[O' BRIAIN, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

RATIBE MUTI ABDULHAMID

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 2420).

Criminal law—Constitutional law—Murder—Premeditated and unpremeditated murder—The Criminal Code, Cap. 154, *sections* 204, 205 *and* 207 (*as they stood prior to the Criminal Code* (*Amendment*) *Law, No.* 3 *of* 1962)—*Article* 7, *paragraph* 2, *of the Constitution—Section* 205 *provides a mandatory sentence of death for all cases of murder—Article* 7, *paragraph* 2 *of the Constitution excludes the death penalty in cases of murder other than cases of premeditated murder—Consequently there is a statutory lacuna regarding punishment of the crime of unpremeditated murder where conviction rests on section* 204—*Which lacuna the courts have no power to fill—Notwithstanding their powers as well as their duty under paragraphs* 1, 4 *and* 5 *of Article* 188, *of the Constitution to construe and apply the laws in force on the date of the coming into force of the Constitution with such amendments or modifications as may be necessary to bring them into accord with the Constitution—Therefore, pending a new legislation* (*such new legislation has now been enacted by the Criminal Code* (*Amendment*) *Law, No.* 3 *of* 1962), *there is no power to impose any sentence in respect of the crime of unpremeditated murder in cases where the conviction rests on section* 204 *of the Criminal Code.*

Constitutional Law—Supreme Constitutional Court—How far decisions of the S.C.C. are binding on the courts—Ratio decidendi—Obiter dicta—Articles 144, 148, 149 *and* 180 *of the Constitution—Functions of the Courts and the Supreme Constitutional Court, respectively, in relation to matters of interpretation of the Criminal Code—Constitution Part X—No question of conflict or contest of power or competence within the meaning of Article* 139 *of the Constitution arises where the courts in the exercise of their jurisdiction have to differ from opinions of the Supreme Constitutional Court—Exclusive jurisdiction of the Supreme Constitutional Court on issues of unconstitutionality as distinct from interpretation of the Criminal Code—Ambiguities in the Constitution—Article* 149(*b*) *of the Constitution.*

Criminal law—Unpremeditated murder—Unlawful killing—Sections 203 and 206 of the Criminal Code (as they stood prior to the amending Law No. 3 of 1962, supra).

The appellant was convicted on the 27th September, 1961, on her own plea, by the Assize Court of the murder without premeditation of her husband and sentenced to ten years' imprisonment. The conviction rested on section 204 of the Criminal Code. She appealed against sentence but the point was allowed to be taken before the High Court that there was no power in law to impose any penalty in respect of unpremeditated murder.

For the purpose of clarifying the issues involved in this case it would seem convenient to quote the material provisions of the Criminal Code (as they stood prior to the Criminal Code (Amendment) Law, No. 3 of 1962) as well as the material provisions of the constitution.

Section 203 of the Criminal Code:

"Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty whether such omission is or is not accompanied by an intention to cause death or bodily harm".

Section 204 of the Criminal Code:

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder".

Section 205 of the Criminal Code:

"Any person convicted of murder shall be sentenced to death".

Section 206 of the Criminal Code:

"Any person who commits the felony of manslaughter is liable to imprisonment for life".

Section 207 defines "malice aforethought" substantially on the same lines as in English Law. There is no doubt that the term "malice aforethought" covers many instances of "unpremeditated murder" within the meaning of Article 7, paragraph 2, of the Constitution.

Article 7, paragraph 2, of the Constitution:

"No person shall be deprived of his life except in the execution of a sentence of a competent court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law".

Article 188, paragraph 1, of the Constitution:

"Subject to the provisions of this Constitution and to the following provisions of this Article, all laws in force on the date of the coming into operation of this Constitution shall, until amended, whether by way of variation, addition or repeal, by any law or communal law as the case may be, made under this Constitution, continue in force on or after that date, and shall, as from that date be construed and applied with such modification as may be necessary to bring them into conformity with this Constitution".

Article 188, paragraph 4, of the Constitution:

"Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this Article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of this Constitution including the Transitional Provisions thereof".

Article 188, paragraph 5, of the Constitution:

"In this Article -

'law' includes any public instrument made before the date of the coming into operation of this Constitution by virtue of such law;

'modification' includes amendment, adaptation and repeal".

On *March 6, 1961, the Supreme Constitutional Court held* in the case *The Republic and Nicolas Pantopiou Loftis*, 1 R.S C.C. 30, that section 205 of the Criminal Code to the extent to which it provides for the death penalty in cases of murder other than premeditated murder, is repugnant to and inconsistent with paragraph 2 of Article 7 of the Constitution. The Supreme Constitutional Court in the same case proceeded further and laid down by way of modification of section 205

that a person convicted of murder other than premeditated murder shall be liable to imprisonment for life. That was a decision on a reference made to the Supreme Constitutional Court by the High Court under Article 144, paragraph 1, of the Constitution, on the question, *inter alia*, whether section 205 of the Criminal Code is wholly or partially unconstitutional.

It was in that state of affairs that the Assize Court convicted the appellant under section 204 of the Criminal Code of the unpremeditated murder of her husband and sentenced her to ten years' imprisonment under section 205 as modified by the Supreme Constitutional Court in the Lofti's case (*supra*).

Counsel for the appellant argued that Article 7, paragraph 2, of the Constitution, excluding the death penalty in cases of murder other than premeditated murder, resulted in a *casus omissus* with respect to punishment of the crime of murder without premeditation and that the decision of the Supreme Constitutional Court in Lofti's case (*supra*) in so far as it provides punishment for unpremeditated murder is mere *obiter* not binding on any court, inasmuch as it was outside the question reserved for their decision by the High Court. Counsel for the Republic contended that the opinion of the Supreme Constitutional Court even upon the matter not reserved to them was as binding upon the High Court as was their decision upon the question so reserved. He further invited the High Court, before holding otherwise, to refer the question to the Supreme Constitutional Court there being an issue of conflict or contest of power or competence within the meaning of Article 139 of the Constitution.

Held: (1) Section 205 of the Criminal Code making it mandatory to impose the sentence of death and none other in all cases of murder as defined in section 204 (read in conjunction with section 207), is, to the extent to which it provides for the death penalty for murder other than premeditated murder, repugnant to, and inconsistent with Article 7, paragraph 2, of the Constitution. (See: *The Republic and Loftis*, 1 R.S.C.C. 30).

