Question:
Write an essay of between four (4) and five (5) pages in which you discuss whether the judgment in Jaga v Dönges 1950 (4) SA 653 (A), which was delivered at the height of apartheid, remains important for the interpretation of statutes after the democratic transformation.

Special instructions:
(a) Please use the following headings to structure your essay:
(1) Introduction - which has been provided to you below and which you merely need to copy and insert into your essay (1 mark);
(2) The facts of the Jaga case (6 marks);
(3) The dominant interpretive approach before 1994 as followed by the majority in Jaga (12 marks);
(4) The alternative interpretive approach followed by the minority in Jaga (12 marks);
(5) Section 39(2) of the Constitution and the new interpretive approach followed in the Bato Star case (15 marks);
(6) Conclusion (4 marks).
(b) The length of your assignment should not exceed five (5) typed pages. Should your assignment exceed the restriction placed on the number of pages you will be penalised (i.e. marks will be deducted from your assignment).
(c) Please refer to relevant case law or authority when formulating your answer to the essay.
(d) Your essay must be properly referenced. The practice of merely inserting a bibliography at the end of the essay will not suffice. If you are submitting a typed assignment, then referencing should be done in footnotes. If you are submitting a handwritten assignment, then we will accept the Harvard style (in text) method of referencing.
Should you choose to ignore the instructions on referencing you will be severely penalised (i.e. marks will be deducted from your assignment); as a failure to reference properly constitutes plagiarism which is an offence in terms of the rules of the University.
(e) Please note that only proper attempts at answering the assignment question will be accepted.

1.2.1 Introduction (1 mark)
In its Bato Star judgment, the Constitutional Court made reference to the interpretive approach followed in Jaga v Dönges, a notorious case from the 1950s. In this essay, I argue that the recent comments by the Constitutional Court about the case clearly show that the Jaga judgment (is still / is no longer) relevant to the interpretation of statutes after the democratic transformation [choose and defend one option].

1.2.2 The facts of the Jaga case (6 marks)
"During the early 1950s, Jaga was caught selling unwrought gold. He was sentenced to “three months imprisonment suspended for three years”. Section 22 of Act 22 of 1913 read as follows: “Any person who has been sentenced to imprisonment for any offence committed by the sale of unwrought precious metal and who is deemed by the Minister to be an undesirable inhabitant of the Union, may be removed from the Union under a warrant”. The Minister declared Jaga an undesirable inhabitant of the Union and a warrant for his deportation to India was issued. Jaga challenged his deportation on the basis that he had not been sentenced to imprisonment. The Minister argued that a suspended sentence of imprisonment is still a sentence of “imprisonment” within the ordinary meaning of section 22. Jaga argued that “imprisonment” meant actual (as opposed to merely potential) imprisonment. “Sentenced to imprisonment” thus meant to be physically held in prison, which he was not (his sentence was merely suspended and he was allowed to go home)"

1.2.3 The dominant interpretive approach before 1994 as followed by the majority in Jaga (12 marks)
1. The interpretive approach followed by the majority in Jaga was the orthodox text-based (literal) approach.
2. Orthodox text-based approach
The primary rule of the orthodox (literal) text based approach is that if the plain or ordinary meaning of words in the legal text is unambiguous, then this clear meaning is the intention of the legislator.
An ordinary citizen may rely on the everyday meaning of legislation; therefor the courts may not proceed beyond the plain meaning of the text. A dictionary must firstly be used to settle interpretive questions.
The ‘golden rule’ of interpretation is that if the ‘plain meaning’ of words are ambiguous (there exists more than one meaning of the word, in question, in the dictionary), vague or misleading or if the strict literal interpretation would result in absurdity, then the court may deviate to avoid such absurdity.
3. The majority of the court decided to adopt a textual approach (as was common in 1950 when the case was heard). The court held that the words “sentenced to imprisonment” were not further defined or qualified by the legislature. The plain meaning should therefore be determined and applied. “Imprisonment”, in plain language, meant that the sentence imposed on the offender contained a period of imprisonment (suspended or not) as an element. The warrant was thus legally issued as Jaga did receive a sentence of imprisonment.

1.2.4 The alternative interpretive approach followed by the minority in Jaga (12 marks)
1. The interpretive approach followed by the minority in Jaga was the purposive (text-in-context/contextual) approach.
2. The purposive (text-in-context) approach
Even before 1994, the purposive approach was applied by the courts from time to time. This approach dates back to 16th century English law and has resulted in a number of important minority judgments.
The purpose of the legislation is the most important factor in terms of the text-in-context approach. The law-text in context of surrounding circumstances, as well as social and political considerations, is taken into account. The most important rule of the contextual approach is the so-called mischief rule.
In *Construction of Statutes*, Elmer Driedger defines the mischief rule as follows: “A statute is to be so construed as to suppress the mischief and advance the remedy, thus giving the courts considerable latitude in achieving the objective of the legislature despite any inadequacy in the language employed by it.”

