The distinction between policy and principle and its relation to convergence and divergence

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In the common law, previous decisions are authoritative, but they do not generate a fixed and complete body of rules. The common law develops by the exercise of moral judgement in adjudication where the law is unsettled. It seems likely that legal systems that share historic precedents but are no longer bound together by common precedents will gradually diverge. A crucial issue is whether decisions of one system, though not binding, retain persuasive authority for another system, or are acknowledged as relevant to decisions by analogy. This depends in part on a controversial distinction concerning common law reasoning.

On one view, even aside from the constraints of precedent, it is in the nature of common law adjudication that it is not open to a court to lay down whatever rule might seem apt, all things considered, as a legislature might do. It must focus only on certain considerations, that is to say considerations of principle as opposed to considerations of policy, the latter being reserved to the legislature. A distinction along these lines is made in different ways by various writers. Versions of the distinction are found in Dworkin and in corrective justice theory and private law rights theory. However, many commentators consider the distinction entirely spurious. If the distinction is sound, it seems that principle-based decision-making focuses on a limited range of considerations relating to the relationship between the parties, considered abstractly or objectively, and is liable to be insensitive to general social and economic circumstances. Policy-based decision-making, by contrast, allows for wider objectives to be taken into account, is more sensitive to political considerations and social and economic circumstances, and is likely to be influenced by empirical evidence.

In this paper I will defend a version of the policy/principle distinction, and I will argue that, if the requirement for principle-based decision-making in adjudication is respected, decisions from other common law jurisdictions remain relevant for decision by analogy or as persuasive authorities, and that this counteracts the tendency to divergence. I will also argue that it has the effect of promoting a common approach to theoretical understanding and development across the common law.