(2) (ZEKIA and JOSEPHIDES, JJ. *dissenting*):

(a) Therefore, where a conviction of unpremeditated murder rests as in this case on section 204, the death penalty provided for by section 205 being unconstitutional, the Criminal Code as it now stands provides no other penalty for such conviction resting on the former section. Consequently, Article 7,

paragraph 2, of the Constitution has thus created a *lacuna* in the Criminal Code.

(b) Although Article 188, paragraphs 4 and 5, of the Constitution confers upon the Courts powers to apply the laws in force on the date of the coming into operation of the Constitution (i.e. on the 16th August, 1960) with such modifications as may be necessary to bring them into accord with the provisions of the Constitution, such powers however, do not extend to legislative powers in order to fill statutory *lacunae* in the civil or criminal law of the country. It follows that, the appellant having pleaded guilty on a charge of unpremeditated murder under section 204 and been convicted on that count and on that section, no penalty can be imposed in this case and the appellant is entitled to be discharged immediately.

(3) (ZEKIA and JOSEPHIDES, JJ. *abstaining from deciding these points*):

(a) True, in *Loftis'* case (*supra*) the Supreme Constitutional Court after deciding the question reserved to them by this Court under Article 144, paragraph 1, of the Constitution, *viz.* whether *inter alia*, section 205 of the Criminal Code was wholly or partially unconstitutional, proceeded further and laid down by way of modification of section 205 the penalty to be incurred in cases of unpremeditated murder, to the effect that "any person convicted of murder other than premeditated murder shall be liable to imprisonment for life". But these views of the Supreme Constitutional Court form no part of the *ratio decidendi* of the decision and should be treated as mere *obiter dicta* made with the intention of helping in the elucidation of difficulties arising but not intended to have, and certainly not having, any binding effect upon other courts.

(b) Under the Constitution, the Criminal Code, in so far as it is not unconstitutional, is clearly to be judicially interpreted and applied by the Courts established under Part X of the Constitution, with the High Court as the final Court of Appeal. The Supreme Constitutional Court has no function in relation to such matters, save indirectly, where a question of unconstitutionality arises.

(c) No issue of conflict or contest of powers or competence

within the meaning of Article 139 of the Constitution is involved in this case.

Held, Per ZEKIA, J. in his dissenting judgment:

(1) Article 188, paragraphs 1 and 4, of the Constitution empowers the Court to adapt the laws in such a way as is necessary to bring them into conformity with the Constitution.

It has been argued that by a mere modification of section 205 by inserting the word "premeditated" before the word "murder" occurring in the section conformity with the Constitution will be achieved.

I agree that if section 205 is modified to read "any person convicted of premeditated murder shall be sentenced to death" that section will conform with the letter of the Constitution but what I respectfully disagree is that, if nothing more is added to this section or to any other relevant section of the criminal law by way of adaptation regarding the punishment in unpremeditated murder, we shall not be acting in conformity with the spirit of the Constitution.

(2) I am of the opinion that a reasonabe adaptation of the Criminal Code relating to homicidal offences necessitates the reading of section 205 in the way I have already suggested. This is not a case where provision is made or stands in a criminal code which declares a particular act or omission to be an offence and no provision, either general or specific, for punishment is made in respect of such an offence. I would readily agree that the Court cannot impose any punishment for such an offence which stands by itself even by way of adaptation. Take for instance the offence of obtaining money by false pretences: if punishment is not provided for the offender no punishment can be imposed at all. Here we are dealing with an offence which stands in the middle of a set of graded offences, that is, felonious homicides where offences are classed and punished according to their gravity. The unpremeditated murder is an intermediate offence in the sense that it stands in gravity between premeditated murder and manslaughter. The punishment is expressly provided for these two offences and still in force; for the former capital punishment and for the latter life imprisonment. Can it be said that by Article 7, paragraph 2, of the Constitution it was intended to leave unpunished unpremeditated murder

while punishment for manslaughter, a lesser offence, is retained intact? Certainly not. Can one doubt that the intention was to treat the unpremeditated murder as far as punishment is concerned on the same footing as manslaughter? Are we not bound to come to this conclusion by necessary implication? Personally I have no doubt in the matter. The word "adaptation" is wider in scope and in my view enables the Court to recast the relevant sections of the Criminal Code to the extent which is necessary to bring the law to line with the letter and spirit of the Constitution.

Held, Per JOSEPHIDES, J. in his dissenting judgment;

(1) It is the duty of every Court in the Republic in applying the provisions of any law in force on the date of the coming into operation of the Constitution to amend it, adapt it, or repeal it as to bring it into conformity with the provisions of the Constitution (see Article 188, paragraphs 1, 4 and 5, of the Constitution).

(2) In view of the express provisions of Article 7, paragraph 2, of the Constitution, the provision of death penalty for murder, other than premeditated murder, in section 205 of the Criminal Code, is repugnant to or inconsistent with the Constitution; and it is the duty of a court exercising criminal jurisdiction to apply section 205 with such amendment or adaptation as may be necessary to bring it into accord with the Constitution.

(3) It has been submitted that there is a *lacuna* in the law and that it is not the duty of any court to fill such *lacuna*, as distinct from doing what is strictly necessary to adapt the law to conform with the Constitution.

In deciding this matter we ought to consider the spirit as well as the letter of the statute on which this question arises. There is no doubt what was the clear intention of the framers of the Constitution; it was to have a body of legislation ready for the new Republic at its inception and during the first years of its existence until new laws were made by the legislature of the Republic. That is why by express provision in the Constitution the laws in force in the former Colony of Cyprus were saved, subject to "such modification as may be necessary to bring them into conformity with the Constitution", and all Courts in the Republic were empowered to apply them accordingly (Article 188.1 and 4). In those

circumstances it is inconceivable that it was ever intended to create by implication gaps in the criminal law, especially having regard to the very wide powers conferred on the courts of the Republic not only to amend but to adapt all existing laws.

(4) In the light of these considerations, I am of the view that the power of adaptation given to the courts, which is a much wider power than that of amendment or repeal, is a power to adapt the law in such a way as not to be repugnant to, or inconsistent with, any of the provisions of the Constitution; and not simply to amend it to the extent that it is strictly necessary to conform with the Constitution, thus leaving gaps in the laws saved under the Constitution.

(5) I am, therefore, of opinion that it is our duty to adapt section 205 of the Criminal Code in such a way as to provide for a punishment for unpremeditated murder other than the death penalty. The heaviest punishment, apart from the death penalty, provided in our Criminal Code is that for manslaughter under section 206, which is imprisonment for life; and manslaughter is the gravest crime after murder in our Code. I would, therefore, adapt section 205 to provide that any person convicted of murder without premeditation shall be liable to imprisonment for life.