External aids to interpretation must be applied from the beginning of the process of interpretation. These aids and circumstances are indicative of the context wherein the legislation was enacted by indicating what the main mischief was that the legislation intended to address. The court will then turn to ‘secondary aids’ to interpret the intention of the legislator. ‘Secondary aids’ are the long title of the statute, headings of chapters and sections, and the text in the other official language etc

1. In *Jaga v Dönges*, Schreiner JA identified the following guidelines for the interpretation of statutes:
   • From the beginning the interpreter may take a wider context of provision into consideration with the legislative text in question.
   • The relevant contextual factors must be taken into account, irrespective of how unambiguous or ambiguous the grammatical meaning of the text is.
   • There are times when the wider context could be more important than the text itself.
   • When the meaning of the text and context is determined, it must be applied, even if the interpreter is thinks that the legislature intended something different.

1.2.5 Section 39(2) of the Constitution and the new interpretive approach followed in the Bato Star case (15 marks);
Section 39(2) of the Constitution provides:
“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”
S 39(2) is an authoritative provision, which in effect means that all courts, tribunals or forums must review the aim and purpose of legislation in light of the Bill of Rights: unambiguous text and plain meanings are longer considered as being sufficient. S 39(2) of the Constitution forces the interpreter to promote the values and objects of the Bill of Rights, before reading a particular legislative text.

**Facts of the Bato Star case.** The case concerned the allocation of quotas in the fishing industry. The amount of fish that may be caught by a deep-sea fishing trawler is limited by a quota system. The quota which each trawler is allowed to catch is determined by the Minister of Environmental Affairs and Tourism in terms of the Marine Living Resources Act 18 of 1998.
Section 2 of the Act is headed “Objectives and principles” and lists the objectives of the Act, including to achieve sustainable development, to further biodiversity, and to restructure the fishing industry in order to achieve equity. The section states that the Minister must “have regard to” these objectives when he allocates quotas. Section 18(5) deals specifically with the allocation of fishing quotas. It again states that the Minister must make allocations that will achieve the objective contemplated in section 2. The Bato Star fishing company was allocated a quota for the year. However, it complained that its quota was too small, and approached the court to have the allocation of quotas set aside. The case turned on the question whether the Minister did “have regard to” the objective of achieving equity in the fishing industry when quotas were allocated.
How should the phrase “have regard to” be interpreted and understood in this case?
The Supreme Court of Appeal answered the question by asking, in a textualist fashion, what the ordinary meaning of the words “have regard to” was. To answer this question, the court looked at the way in which the phrase has been applied by our courts for many years.
These cases made it clear that “to have regard to” meant no more than “to take into consideration” or “to take into account” or “not to overlook”. This meant that, when granting quotas in terms of section 18(5), the Minister had to take the principle of equity mentioned in section 2 into consideration, but did not have to make it his special concern. It was clear from the facts that the Minister did take the need to transform the fishing industry into account when quotas were allocated. The quotas were therefore validly allocated.

Bato Star appealed to the Constitutional Court. It claimed that the Supreme Court of Appeal had interpreted the phrase “have regard to” incorrectly. Bato Star argued that the phrase “have regard to” equity not only meant that equity should be “taken into account” (as the ordinary meaning of the words suggests), but that equity should be “promoted as the overriding concern”. This alternative meaning is suggested by the context in which the phrase operates. The Constitutional Court agreed.
In his judgment, Ngcobo J expressed concern about the textual method of interpretation followed in the Supreme Court of Appeal.
He agreed that the ordinary meaning of the phrase “have regard to” was “to take into account”, but insisted that it is no longer the ordinary meaning of words that must be applied, but the purpose of legislation and the values of the Constitution. Referring to the minority judgment in *Jaga v Dönges* with approval, the court made the following statement:
“I accept that the ordinary meaning of the phrase ‘have regard to’ has in the past been construed by our courts to mean ‘bear in mind’ or ‘do not overlook’. However, the meaning of that phrase must be determined by the context in which it occurs. In this case that context is the statutory commitment to redressing the imbalances of the past, and more importantly, the constitutional commitment to the achievement of equality. And this means that the phrase as it relates to section 2 must be construed purposively to ‘promote the spirit, purport and objects of the Bill of Rights’. […] The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). […] I am troubled therefore by an interpretative approach that pays too much attention to the ordinary language of the words ‘have regard to’.”

1.2.5 Conclusion (4 marks)
A short statement like the following would be sufficient: the minority judgment in *Jaga* was one of the first concrete efforts in South African case law to use the wider context to move beyond the plain grammatical meaning to ascertain the legislative
question: write an essay of between four and five pages in which you discuss the various approaches to statutory interpretation, how the interpretation clause of the Constitution has affected the approach adopted by the courts when interpreting statutes and the general principles applied by South African courts in the interpretation of the Constitution.

special instructions:
(a) please use the following headings to structure your essay:

1.1 introduction (1 mark)
1.2 a comparison between the orthodox text-based and text-in-context approaches to statutory interpretation (20 marks)
1.3 the impact of the interpretation clause of the Constitution on the approach adopted by the courts when interpreting statutes (15 marks)
1.4 the general principles applied by South African courts when interpreting the Constitution (10 marks)
1.5 conclusion (4 marks).

