130].
72 *Kenneweg v Allegany County Commissioners* (1905) 62 A 249 at 251 *per* McSherry CJ.
73 Ghodoosi (n 21) at pp 686 and 688.
74 For the difference between incommensurability and incomparability, see, generally, Ruth Chang, "Introduction" in *Incommensurability, Incomparability, and Practical Reason* (Ruth Chang, gen ed) (Harvard University Press 1997); Stephen Gardbaum, "Law, Incommensurability, and Expression" (1998) 146 University of Pennsylvania Law Review 1687 at p 1687; and Virgílio Afonso Da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision" (2011) 31 Oxford Journal of Legal Studies 273 at p 301.
75 See para 38 above.
76 Robert Goff, "The Search for Principle" (1983) Proceedings of the British Academy 169.
77 See Richard Fallon, "Legitimacy and the Constitution" (2005) 18(6) Harvard Law Review 1787 at pp 1790–1791 (distinguishing between legal, sociological and moral legitimacy). Legal legitimacy refers to the compliance of a claim of authority with legal norms; sociological legitimacy is observed where a claim of legal authority is accepted as deserving of respect or obedience; and moral legitimacy inheres in the moral justification, if any, for that claim of authority.
78 Murray Gleeson, "Judicial Legitimacy", Speech at the Australian Bar Association Conference (2 July 2000).
79 ibid.
80 Alexander Hamilton, "Federalist No 78" in *The Federalist Papers*.
81 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [21] *per* V K Rajah JA.
82 Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (NYU School of Law, Public Law Research Paper No 10-73).
83 See paras 31–32 above.
84 *UKM* (n 45) at [179]–[186].
85 Ministry of Social and Family Development, "Response to High Court's Decision on Adoption Appeal", 17 December 2018 <https://www.msf.gov.sg/media-room/Pages/Response-to-High-Courts-Decision-on-Adoption-Appeal> accessed 10 January 2019.
86 Rachel Au-Yong, "Parliament: Authorities looking at adoption laws and surrogacy, do not support gay families, says Minister Desmond Lee" (*The Straits Times*, 14 January 2019) <www.straitstimes.com/singapore/parliament-authorities-looking-at-adoption-laws-and-surrogacy-does-not-support-gay> accessed 30 January 2019.
87 See Steven Calabresi, "Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)" (1991) 105 Harvard Law Review 80; Leighton McDonald, "New Directions in the Australian Bill of Rights Debate" (2004) Public Law 22; Tom Hickman, "Constitutional dialogue, constitutional theories and the Human Rights Act 1998" (2005) Public Law 306.
88 *UKM* (n 45) at [130], citing *Fender v St John-Mildmay* [1938] AC 1, 23 (Lord Thankerton).
89 *UKM* (n 45) at [185].
90 Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press 2015).
91 *UKM* (n 45) at [125].
92 347 US 483 (1954).
93 Winfield (n 23) at p 91.