(6) It would seem that my adaptation of section 205 coincides in substance with that adopted by the Supreme Constitutional Court in the *Loftis*' case and it, therefore, follows that no question of any conflict arises in so far as the proposed modification of that section is concerned.

(7) The question reserved for the decision of the Supreme Constitutional Court under Article 144 of the Constitution was whether, having regard to Article 7, paragraph 2, of the Constitution, sections 204, 205 and/or 207 of the Criminal Code, Cap. 154, were wholly or partially unconstitutional. The Supreme Constitutional Court gave its decision on the question reserved to the effect that section 205 "to the extent to which it provides for the death penalty for murder other than premeditated murder is inconsistent with paragraph 2 of Article 7 of the Constitution", and it then went on to lay down how it should be applied modified. The question, which was reserved under Article 144, and not under Article 149 of the Constitution, was, *inter alia*, the unconstitutionality of section 205 of the Criminal Code and it may well be that the suggested

modification was made *obiter* by that Court, in which case it does not form part of the *ratio decidendi*. But, having regard to the conclusion I have reached in this case, it becomes unnecessary for me to consider that matter.

(8) The other point raised by counsel for the Republic, is that the question whether it was within the competence of the Supreme Constitutional Court to lay down a punishment for unpremeditated murder in *Loftis*' case should be referred to them for their decision, under the provisions of Article 139, paragraph 2, of the Constitution. In the first place it does not appear that Article 139, paragraph 2, is at all applicable. That paragraph refers to any question arising as to the "competence" of the Supreme Constitutional Court, and not to any "conflict" or "contest" between any courts or judicial authorities, which is expressly provided for in paragraph 1 of the same Article. But even if Article 139, paragraph 2, were applicable to this case, it seems to me that no question as to the "competence" of the Supreme Constitutional Court arises; nor is there any conflict or contest between this Court and that Court. Finally, even if there was a conflict or contest, I doubt whether section 139, paragraph 2, would be applicable to the present case in which the Supreme Constitutional Court has already decided the question reserved to it under Article 144. Because, if that were so, it would mean that the Supreme Constitutional Court would be asked to confirm or review its own decisions. But as already stated it is not necessary for the purposes of this appeal to decide this question either.

Appeal allowed. The appellant to be discharged forthwith.

Cases referred to:

The Republic and Nicolas Pantopiou Loftis, 1 R.S.C.C. 30; *Jones v. Smart* I.T.R. 52.

Per curiam: There is little doubt that it was open to the prosecution in this case to prefer a charge for manslaughter under section 203 of the Criminal Code and that the appellant could have been convicted and sentenced on that charge (*vide* sections 203 and 206 of the Criminal Code).

Per JOSEPHIDES, J.:

The Constitution is the supreme law of the Republic

(Article 179, paragraph 1), and it is the duty not only of the Supreme Constitutional Court but of all the courts of the Republic to apply it; and where any provision in the Constitution is clear and unambiguous there is no necessity or duty to refer such matter to the Supreme Constitutional Court. It is only in cases of ambiguity in any Article of the Constitution that the Supreme Constitutional Court has exclusive jurisdiction to make any interpretation of the Constitution and not of any other statute (see Articles 149 and 180 of the Constitution). Furthermore, the question of the unconstitutionality (and *not* the interpretation) of any law or decision, material for the determination of any matter at issue, if raised by a party to any proceedings, must be reserved for the decision of the Supreme Constitutional Court; and that Court shall determine the "question so reserved". Such decision is binding on the court by which the question has been reserved and on the parties to the proceedings only, and it is not binding on any other court (see Articles 144 and 148).

Appeal against sentence.

The appellant was convicted on the 27.9.61 at the Assize Court of Nicosia (Criminal Case No. 9929/61) on one count of the offence of unpremeditated murder under section 204 of the Criminal Code and was sentenced by Dervish, P.D.C., Avni, D.J. and Emin D.J. to 10 years' imprisonment.

M. Fuad Bey for the appellant.

O. Beha for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgments delivered by the members of the Court.

O' BRIAIN, P.: The appellant in this case was convicted by the Assize Court of Nicosia of the murder, without premeditation, of her husband, one Djemal Mehmet Ali, and sentenced to ten years imprisonment for same. She appeals against the sentence on the ground that it is excessive, and the point is taken, on her behalf, that there is, at present, no authority in law to impose any penalty in respect of murder which is not premeditated.

The argument of Fuad Bey is that the Constitution, Article 7.2, as interpreted in the judgment of the Supreme

Constitutional Court, case No. 8/61 (to which I shall hereinafter refer as "The *Loftis* case") rendered section 205 of the Criminal Code, Cap. 154, to the extent to which it provides for the death penalty for murder other than premeditated murder unconstitutional and results in a *casus omissus* with respect to the penalty for cases of murder other than premeditated murder. In default of any legislation providing for this casus omissus, Fuad Bey submits that the position now is that while a person may be convicted of murder in such cases no Court has authority to impose a penalty in respect of same. He argues the Supreme Constitutional Court, which recognised this lacuna, in so far as it purported to apply the Criminal Code with modification, was acting entirely de hors its functions and that its observations, on this matter, are mere obiter dicta, not binding on any Court.

Mr. Beha relied on the fact that the Supreme Constitutional Court in the Loftis case, after deciding the question reserved by this Court for its decision, proceeded to express an opinion as to the effect of its decision upon the provisions of the Criminal Code, relating to the punishment for unpremeditated murder, a matter that had not been reserved by this Court. Its view was that the Constitution, Article 7 (2), created a *lacuna* in the Criminal Code and that this ought, if possible, to be obviated, a view with which, I may say, I find myself in complete agreement. It further expressed the opinion that the Courts, in applying section 205 of the Criminal Code to such cases, ought to read the section as if it contained, after the word "death" the phrase "and any person convicted of murder other than premeditated murder shall be liable to imprisonment for life". Mr. Beha contended that this opinion upon a matter not "so reserved" was as binding upon this court in these proceedings as was its decision upon the question that was "so reserved" in the *Loftis* case binding on the Court and parties in those proceedings. He invited this Court, before holding otherwise, to refer the question to the Supreme Constitutional Court pursuant to Article 144. However, he later admitted that this Article was not appropriate and abandoned this point. He submitted further that under Article 139. 1 the Supreme Constitutional Court had jurisdiction to adjudicate finally "on a recourse made in connection with any matter relating to any conflict or contest of power or competence..... arising between any organs of or authorities in the Republic". He invited the Court to

make a recourse pursuant to Rule 14(2) of the Supreme Constitutional Court Rules, 1961, dated 27th April, 1961. But, this rule relates to proceedings under paragraph 2 of Article 139 and not to a recourse under paragraph 1 of Article 139. Moreover, paragraphs 3, 4 and 5 of Article 139 show clearly that these proceedings under paragraph 1 postulate a conflict or contest of power. Is there here a conflict or contest at all within the meaning of Article 139?