(b) use the model introduction supplied below to get your essay started.
(c) please refer to relevant case law or authority when formulating your answer to the essay.
(d) the length of your assignment should not exceed five (5) typed pages. Should your assignment exceed the restriction placed on the number of pages you will be penalised (i.e. marks will be deducted from your assignment).

1.1 introduction (1 mark)

Two approaches to interpretation (i.e. the orthodox text-based and the text-in-context approaches) are relevant in South Africa. The introduction of a supreme Constitution changed the approach to statutory interpretation adopted by South African courts. In this essay, I compare the orthodox text-based approach with the text-in-context approach. I explain how the interpretation clause of the Constitution has affected the approach adopted by courts when interpreting statutes and, finally, I discuss some of the general principles South African courts will apply when interpreting the Constitution.

1.2 a comparison between the orthodox text-based and text-in-context approaches to statutory interpretation (20 marks)

Orthodox text-based approach

The primary rule of the orthodox (literal) text based approach is that if the plain or ordinary meaning of words in the legal text is unambiguous, then this clear meaning is the intention (Principal Immigration Officer v Hawabu) of the legislator. An ordinary citizen may rely on the everyday meaning of legislation; therefore, the courts may not proceed beyond the plain meaning of the text. A dictionary must firstly be used to settle interpretive questions.

The ‘golden rule’ of interpretation is that if the ‘plain meaning’ of words are ambiguous (there exists more than one meaning of the word, in question, in the dictionary), vague or misleading or if the strict literal interpretation would result in absurdity (Venter v RJ), then the court may deviate to avoid such absurdity. The court will then turn to ‘secondary aids’ to interpret the intention of the legislator. ‘Secondary aids’ are the long title of the statute, headings of chapters and sections, and the text in the other official language etc. If the ‘secondary aids’ also do not lead to a satisfactory result, then the court may refer to tertiary aids to interpretation. These tertiary aids are common law presumptions that may be used. In these cases, the court will concede that it cannot determine what is intended by the legislature and that it will own assumption about what the legislature has intended.

The textual approach after 27 April 1994 (Interim Constitution came into effect)

The Appellate Division referred to with approval to the textual approach for statutory interpretation in Swanepoel v Johannesburg City Council: “[T]he rules of statutory [exegesis] are intended as aids in resolving any doubts as to the legislature’s true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought.”

The Supreme Court of Appeal the traditional rule of interpretation in Commissioner, SARS v executor, Frith’s Estate: “The primary rule in construction of a statutory provision is (as is well established) to ascertain the intention of the legislature an (as is equally well established) one seeks to achieve this, in the first instance, by giving the words under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it.”

There are many foundations of the text-based (literal) method of interpretation namely: legal positivism, sovereignty of Parliament as well certain formalistic ideas about which consists of language and understanding. Swanepoel can be condoned, because judgment was handed down on 27 May 1994, which was a month after the introduction of the Interim Constitution.
However, Frith’s Estate was decided seven years into the constitutional era, which is after Qozeleni v Minister of Law and Order, Matiso v Commanding Officer, Port Elizabeth Prison and S v Makwanyane.

The purposive (text-in-context) approach
Even before 1994, the purposive approach was applied by the courts from time to time. This approach dates back to 16th century English law and has resulted in a number of important minority judgments.

The purpose of the legislation is the most important factor in terms of the text-in-context approach. The law-text in context of surrounding circumstances, as well as social and political considerations, is taken into account. The most important rule of the contextual approach is the so-called mischief rule.

In Construction of Statutes, Elmer Driedger defines the mischief rule as follows: “A statute is to be so construed as to suppress the mischief and advance the remedy, thus giving the courts considerable latitude in achieving the objective of the legislature despite any inadequacy in the language employed by it.”

External aids to interpretation must be applied from the beginning of the process of interpretation. These aids and circumstances are indicative of the context wherein the legislation was enacted by indicating what the main mischief was that the legislation intended to address. The context can be researched by considering the legal position before the legislation, the legal problem that existed, the new solutions brought about by the statute and the reasons for the new legislation. The contextual approach differs from the literal approach in the following respects:

• The wider context may be considered form the start.
• It does not matter of how unambiguous or ambiguous the grammatical meaning of the text is, the surrounding background must be considered to determine the context.
• There are times when the wider context could be more important than the text itself.

Purposive interpretation was introduced as a form of replacement for the mischief rule, the literal rule and the golden rule to determine cases.

In Jaga v Dönges, Schreiner JA had identified the following guidelines for the interpretation of statutes:
• From the beginning the interpreter may take a wider context of provision into consideration with the legislative text in question.
• The relevant contextual factors must be taken into account, irrespective of how unambiguous or ambiguous the grammatical meaning of the text is.
• There are times when the wider context could be more important than the text itself.
• When the meaning of the text and context is determined, it must be applied, even if the interpreter is thinks that the legislature intended something different.

