Model Answers to Potential Exam Questions

Chapter 3

2) What are the advantages and disadvantages of a contextual approach to statutory interpretation?

Following the doctrine of the separation of powers, the role of the judiciary is to apply a statute to give light to the intention of Parliament. Statutes are comprised of words and judges need to interpret the words of a statute and apply them to the situation in the relevant case. Approaches to interpretation which only rely upon the words of a statute are known as text-based. However, sometimes a reliance solely on the words of the statute can lead to anomalous results such as in the case of *Whiteley v Chappell* (1868) 4 LR QB 147 in which the relevant statute made it a crime to impersonate people “entitled to vote”. The defendant impersonated a dead person and the court found that as dead people cannot vote the defendant was not guilty. This seemed to go against common sense and the ultimate aim of Parliament in preventing electoral fraud. In circumstances such as this it could be argued that judges should examine the context within which the statute was created, in order to determine the intention of Parliament, this is known as a contextual approach.

The mischief rule and the purposive approach are both ways of interpreting a statute in a contextual manner. The mischief rule involves examining the common law before the statute was passed and determining what was wrong or what the “mischief” was which Parliament wanted to remedy. The statute is then interpreted in order to remedy this mischief. An example of this approach can be seen in the case of *Smith v Hughes* [1960] 2 All ER 859 in which the Street Offences Act 1959 made it an offence to “loiter or solicit in a street or public place”. The defendants in question had solicited by standing on balconies and calling for attention from behind half-open or closed windows. On a strict literal interpretation the defendants would not be found guilty as the defendants were not in a street or public place. The court determined that the mischief that Parliament wanted to remedy was the molestation of people on the streets due to solicitation, and interpreted the statute in the light of this to find the defendants guilty.

The purposive approach is similar to the mischief approach as it places the statute within the wider context. However, while the mischief rule looks backwards to focus upon a defect in the common law before the passing of a statute, the purposive approach looks forward to try to determine what situation Parliament wished to achieve on the passing of the statute. This is commonly used in the interpretation of European Union laws, due to their often being based on wide, overarching aims.

An example of the use of a purposive approach can be found in the case of *R v Registrar General, ex p Smith* [1991] 2 All ER 88. In this case the applicant was a convicted murderer detained in a high security psychiatric hospital who wanted to
obtain his birth certificate and learn the identity of his mother. The relevant statute stated that the Registrar General “shall...supply” the documentation. It was determined that the applicant could pose a danger to his mother. The judges took a wide approach, looking at the general aims of the statute and decided that Parliament could not have intended to promote serious crime. Therefore, despite the words of the statute they ruled that the Registrar did not have to supply the birth certificate.

Advantages of a contextual approach to statutory interpretation include that it avoids some of the anomalous decisions which results on a literal rule approach, due to words not always being able to express intention effectively. It therefore allows judges to use their expertise to avoid absurdities and come to the result that Parliament would have intended. Furthermore, the purposive approach is a more modern approach to statutory interpretation and puts the English Legal System more in line with European countries and the EU.

Disadvantages of the contextual approach include that it blurs the constitutional boundaries between Parliament and the judiciary whose role is merely to apply the laws created by Parliament, as contained in a statute. It can therefore give judges far too much power by allowing them to second guess the intention of Parliament and “make law”. Another disadvantage lies in the subjective nature of the determination of the context within which an Act is made. It may be difficult for judges to determine exactly what Parliament’s intention was on passing the statute and this may lead to inconsistent decision making.

A contextual approach to statutory interpretation mitigates against some of the anomalous decisions which results from a purely literal approach. However, looking beyond the words of the statute may give too much opportunity for judicial creativity, a lack of certainty and blurred constitutional roles.