At the time the decision in Loftis case was given, the express terms of the Constitution provided by Article 144. 2 that the Supreme Constitutional Court was required to hear the parties, consider and determine the question "so reserved" by the High Court and transmit its decision to this Court, Article 144. 3 imposes a restriction upon the application of any such decision.

Since it was this Court which made the reference there is no difficulty in our ascertaining what was the *ratio decidendi* in that case. As I understand the Constitution and the law, the decision of the "question so reserved" was binding upon this Court and the parties concerned in the Loftis appeal. But, the Courts in England and Cyprus, whether of co-ordinate jurisdiction or otherwise, have consistently held that only the *ratio decidendi* of a decision is a binding authority and that *obiter dicta*, though deserving respect, depending upon the authority of the Judge making them, are not binding even on inferior Courts. Under the Constitution, the Criminal Code, in so far as it is not unconstitutional, is clearly to be judicially interpreted and applied by the Courts established under Part X, with the High Court as the final Court of Appeal. It seems to me that the Supreme Constitutional Court has no function in relation to such matters, save indirectly, where a question of unconstitutionality arises.

So much being clear on the face of the Constitution can this Court accept the submission of Counsel that the Supreme Constitutional Court intended to assert jurisdiction in criminal matters, notwithstanding the letter and spirit of the Constitution? I do not think so. There is a whole field of law in respect of which the Supreme Constitutional Court has clearly exclusive jurisdiction. There is another field of law in respect of which jurisdiction is clearly vested in the Courts established under Part X. On the borders of these two fields cases may from time to time arise where it is difficult to as-

certain with certainty where the boundary is. But this is no borderline case. It is clearly a question of what punishment if any the Criminal Code empowers a Court trying an accused for unpremeditated murder to impose. It is not in every case where the Supreme Constitutional Court expresses a view upon the Civil or Criminal Law or where this Court expresses an opinion on the meaning of the Constitution that a conflict or contest of competence arises. In my opinion, the observations referred to should be treated as *obiter dicta* made with the intention of helping in the elucidation of difficulties arising but not intended to have, and certainly not having, any binding effect upon other courts.

I proceed, accordingly, to consider Fuad Bey's second submission, namely that upon a true interpretation of the Criminal Code there is a *lacuna* in respect of a penalty for murder which is not premeditated and that that *lacvna* cannot be filled until the legislative authority of the Republic passes the required legislation.

Section 204 of the Criminal Code defines murder. Section 205, dealing with the punishment of murder is in the following terms : "Any person convicted of murder shall be sentenced to death". As enacted, this latter section made it mandatory to impose the sentence of death and none other in all cases of murder.

In English law, murder may involve premeditation in the ordinary sense of that word, but this is not of the essence of the crime. "Aforethought" in the phrase "malice aforethought" does not necessarily imply premeditation but it implies intention which must necessarily precede or be contemporaneous with the act intended".

The Constitution of Cyprus, Article 7. 2 provides -

> "No person shall be deprived of his life except in the execution of a sentence of a competent court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law".

The effect of this provision is clear. Since the Constitution came into effect, notwithstanding that section 205 of the Criminal Code, which uses "murder" as a generic term as

enacted, applied to all cases of murder, this Article of the Constitution now restricts its application to a certain species of murder only, namely, murder planned and designed. In such cases, death is still the punishment and the only sentence a Court in Cyprus may lawfully pass upon an accused who is so convicted. Accordingly, if one construes section 205 of the Criminal Code as applicable only to cases of murder which are premeditated and as inapplicable to other cases of murder, section 205 is brought completely into "conformity with the Constitution" (Article 188. 1) or "into accord with the Constitution" (Article 188. 4). If this view be correct, no amendment or adaptation or repeal of the Criminal Code is required so as to secure that there shall be no contravention of the Constitution. Can that which is not required be described as necessary?

The Supreme Constitutional Court has interpreted the Constitution, Article 7, on a reference from this Court pursuant to Article 144, in the Loftis case, though that decision operated so as to make section 205 of the Criminal Code applicable to such proceedings only. But the *ratio decidendi* of the Supreme Constitutional Court in the Loftis case appears to me clear and convincing and one which should be adopted by this Court and all Courts applying the Criminal Code to cases of premeditated murder.

This leaves for consideration then the position regarding cases of murder where the element of premeditation is absent. Counsel for the appellant argues that there is now no express statutory provision for sentence in such cases of murder. Counsel for the Republic does not contravert this. Therefore we have both parties admitting a *lacuna* which will continue until amending legislation is enacted by the Legislature, unless, in this transitional period the Courts applying the Criminal Code have power to amend, adapt or repeal the provisions of the Code.

It is argued by the Counsel for the Republic that one of the transitional provisions of the Constitution so empowers the Courts of the Republic, namely Article 188.

Article 188 unquestionably confers powers upon the Courts to modify the laws, or as Fuad Bey has put it, confers powers on the Courts to legislate. But reading Article 188 as a whole, I am satisfied that this very anomalous function conferred upon the Courts of the Republic, conflicting as it

does with the classic and time honoured segregation of the Executive, Legislative and Judicial powers, is strictly limited in two respects, *viz*: (1) time, and (2) purpose. As to time, Article 188 provides -

> "1. All laws in force on the date of the coming into operation of this Constitution shall until amended .....by any law..... continue in force on or after that date".
>
> "4. Any Court in the Republic applying the provisions of any such law which continues in force under paragraph (1) of this Article, shall apply it in relation to any such period....."

These provisions read together clearly limit the power to modify to the period between 16th August, 1960 and the enactment of legislation by the Legislature of the Republic. As to object, the terms of Article 188. 1 and 188. 4, show no less clearly that the purpose or object for which use may be made of this power is strictly limited. Article 188. 1 -

> ".....all laws shall..... be construed and applied with such modification as may be necessary to bring them into conformity with this Constitution".