The text-in-context approach allows the courts to have inherent law-making discretion during statutory interpretation. The roles of courts are more flexible and not limited to mere textual analysis of legislation. It must however be stated that this discretion is qualified by the prerequisite that modifications of the text is possible when legislation supports a modification and when such scope and purpose is clear.

(1.3) The impact of the interpretation clause of the Constitution on the approach adopted by the courts when interpreting statutes (15 marks)
Section 39(2) of the Constitution provides: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”
S 39(2) is an authoritative provision, which in effect means that all courts, tribunals or forums must review the aim and purpose of legislation in light of the Bill of Rights: unambiguous text and plain meanings are longer considered as being sufficient. S 39(2) of the Constitution forces the interpreter to promote the values and objects of the Bill of Rights, before reading a particular legislative text.

Facts of the Bato Star case. The case concerned the allocation of quotas in the fishing industry. The amount of fish that may be caught by a deep-sea fishing trawler is limited by a quota system. The quota which each trawler is allowed to catch is determined by the Minister of Environmental Affairs and Tourism in terms of the Marine Living Resources Act 18 of 1998.
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The Supreme Court of Appeal answered the question by asking, in a textualist fashion, what the ordinary meaning of the words “have regard to” was. To answer this question, the court looked at the way in which the phrase has been applied by our courts for many years.

These cases made it clear that “to have regard to” meant no more than “to take into consideration” or “to take into account” or “not to overlook”. This meant that, when granting quotas in terms of section 18(5), the Minister had to take the principle of equity mentioned in section 2 into consideration, but did not have to make it his special concern. It was clear from the facts that the Minister did take the need to transform the fishing industry into account when quotas were allocated. The quotas were therefore validly allocated.

Bato Star appealed to the Constitutional Court. It claimed that the Supreme Court of Appeal had interpreted the phrase “have regard to” incorrectly. Bato Star argued that the phrase “have regard to” equity not only meant that equity should be “taken into account” (as the ordinary meaning of the words suggests), but that equity should be “promoted as the overriding concern”. This alternative meaning is suggested by the context in which the phrase operates. The Constitutional Court agreed.

In his judgment, Ngcobo J expressed concern about the textual method of interpretation followed in the Supreme Court of Appeal. He agreed that the ordinary meaning of the phrase “have regard to” was “to take into account”, but insisted that it is no longer the ordinary meaning of words that must be applied, but the purpose of legislation and the values of the Constitution. Referring to the minority judgment in Jaga v Dönges with approval, the court made the following statement:

“I accept that the ordinary meaning of the phrase ‘have regard to’ has in the past been construed by our courts to mean ‘bear in mind’ or ‘do not overlook’. However, the meaning of that phrase must be determined by the context in which it occurs. In this case that context is the statutory commitment to redressing the imbalances of the past, and more importantly, the constitutional commitment to the achievement of equality. And this means that the phrase as it relates to section 2 must be construed purposively to ‘promote the spirit, purport and objects of the Bill of Rights’. […] The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). […] I am troubled therefore by an interpretative approach that pays too much attention to the ordinary language of the words ‘have regard to’.’”

In Holomisa v Argus Newspapers Ltd the court referred to section 35(3) of the interim Constitution (the former s39(2)) that the interpretation clause of the Constitution was held to be “…not merely an interpretive directive, but a force that informs all legal institutions and decisions with the new power of constitutional values”.

In Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd v Smit, Langa DP explained that all statutes to be interpreted through the Bill of Rights in the Constitution.

1.4 The general principles applied by South African courts when interpreting the Constitution (10 marks)

1. Shabalala v The Attorney-General of Transvaal:
   - A supreme Constitution must be given a generous and purposive interpretation.
   - Respect must be paid to the language in the Constitution; the context is anchored to the particular constitutional text.

2. Nyamakazi v President of Bophuthatswana:
   - A purposive interpretation of the Constitution is necessary, since it enables the court to take into account more than legal rules.

3. S v Acheson:
   - During the interpretation of the Constitution, its spirit and tenor must be adhered to.

4. S v Makwanyane:
   - A provision in the Constitution cannot be interpreted in isolation, but must be read in the context as a whole.
   - Constitutional interpretation must start and end with the Constitution.

5. S v A Juvenile:
   - The Constitution has bestowed on the court the sacred trust of protecting human rights.

6. Khala v Minister of Safety and Security:
   - The Constitution was drafted with a view to the future, providing a continuing framework for the legitimate exercise of government power and the protection of individual rights and freedoms.

7. Qozoleni v Minister of Law and Order:
   - The Constitution must be interpreted in the context and setting existing at the time when the case is heard, and not when it was passed, otherwise the growth of society will not be taken into account.

8. Nortje v Attorney-General of the Cape:
   - These methods and principles of constitutional interpretation don’t constitute an firm set of rules and constitutional interpretation is an inherently flexible process.

9. S v Zuma:
   - The principles of international human rights and foreign law must be applied with due regard for the South African context.

10. Prince v Cape Law Society:
    - All judges and judicial officers are obliged to continuously interpret and apply legislation to give effect to fundamental values and rights in the Constitution.