Article 188. 4 -

> "Any court in the Republic applying the provisions of such law which continues in force under paragraph (1) of this Article, shall apply it.....with such modification as may be necessary to bring it into accord with the provisions of this Constitution....."

The repetition in both paragraphs of the phrase "such modification as may be necessary to bring them/it into conformity with.....this Constitution" indicates to my mind that the modification must be directed to that purpose and, in addition, must be necessary for same. If it were the intention of the Constitution makers that the Courts should exercise, even for a limited period, legislative power in order to fill *lacunae* in the Civil or Criminal Law of the country, nothing would have been easier than to provide this in express terms in one or both of these paragraphs. I take to the view that necessity to avoid conflict with the Constitution and no other circumstance whatever is prescribed as justifying the use by the Courts of the very extraordinary power given them by

Article 188. This view is confirmed by the observation of Buller J. in *Jones v. Smart* I.T.R. 52 when he stated "A *casus omissus* can in no case be supplied by a Court of Law for that would be to make laws". Now, the Courts of Cyprus find themselves compelled to exercise, for a transitional period, what Fuad Bey, in his able argument, has aptly described as quasi-legislative powers.

I entertain no doubt that if the Courts of Cyprus are to retain intact their independence and impartiality they must in exercising this power proceed with care and in no of hand manner. They should invoke and exercise this anomalous power only when left with no alternative but to apply a law which in terms does violence to the Constitution.

The Supreme Constitutional Court in their judgment, speaking of the effect of Article 7. 2 on the Criminal Code describe it as being "only a limitation affecting the imposition of the death penalty". I respectfully agree. But the death penalty was, for years before 1960, the only penalty a Court in Cyprus could impose in a case of murder. If that sole penalty be now restricted to cases of premeditated murder, it seems to me to follow, as a matter of law and logic, that no penalty may be imposed by our Courts until the law is amended by legislature. This is a case involving the liberty of the citizen. Holding as I do, after most anxious consideration, that there is no justification or warrant in law for imprisoning the appellant she is entitled to an immediate discharge, however lacking in merit she may be. Even a convicted murderess is entitled to receive from this High Court of Justice the full measure of her legal rights, not one jot less, not one iota more. The consequences of applying a law, correctly interpreted, should not in any way concern the Courts. As the Jurists of Ancient Rome with their wonderful genius for coining the apt phrase so well put it, "*Fiat justitia ruat coelum*", "Let right be done though the Heavens fall".

I would allow this appeal and discharge the appellant forthwith.

ZEKIA, J.: The appellant in this case was convicted of unpremeditated murder and sentenced to 10 years imprisonment. She appealed against the sentence on the ground that it is excessive. This Court, however, thought fit to allow counsel for the appellant, assigned by the Court, to appeal against the legality of the sentence also.

Article 7, paragraph 2, of the Constitution restricts the penalty of death to premeditated murder without making provision for the punishment to be imposed on unpremeditated murder.

The Criminal Code so far does not contain any express provision for the punishment to be imposed on unpremeditated murder. It is submitted therefore that the appellant could not be legally sentenced to any term of imprisonment. It was further submitted that the decision of the Supreme Constitutional Court on this point (No. 8/61) to the effect that there was a *lacuna* and that the relevant section of the Criminal Code should be read as providing life imprisonment in this category of offences is in the nature of obiter dicta and not binding on the Courts of the Land. The *lacuna* created by Article 7, paragraph 2, of the Constitution could only be filled in by legislative authority and not by any Court.

I am content to dispose of this appeal by saying that by an adaptation of section 205 of the Criminal Code to the provisions of the Constitution the apparent defect in law is remedied. By such adaptation it is permissible to read section 205 of the Criminal Code modified as follows: "Any person convicted of premeditated murder shall be sentenced to death and any person convicted of unpremeditated murder shall be sentenced to life imprisonment".

For convenience, the relevant Articles of the Constitution and the sections of the Criminal Law are set out hereunder:

Article 7, paragraph 2 :

"No person shall be deprived of his life except in the execution of a sentence of a competent court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law".

Article 188, paragraph 1:

"Subject to the provisions of this Constitution and to the following provisions of this Article, all laws in force on the date of the coming into operation of this Constitution shall, until amended, whether by way of variation, addition or repeal, by any law or communal law, as the case may be. made under this Constitution, continue in

force on or after that date, and shall, as from that date be construed and applied with such modification as may be necessary to bring them into conformity with this Constitution".

Article 188, paragraph 4:

"Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this Article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of this Constitution including the Transitional Provisions thereof".

Article 188, paragraph 5:

"In this Article -
'law' includes any public instrument made before the date of the coming into operation of this Constitution by virtue of such law;
'modification' includes amendment, adaptation and repeal".

Section 203 of the Criminal Code:

"Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty whether such omission is or is not accompanied by an intention to cause death or bodily harm".

Section 204 of the Criminal Code:

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder".

Section 205 of the Criminal Code:

"Any person convicted of murder shall be sentenced to death".

Section 206 of the Criminal Code:

"Any person who commits the felony of manslaughter is liable to imprisonment for life".

As I said Article 7, paragraph 2, of the Constitution restricts capital punishment to cases of premeditated murder. It contains no reference to the punishment to be imposed on unpremeditated murder. From the definition of murder and

manslaughter, given above, it is clear that murder is an aggravated form of manslaughter, the former having an additional element, namely, the malice aforethought. It is always open to the trial court to convict and punish a person who may be found guilty of unpremeditated murder of the lesser offence of manslaughter and sentence him up to life imprisonment.

Article 188, paragraphs 1 and 4, of the Constitution empowers the Court to adapt the laws in such a way as is necessary to bring them into conformity with the Constitution.

It has been argued that by a mere modification of section 205 by inserting the word "premeditated" before the word "murder" occurring in the section conformity with the Constitution will be achieved.

I agree that if section 205 is modified to read "any person convicted of premeditated murder shall be sentenced to death" that section will conform with the letter of the Constitution but what I respectfully disagree is that if nothing more is added to this section or to any other relevant section of the criminal law by way of adaptation regarding the punishment in unpremeditated murder we shall not be acting in conformity with the spirit of the Constitution.

I am of the opinion that a reasonable adaptation of the Criminal Code relating to homicidal offences necessitates the reading of section 205 in the way I have already suggested. This is not a case where provision is made or stands in a criminal code which declares a particular act or omission to be an offence and no provision, either general or specific, for punishment is made in respect of such an offence. I would readily agree that the Court cannot impose any punishment for such an offence which stands by itself even by way of adaptation. Take for instance the offence of obtaining money by false pretences : if punishment is not provided for the offender no punishment can be imposed at all. Here we are dealing with an offence which stands in the middle of a set of graded offences, that is, felonious homicides where offences are classed and punished according to their gravity. The unpremeditated murder is an intermediate offence in the sense that it stands in gravity between premeditated murder and manslaughter. The punishment is expressly provided for these two offences and still in force; for the former capital punishment and for the latter life imprisonment. Can it be said that by Article 7, paragraph 2, of the Constitution it was

intended to leave unpunished unpremeditated murder while punishment for manslaughter, a lesser offence, is retained intact? Certainly not. Can one doubt that the intention was to treat the unpremeditated murder as far as punishment is concerned on the same footing as manslaughter. Are we not bound to come to this conclusion by necessary implication? Personally I have no doubt in the matter. The word "adaptation" is wider in scope and in my view enables the Court to recast the relevant sections of the Criminal Code to the extent which is necessary to bring the law to line with the letter and spirit of the Constitution.

I need hardly say that it is most undesirable to delay legislation obviating the situation thus arisen.

I am of the opinion, therefore, that the appellant in this case was rightly sentenced to imprisonment.

VASSILIADES, J.: This is an appeal against a sentence of ten years imprisonment, imposed on the appellant by the Assize Court of Nicosia, for the murder of her husband.

The appellant, a young woman of the age of 20, killed the deceased, a kebab-maker, of the age of about 38, with an axe, in their bedroom at Nicosia, the night of the 11th June, last. The injuries which caused death, were the result of two blows on the head : one with the blunt side of the axe, and a second with the sharp end. They caused severe injuries, including laceration of the brain, with fatal consequences.

The appellant at first denied knowledge of the crime; but shortly after her arrest, she volunteered a statement to one of the investigating police-officers where she gave her version of the circumstances which led to the killing of her husband.

Her case was that the deceased, a man of apparently very low moral standards, and over 30 convictions against him, mostly for crimes of violence, in whose hands she was leading a miserable and unhappy life, had a big knife in their bedroom, and in addition, he brought the axe in question, with which he threatened to kill her that night. So she went with him to bed, and when he was asleep, according to her own statement, appellant "murmured to herself". (Blue 14/15).

> "Instead of you cutting my head, I will cut off your head' .....As soon as Djemil (the deceased) has slept, (the statement continues), I got up, picked up the axe which Djemil had brought up earlier, and struck him

once near his left eye-brow with the back of the axe. Djemil immediately got up and rushed on me in order to take the axe, and said: 'You acted earlier than I'. I pulled and took away the axe from the hands of Djemil, and this time I struck once more on his head with the sharp side of the axe and said: 'Before you cut off my head I will cut off your head'. After Djemil received the second blow on his head, he fell in the bed and remained there".

These are the circumstances in which, according to the appellant, the murder was committed.

At the completion of the Police investigation about two weeks after the crime (Blue 17), appellant was formally charged with causing the death of her husband by a "wilful and unlawful act". Her answer to the charge after caution, was: "I have admitted anyhow; I stick to my word".

In due course, appellant was committed for trial on a charge of murder.

The information filed against her by the Attorney-General contained a single count: for "premeditated murder, contrary to sections 204 and 205 of the Criminal Code, Cap. 154, and Art. 7 of the Constitution", the count read.

The particulars of the offence, as stated in the information, were:-

"The accused on the 11th June, 1961, at Nicosia in the District of Nicosia, did of malice aforethought cause the death of one Djemil Mehmed Ali of Lapithos then of Nicosia, by an unlawful act, after due premeditation".

I read the words "due premeditation" to mean : premeditation sufficient to make the crime a premeditated murder

To this charge, appellant pleaded 'not guilty'.

At the end of the opening of the case, by counsel for the prosecution, after plea, the Court asked the question whether-

"apart from the statement of the accused herself, was there any independent evidence tending to prove or disprove, premeditation?" (Page 3D. of the record).

I make special reference to this question because, in my opinion, it indicates what was in the mind of the Court, at

that early stage of the trial, regarding the crime of murder.

After hearing counsel for the prosecution, as well as counsel for the defence on this matter, the Court is recorded to have asked: (at p.5E.)

> "In view of what you stated as to what the evidence for the Republic would be, and in view of the submission made by Mr. Denktash (counsel for the defence) don't you feel that it would be more proper if a second charge be added against the accused of having committed this offence, without premeditation?"

Learned counsel for the Republic took the hint, and by leave of the Court, added a second count on the information, in the same manner as he would have done, if he had to add a count for manslaughter; or for another crime. The following count was then added as second count:

> "Murder contrary to sections 204 and 205 of the Criminal Code, Cap. 154".
>
> "Particulars of the offence".
>
> "The accused at the time and place above stated did of malice aforethought cause the death of one Djemil Mehmed Ali by an unlawful act".

Now these two counts could not have been put on an information in Cyprus, prior to the establishment of the Republic ; and I venture the view that they would not have been put in this case, but for the decision of the Supreme Constitutional Court in Loftis case (Case No. 8/61 - Decided on the 6th March, 1961) - I shall deal with that matter presently.

The appellant pleaded 'guilty' to the added count. The plea was accepted; counsel for the prosecution offered no evidence in support of the original count, and the Court thereupon "dismissed" that count.

This confirms me in the view, that the two counts must have been taken to charge two different crimes; same as a count for murder, would charge a different and distinct crime from that in a count for manslaughter, although of similar nature ; the former under sect. 204, the latter under sect. 203 of the Criminal Code. Wounding with intent, contrary to section 228, would be charged as a different crime from that

of unlawful wounding contrary to sect. 234 ; and both these would be treated as distinct crimes from causing grievous harm contrary to sect. 231, etc., etc.

Now, the Assize Court "dismissed" count (1) on the information. What was meant by that, may not be quite clear. But what law and practice required the Court to do in the circumstances, is perfectly clear. They had *to acquit* the accused on that count. Sections 68, 74 and 77 of the Criminal Procedure Law (Cap. 155) leave no room for doubt on that point ; and dozens of records in criminal trials, over the last eighty years, will show the practice of the Courts on such occasions.

The effect of the Court's 'dismissal' of the charge in the first count, can, in my opinion, have no other meaning than an "acquittal" on that count. Surely, the appellant cannot be tried again, whatever happens, for the crime charged in the first count.