1.5 Conclusion (4 marks)
Most courts still use the orthodox text-based approach, but the tendency to apply the contextual approach to interpretation is being used on a more regular basis. The contextual approach is becoming the more authoritative as it relates to a supreme Constitution and the connected necessity to consider constitutional values and fundamental rights. At this point in time, the courts may follow either the literal or the contextual approach. The approach to be followed will in all probability be determined by the nature of the problem to be interpreted. In cases where the text is clear, it is likely that the courts will still apply the literal approach. With the proviso to constitutional values always be considered, the literal approach will most probably still be considered where the text is unambiguous in a case. On the contrary, in cases where the text is ambiguous, the contextual approach will most probably be followed by the courts more increasingly to comply with the interpretation of statutes which has changed to comply with the requirements of constitutionality.

Write an essay of between four (4) and five (5) pages in which you discuss the interpretive approach favoured by the court in Commercial Union Assurance v Clarke 1972 (3) SA 508 (AD) in determining whether a statutory provision should be treated as directory or peremptory, and whether the adoption of the interpretive approach prescribed by section 39(2) of the Constitution, has rendered obsolete all previous attempts to determine whether a statutory provision is directory or peremptory

SPECIAL INSTRUCTIONS:

(a) Use the following headings to structure your essay: (1.1) Introduction [1 MARK], (1.2) The facts of the Commercial Union Assurance case [5 MARKS], (1.3) The interpretative approach adopted by the court in Commercial Union Assurance [15 MARKS], (1.4) Section 39(2) of the Constitution and its influence on statutory interpretation in South Africa [15 MARKS], (1.5) A legal opinion in support of the statement that the adoption of the interpretive approach prescribed by section 39(2) of the Constitution, has rendered obsolete all previous attempts to determine whether a statutory provision is directory or peremptory. In order to substantiate your answer for this section, you must discuss one relevant case in detail. [10 marks]; (1.6) Conclusion [4 marks]

1.1 Introduction

1.2 Facts of the Commercial Union Assurance v Clarke 1972 (3) SA 508 (AD)

While the courts generally adopted a textual approach, they openly embraced a purposive approach when called upon to decide whether a statutory provision should be treated as directory or peremptory. Botha refers to Commercial Union Assurance v Clarke 1972 (3) SA 508 (AD) as an example of this interesting historical fact.

In this case, an insurance company denied that it was liable to pay compensation to an injured road user because that road user failed to follow the correct procedure when his claim was instituted. Section 11 bis of the Motor Vehicle Insurance Act 29 of 1942 states that a claim for compensation “shall [...] be sent by registered post or by hand to the registered company”. It goes on to provide that no claim “shall be enforceable by legal proceedings if it commenced within sixty days from the date upon which the claim was sent or delivered to the registered company”. In this case the notice was delivered in time, but was sent by ordinary post. The insurance company used this technical point to try to escape liability. It argued that the statutory mail requirement was peremptory. The court rejected the company’s argument and held that the provision was directory.

1.3 The interpretative approach adopted by the court in Commercial Union Assurance v Clarke

The court held that “each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other”. This means that the court must not look at the legislative text itself to try to solve the issue (as textualists tend to do), but must instead ask whether the consequences of requiring strict compliance would be fair (just) in the circumstances or practical (functional) in the circumstances (given the purpose of the legislative provision in the first place). This is an open-ended question that can only be solved on the facts of each case. The purpose of the legislation is decisive in this regard. Botha is correct. The court took the following into account:

(1) The imperative use of the language in the section.
(2) The purpose of the section, which was to protect claimants by ensuring that they had definite proof of the date upon which the 60 days period started to run.
(3) That if a claimant decided not to register the letter, he forfeited this protection himself and took the risk upon himself.
(4) That the company was not prejudiced in any way by the fact that the letter was sent by ordinary post and received more than 60 days before legal proceeding commenced.

In the circumstances, to hold that the company could escape liability on the basis of a technicality which had not prejudiced them at all would be unfair and unjust. The court therefore held that the provision was directory only, and that it had substantially been complied with. The decisive thing to note is that the court essentially decided the case on what would be fair (and practical) in the circumstances, given the overall purpose of the legislation. It thus applied a purposive approach, as Botha correctly suggests.

1.4 Section 39(2) of the Constitution and its influence on statutory interpretation in South Africa

Section 39(2) of the Constitution provides:
“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”

S 39(2) is an authoritative provision, which in effect means that all courts, tribunals or forums must review the aim and purpose of legislation in light of the Bill of Rights: unambiguous text and plain meanings are longer considered as being sufficient. S 39(2) of the Constitution forces the interpreter to promote the values and objects of the Bill of Rights, before reading a particular legislative text.

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**How should the phrase “have regard to” be interpreted and understood in this case?**

The Supreme Court of Appeal answered the question by asking, in a textualist fashion, what the ordinary meaning of the words “have regard to” was. To answer this question, the court looked at the way in which the phrase has been applied by our courts for many years.