Having been acquitted of the murder of her husband, charged in the count preferred under "sections 204 and 205 of the Criminal Code and Article 7 of the Constitution", could the appellant be charged and convicted, in the same information, for the same murder, charged under the same sections of the Criminal Code, but now without reference to Article 7 of the Constitution, as charged in the second count?

The answer to this question, is, in my opinion, clearly in the negative, for the obvious reason that Article 7 of the Constitution was neither intended by the legislator to create a new crime, nor did it in effect do so. Both before and after the establishment of the Republic under the Constitution, the crime of murder is that prescribed in section 204 of the Criminal Code (Cap.154); this section in no way comes into conflict with the Constitution, and shall remain the law until that part of the Criminal Code be altered by the legislature. A glance at the Bill published in the Official Gazette of the Republic, No. 106 of the 17th November, 1961, and the Objects and Reasons for the proposed enactment appearing in p.262 of the Greek issue, indicate that the appropriate Authority in the State take the same view.

If I found it necessary for the purposes of this case, to answer the question what part of the criminal law would take cognisance of a homicide without premeditated malice, I

would venture the answer that pending amendment of the Criminal Code, section 203 would seem to cover all such cases.

Be that as it may, however, the position remains that the appellant having pleaded 'not guilty' to the charge of premeditated murder, (the crime which, on her own statement, she seems to have committed) she was in effect acquitted of that crime, as I have already held. And in the circumstances I would not be prepared to support any sentence for that same crime.

The point, however, was not taken in this appeal, as the appellant who signed her own notice of appeal, apparently, was not inclined to appeal against a conviction resting on her own plea of 'guilty'; and learned counsel assigned to her for the hearing of the appeal, apparently thought that he had a much safer case in the appeal against sentence.

It is therefore incumbent upon me, I think, to deal also with the matters raised in the appeal against sentence, on the assumption that the conviction on the second count is good in law. I shall endeavour to do so shortly, stating merely the grounds upon which my judgment rests, without going into the reasoning behind such grounds.

In the first place, I take the view, as I have already said, that the provisions in Article 7. 2 of the Constitution, do not affect at all the provisions of sections 204 and 207 of the Criminal Code providing for the crime of murder. They merely prohibit any law of the Republic, existing or future law, to provide the penalty of death, for cases other than those specifically stated in the article in question, dealing with one of the fundamental rights guaranteed by the Constitution, to all persons found in the Republic; the right to life and corporal integrity.

In this connection I had the advantage of reading the judgment just delivered by the learned President of this Court, and all I need say, is that I respectfully agree with his conclusions, as well as with the reasoning behind them. I share the view that the law of the Republic as it stands cannot provide for the penalty of death under section 205 of the Criminal Code, in cases of unpremeditated homicide, where the conviction rests on section 204. And for a conviction under this section, the law provides no other sentence.

Obiter the *ratio decidendi* in this case, I have already

ventured the view that section 203 of the Criminal Code may be wide enough to cover all cases of unpremeditated homicide, as probably visualised by the makers of the Constitution, pending amendment of the Code. The penalty of life imprisonment provided in section 206, for convictions under section 203 would, no doubt, meet any such case. And I think nobody can suggest that section 203 is not wide enough to cover all criminal homicides, intended or unintended; premeditated or otherwise. Nor can, I think, any one suggest that if this woman were charged in the second count for causing the death of her husband by an unlawful act, she could not be convicted, in the circumstances of this case, on such second count.

The only other matter which it is, perhaps, necessary for me to deal with, in this appeal, is whether the decision of the Supreme Constitutional Court in *Loftis* case (Case No. 8/1961) can in any way affect the position arising in this case.

It seems to me that it has greatly affected the proceedings before the Assize Court. And this makes it all the more desirable to look also at this aspect of the appeal.

Loftis was convicted together with another person, of the murder of one Gavrias, before the Assize Court of Nicosia, in its first session after the establishment of the Republic. He was convicted under section 204 of the Criminal Code, and sentenced to death under section 205.

When asked whether he had anything to say after conviction, why sentence should not be passed on him, his answer was that he was suffering for the other man's crime. His advocate had nothing to say in that connection.

In due course, Loftis appealed against conviction and sentence. In his grounds of appeal nothing was said regarding the legality of the sentence. At the hearing of the appeal, his advocate raised for the first time, the question of the constitutionality of the sentence. The High Court considered that it was incumbent upon them, in accordance with Article 144 of the Constitution, to refer the matter to the Supreme Constitutional Court. And counsel on both sides were asked to agree on the draft of the formal reference. This position is clearly set out in the decision of the High Court of the 7th February, 1961, in Criminal Appeal No. 2293*.

The record shows that counsel were not able to agree.

* See *Loftis* v. *The Republic*, reported in this volume, p. 108, *ante*.

Appellant's advocate set out the question raised, in four parts, in a draft which he filed on the 16.12.61. Counsel for the Republic drafted the question in a very different form, which he also filed. And on the 17th February, the High Court (comprising in that appeal one of the members of the S.C.C.) framed and referred the question in their own form, different from both the other drafts.

In their decision of the 6th March, the Supreme Constitutional Court say at p.2, that in view of the wording of Article 144. 1 "A court is bound to reserve the question raised in the form in which it has in fact been raised before it;" and it therefore "presumed" that the High Court had done so in that case.

In page 4 of the same decision, the Supreme Constitutional Court make it clear that as provided in Article 144, only questions "material for the determination of any matter in issue", may be so referred.

Now in *Loftis* appeal (No. 2293) the question of sentence of death under s.205, would only arise if the appeal against conviction failed. In fact the appeal against conviction did not fail. By a majority-decision the conviction for murder was quashed, and Loftis was convicted for unlawful wounding with intent, under section 228(a) of the Criminal Code; and was sentenced accordingly.

One may easily understand that at that early stage in the life and the working of the Constitution of the new State, with a completely new institution to the law of this country, the Supreme Constitutional Court, such difficulties were bound to arise.

In *Loftis* appeal before the High Court the constitutionality of section 205 would not arise until after the disposal of the appeal against conviction. And in fact it never became material for the determination of that case. The decision of the Supreme Constitutional Court, therefore, turned out to be purely academic in that case.

Moreover, that decision was made on the wrong assumption that the question before the Constitutional Court, was in the form in which it was in fact raised by the appellant. And the part of the decision, which was apparently the cause of the confusion in the Assize Court in the present case, namely part (b) of the decision was, as already pointed out in the

judgment just read by the learned President of this Court, a direction to the Criminal Courts how to fill up a *lacuna* in the criminal law, a matter which was never raised by the question referred by the High Court under Article 144.