These cases made it clear that “to have regard to” meant no more than “to take into consideration” or “to take into account” or “not to overlook”. This meant that, when granting quotas in terms of section 18(5), the Minister had to take the principle of equity mentioned in section 2 into consideration, but did not have to make it his special concern. It was clear from the facts that the Minister did take the need to transform the fishing industry into account when quotas were allocated. The quotas were therefore validly allocated.

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1.5

1.6 Conclusion

**Assignment Topic:**

In Daniels v Campbell 2003 (9) BCLR 969 (C) at 985, the court referred to a: “……..“new” method of interpreting statutory provisions ushered in by the enactment of first the interim Constitution and, later, of the Constitution of the Republic of South Africa Act 108, 1996.

Write an essay of between four (4) and five (5) pages in which you discuss whether or not this statement is true. In your essay you need to show whether or not the method referred to is indeed “new” or whether it was applied pre-1994 and thus only endorsed by the constitutional provisions post 1994.

Special instructions

(a) Please use the following headings to structure your essay:

1(1) Introduction—which has been provided to you below and which you merely need to copy and insert into your essay (1 mark)
The contextual approach differs from the literal approach in the following respects:

External aids to interpretation must be applied from the beginning of the process of interpretation. These aids and circumstances are indicative of the context wherein the legislation was enacted by indicating what the main mischief was that the legislation intended to address. The context can be researched by considering the legal position before the legislation, the legal problem that existed, the new solutions brought about by the statute and the reasons for the new legislation. The contextual approach differs from the literal approach in the following respects:

- The wider context may be considered form the start.
It does not matter of how unambiguous or ambiguous the grammatical meaning of the text is, the surrounding background must be considered to determine the context.

There are times when the wider context could be more important than the text itself. Purposive interpretation was introduced as a form of replacement for the mischief rule, the literal rule and the golden rule to determine cases.

In Jaga v Dönges, Schreiner JA had identified the following guidelines for the interpretation of statutes:

- From the beginning the interpreter may take a wider context of provision into consideration with the legislative text in question.
- The relevant contextual factors must be taken into account, irrespective of how unambiguous or ambiguous the grammatical meaning of the text is.
- There are times when the wider context could be more important than the text itself.
- When the meaning of the text and context is determined, it must be applied, even if the interpreter is thinks that the legislature intended something different.

The text-in-context approach allows the courts to have inherent law-making discretion during statutory interpretation. The roles of courts are more flexible and not limited to mere textual analysis of legislation. It must however be stated that this discretion is qualified by the prerequisite that modifications of the text is possible when legislation supports a modification and when such scope and purpose is clear.

1.2.4 The impact of the Constitution (specifically s 39(2)) on statutory interpretation post 1994

Section 39(2) of the Constitution provides:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”

S 39(2) is an authoritative provision, which in effect means that all courts, tribunals or forums must review the aim and purpose of legislation in light of the Bill of Rights: unambiguous text and plain meanings are longer considered as being sufficient. S 39(2) of the Constitution forces the interpreter to promote the values and objects of the Bill of Rights, before reading a particular legislative text.

Facts of the Bato Star case: The case concerned the allocation of quotas in the fishing industry. The amount of fish that may be caught by a deep-sea fishing trawler is limited by a quota system. The quota which each trawler is allowed to catch is determined by the Minister of Environmental Affairs and Tourism in terms of the Marine Living Resources Act 18 of 1998.

Section 2 of the Act is headed “Objectives and principles” and lists the objectives of the Act, including to achieve sustainable development, to further biodiversity, and to restructure the fishing industry in order to achieve equity. The section states that the Minister must “have regard to” these objectives when he allocates quotas. Section 18(5) deals specifically with the allocation of fishing quotas. It again states that the Minister must make allocations that will achieve the objective contemplated in section 2. The Bato Star fishing company was allocated a quota for the year. However, it complained that its quota was too small, and approached the court to have the allocation of quotas set aside. The case turned on the question whether the Minister did “have regard to” the objective of achieving equity in the fishing industry when quotas were allocated.

How should the phrase “have regard to” be interpreted and understood in this case?

The Supreme Court of Appeal answered the question by asking, in a textualist fashion, what the ordinary meaning of the words “have regard to” was. To answer this question, the court looked at the way in which the phrase has been applied by our courts for many years.

These cases made it clear that “to have regard to” meant no more than “to take into consideration” or “to take into account” or “not to overlook”. This meant that, when granting quotas in terms of section 18(5), the Minister had to take the principle of equity mentioned in section 2 into consideration, but did not have to make it his special concern. It was clear from the facts that the Minister did take the need to transform the fishing industry into account when quotas were allocated. The quotas were therefore validly allocated.

Bato Star appealed to the Constitutional Court. It claimed that the Supreme Court of Appeal had interpreted the phrase “have regard to” incorrectly. Bato Star argued that the phrase “have regard to” equity not only meant that equity should be “taken into account” (as the ordinary meaning of the words suggests), but that equity should be “promoted as the overriding concern”. This alternative meaning is suggested by the context in which the phrase operates. The Constitutional Court agreed.

In his judgment, Ngcobo J expressed concern about the textual method of interpretation followed in the Supreme Court of Appeal.

He agreed that the ordinary meaning of the phrase “have regard to” was “to take into account”, but insisted that it is no longer the ordinary meaning of words that must be applied, but the purpose of legislation and the values of the Constitution. Referring to the minority judgment in Jaga v Dönges with approval, the court made the following statement:

“I accept that the ordinary meaning of the phrase ‘have regard to’ has in the past been construed by our courts to mean ‘bear in mind’ or ‘do not overlook’. However, the meaning of that phrase must be determined by the context in which it occurs. In this case that context is the statutory commitment to redressing the imbalances of the past, and more importantly, the constitutional commitment to the achievement of equality. And this means that the phrase as it relates to section 2 must be construed purposively to ‘promote the spirit, purport and objects of the Bill of Rights’. [...] The technique of paying attention to context in
statutory construction is now required by the Constitution, in particular, s 39(2). [...] I am troubled therefore by an interpretative approach that pays too much attention to the ordinary language of the words ‘have regard to’.”

In Holomisa v Argus Newspapers Ltd the court referred to section 35(3) of the interim Constitution (the former s39(2)) that the interpretation clause of the Constitution was held to be “...not merely an interpretive directive, but a force that informs all legal institutions and decisions with the new power of constitutional values”.

In Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd v Smit, Langa DP explained that all statutes to be interpreted through the Bill of Rights in the Constitution.

1.2.5 Conclusion
You then had to end your essay and conclude your argument as a whole in a logical and coherent manner, without repeating yourself.

Write an essay between 4 and 5 pages in which you discuss the following statement.

“Statutory interpretation as a discipline lacked a single theoretical starting point before 1994. As a result a hotchpotch of conflicting rules, principles and methods were applied. The case of Public Carriers Association v Toll Road Concessionaries Pty (Ltd) 1990 (1) SA 925 (AD), is an example of the application of such conflicting rules, principles and methods of statutory interpretation. However, the Constitution has now laid the theoretical debate to rest by prescribing a single theoretical starting point and methodology for the discipline as a whole” (see generally Botha CJ “Statutory Interpretation An introduction for students” (2006) 47)

Special instructions:
(a) Make use of headings and include at least the following: (1) Introduction, (2) The facts of the Public Carriers Association case; (3) The orthodox text-based (literal) approach as followed by the court in Public Carriers Association, (4) The purposive (text-in-context) approach as alluded to by the court in Public Carriers Association and the purposive approach, (5) Section 39(2) and the act of evaluation and conclusion.
(b) Make use of the model introduction supplied below to get your essay started.

1.1 Introduction

1.2 Facts of case
A portion of the N3 between Johannesburg and Durban was declared a toll road in terms of section 9(1) of the National Roads Act 54 of 1971. Section 9(3) of the Act provided that a toll road shall not be declared unless “an alternative road to the intended toll road, along which the same destination or destinations may be reached” is available to road users. The alternative road which was provided overlapped the toll road for a total distance of 79 kilometres, but bypassed all the toll gates, thereby enabling motorists travelling along it to avoid paying toll charges. An association of public road carriers challenged the new toll road on the grounds that a proper “alternative road” had not been made available as required by section 9(3) of the Act. The association claims that the phrase “an alternative road” means an alternative roadway and not an alternative route. It was thus argued that, for there to be an alternative road, two physically separate roadways must exist for the motorist to choose from. Since the use of the so-called alternative road involved travelling a total of 79 kilometres along the toll road, it was not an “alternative road” as required. The toll road operators argued that “alternative road” means “an alternative route”. In this sense two roads (or routes) are alternative roads, even though parts of them are common to both.

1.3 The Public Carriers Association v Toll Road Concessionaries case is a recent example of the textual approach. This is considered to be the last authoritative statement (by the then Appellate Division) of the textual approach before the new constitutional order was introduced. The judgment suggested that if the textual approach could not solve interpretation problems then the purpose of the legislation could. Through this, the court partially recognised the text-in-context approach. This was, however, only in cases where the textual approach failed. Although this case provides a bridge between the textual approach and text-in-context approach, it still serves as a good example of the textual approach. The court has made its decision in favour of the toll road operators. Firstly, the rules of the textual approach were applied to the question. The statement made was that the primary rule in the construction of statutory provisions is to determine what the legislature intended. The court also said that the words under the enactment must firstly be given their ordinary grammatical meaning; otherwise it could not be what the legislature contemplated. The courts turned to the dictionary to find the clear meaning of the terms “roads” and “alternative”.

After consultation with the dictionary, there was no clear meaning of the term “an alternative road” as it was not limited to a single grammatical meaning. Both parties had different interpretations that were linguistically feasible, and therefore the court turned to secondary aids of textual interpretation which was of no assistance. The court then turned to common law
presumptions. None of the presumptions helped as an indication as to the correct interpretation to be accepted by the court. The textual approach could not solve the problem and a solution had to be found. In order to resolve the dispute, the court decided to look at the purpose of the provision. A controversial step was taken by declaring that it should adopt the interpretation which best served that purpose. The court then made the following statement: “It must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it. But where its application results in ambiguity and one seeks to determine which of more than one meaning was intended by the legislature, one may in my view properly have regard to the purpose of the provision under consideration to achieve such objective.” The court further declared that the purpose of s 9(3) was to ensure road users could reach their destination without paying the new toll fees. The court stated that “an alternative road” meant “an alternative route” and not “an alternative roadway”. All that was required was a route that would bypass the toll gates.

1.4
The purposive (text-in-context) approach

Even before 1994, the purposive approach was applied by the courts from time to time. This approach dates back to 16th century English law and has resulted in a number of important minority judgments.

The purpose of the legislation is the most important factor in terms of the text-in-context approach. The law-text in context of surrounding circumstances, as well as social and political considerations, is taken into account. The most important rule of the contextual approach is the so-called mischief rule.

In Construction of Statutes, Elmer Driedger defines the mischief rule as follows: “A statute is to be so construed as to suppress the mischief and advance the remedy, thus giving the courts considerable latitude in achieving the objective of the legislature despite any inadequacy in the language employed by it.”

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Use of common-law presumptions and various aids to interpretation are important tools in the quest for the scope and purpose of legislation.

1.5
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Facts of the Bato Star case. The case concerned the allocation of quotas in the fishing industry. The amount of fish that may be caught by a deep-sea fishing trawler is limited by a quota system. The quota which each trawler is allowed to catch is determined by the Minister of Environmental Affairs and Tourism in terms of the Marine Living Resources Act 18 of 1998. Section 2 of the Act is headed “Objectives and principles” and lists the objectives of the Act, including to achieve sustainable development, to further biodiversity, and to restructure the fishing industry in order to achieve equity. The section states that the Minister must “have regard to” these objectives when he allocates quotas. Section 18(5) deals specifically with the allocation of fishing quotas. It again states that the Minister must make allocations that will achieve the objective contemplated in section 2. The Bato Star fishing company was allocated a quota for the year. However, it complained that its quota was too small, and approached the court to have the allocation of quotas set aside. The case turned on the question whether the Minister did “have regard to” the objective of achieving equity in the fishing industry when quotas were allocated.

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1.6 Conclusion

In Metiso v Commanding Officer, Port Elizabeth Prison 1994 (4) SA 592 (SE) at 597F, Froneman J points out the following:

“*The interpretive notion of ascertaining ‘the intention of the Legislature’ does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that both the purpose and method of statutory interpretation should be different from what it was before the commencement of the Constitution on 27 April 1994.*

*Write an essay of between four (4) and five (5) pages in which you discuss whether the statement of Froneman J reflects the interpretative trend in South Africa post 1994.*

Special Instructions:

(a) Make use of headings and include at least the following (1) Introduction, (2) The interpretative approach adopted by South African courts pre-1994 and the criticisms thereof (name the approach and discuss the criticisms only), (3) The interpretative approach adopted by South African courts post 1994, (4) The impact of the Constitution (specifically section 39(2)) on statutory interpretation post 1994, (5) Critical evaluation and conclusion

1.1 Introduction
1.2
The interpretative approach adopted by South African courts pre-1994 was the orthodox text-based (literal) approach. Criticism of the textual approach

- Firstly, if the legislative text is ambiguous, then common-law presumptions is reduced to a ‘last-resort’.
- The narrow approach is that words are regarded as the primary index to legislative meaning. The court’s view in R v Hildick-Smith: “[t]here is only one kind of interpretation with one definite object, and that is to ascertain the true intention of the legislature as expressed in the Act.”
- Other aids to interpretation, whether internal or external, which can assist in the meaning of text-in-context, are ignored. The interpreter will not have recourse, with all the aids to his or her disposal, unless the textual meaning is ambiguous.
- The clarity of the language used in legislation will determine how it is interpreted by a particular court.
- Not all texts are clear enough to have one final interpretation as a possibility. A discipline such as interpretation of statutes indicates that legislation is not often clear and unambiguous.
- There is little room for judicial law-making and the courts must interpret the law mechanically. According to the text-based approach, the legislature has enacted everything into legislation and is aware of existing law. The doctrine of the separation of powers is slavish and rigid, which only allows the court to interpret the law and not make it. Corrective interpretation is the only instance where a court deviates from the literal meaning of legislation and this in exceptional cases. It is in general the function of the legislature to correct omissions and bad drafting in legislation. According to the maxim, *iudicis est ius dicere sed non dare*, it is a function of the court to interpret the law and not to make it. The *casus omissus* rule is also based on the principle that a court must interpret the law and not make it.

The text-based approach was predominantly used prior to 1994 in South Africa and is still applied in many courts post 27 April 1994.

1.3
The interpretative approach adopted by South African courts post-1994 was the purposive (text-in-context) approach. Even before 1994, the purposive approach was applied by the courts from time to time. This approach dates back to 16th century English law and has resulted in a number of important minority judgments.

The purpose of the legislation is the most important factor in terms of the text-in-context approach. The law-text in context of surrounding circumstances, as well as social and political considerations, is taken into account. The most important rule of the contextual approach is the so-called *mischief* rule.

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1.5 Critical evaluation