For these reasons, and with all due deference and respect to both this Court and the Constitutional Court, the reference in Criminal Appeal 2293 and the decision made thereon in case No.8/1961 are, in my judgment, no part of the law of this Republic, which its criminal courts have to apply ; and cannot affect this appeal.

In conclusion, I agree that this appeal be allowed; the sentence be set aside; and the appellant be discharged forthwith.

JOSEPHIDES, J.: In this case the appellant pleaded guilty to murder, without premeditation, contrary to sections 204 and 205 of the Criminal Code and she was sentenced to 10 years imprisonment. She now appeals against sentence on the ground that it is excessive and that, in any event, it is not warranted by law.

Fuad Bey, in his very able argument on behalf of the appellant, contended that, although there is provision in the statute for the offence of unpremeditated murder, there is no provision for punishment, and, consequently, the Assize Court could not impose any imprisonment. He went on to submit that in *Loftis*' case (Application No.8/61) the Supreme Constitutional Court went beyond the reference made to them and beyond their powers under the Constitution, and that they in fact legislated when they laid down that section 205 of the Criminal Code should be applied modified in such a way as to make a person convicted of unpremeditated murder liable to imprisonment for life. He further submitted that in a reference under Article 144 of the Constitution the jurisdiction of the Supreme Constitutional Court was to determine whether the law or decision in question was constitutional or unconstitutional, and not to lay down what the law ought to be or to fill a *lacuna*, as it was described by that Court. Finally, he contended that as there was no question of any ambiguity of the Constitution involved in the *Loftis*' case, and none had been reserved for their decision, Article 149 of the Constitution was inapplicable, and under Article 144, paragraph 3, the decision in the *Loftis*' case was binding and applicable to those proceedings only.

Mr. Beha, advocate for the Republic, submitted that the question whether the punishment provided by the Supreme Constitutional Court in the *Loftis*' case for unpremeditated murder was constitutional or not should be referred to that Court, under the provisions of Article 139, paragraph 2, of the Constitution, as the question was whether the Supreme Constitutional Court had competence to lay down the punishment for unpremeditated murder. In reply, Fuad Bey submitted that Article 139, paragraph 2, was inapplicable as that Article referred only to the competence of the Supreme Constitutional Court and not to any conflict between any court and the Supreme Constitutional Court, and that, in any event, there was no conflict between this Court and the Supreme Constitutional Court.

It will be appreciated that a number of very important questions are raised in this appeal but, having regard to the view I take of how the law is to be applied in the present case, I do not consider it necessary to deal with every point raised by learned counsel.

The Constitution is the supreme law of the Republic (Article 179, paragraph 1), and it is the duty not only of the Supreme Constitutional Court but of all the courts of the Republic to apply it; and where any provision in the Constitution is clear and unambiguous there is no necessity or duty to refer such matter to the Supreme Constitutional Court. It is only in cases of ambiguity in any Article of the Constitution that the Supreme Constitutional Court has exclusive jurisdiction to make any interpretation of the Constitution and not of any other statute (see Articles 149 and 180 of the Constitution). Furthermore, the question of the unconstitutionality (and *not* the interpretation) of any law or decision, material for the determination of any matter at issue, if raised by a party to any proceedings, must be reserved for the decision of the Supreme Constitutional Court; and that Court shall determine the "question so reserved". Such decision is binding on the court by which the question has been reserved and on the parties to the proceedings only, and it is *not* binding on any other court (see Articles 144 and 148).

Under section 29(1) of the Courts of Justice Law, 1960, the High Court of Justice and all subordinate courts in the Republic in the exercise of their civil or criminal jurisdiction shall apply -

"(a) the Constitution of the Republic, the laws made thereunder and any other law becoming applicable by a Court;

(b) the laws saved under Article 188 of the Constitution subject to the conditions provided therein save in so far as other provision has been or shall be made by a law made or becoming applicable under the Constitution".

Article 188, paragraph 1, of the Constitution provides that all laws in force on the date of the coming into operation of the Constitution shall, until amended or repealed, continue in force and shall be "construed and applied with such modification as may be necessary to bring them into conformity with this Constitution".

Paragraph 4 of the same Article provides that -

"Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this Article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of this Constitution including the Transitional Provisions thereof".

The expression "modification" is defined in paragraph 5 of the same Article as including "amendment, adaptation and repeal".

Consequently, it is the duty of every court in the Republic in applying the provisions of any law in force on the date of the coming into operation of the Constitution to amend it, adapt it, or repeal it in such a way as to bring it into conformity with the provisions of the Constitution.

Article 7, paragraph 2, of the Constitution, so far as material for the purposes of this case, provides that no person shall be deprived of his life except on conviction of an offence for which the death penalty is provided by law, and that a law may provide for such penalty only in cases of premeditated "murder" (see the English text of the Constitution). It should, however, be noted that the term used both in the Greek and Turkish texts of the Constitution is premeditated "homicide" or "killing" (φόνος - Katil) and not "murder".

In view of the express provisions of Article 7, paragraph 2, the provision of death penalty for murder, other than premeditated murder, in section 205 of the Criminal Code, is repugnant to or inconsistent with the Constitution; and it is

the duty of a court exercising criminal jurisdiction to apply section 205 with such amendment or adaptation as may be necessary to bring it into conformity with the Constitution.

It has been submitted that there is a *lacuna* in the law and that it is not the duty of any court to fill such a *lacuna*, as distinct from doing what is strictly necessary to adapt the law to conform with the Constitution.

In deciding this matter we ought to consider the spirit as well as the letter of the statute on which this question arises. There is no doubt what was the clear intention of the framers of the Constitution : it was to have a body of legislation ready for the new Republic at its inception and during the first years of its existence until new laws were made by the legislature of the Republic. That is why by express provision in the Constitution the laws in force in the former Colony of Cyprus were saved, subject to "such modification as may be necessary to bring them into conformity" with the Constitution, and all Courts in the Republic were empowered to apply them accordingly (Article 188. 1 and 4). In those circumstances it is inconceivable that it was ever intended to create by implication gaps in the criminal law, especially having regard to the very wide powers conferred on the courts of the Republic not only to amend but to adapt all existing laws.

In the light of these considerations, I am of the view that the power of adaptation given to the courts, which is a much wider power than that of amendment or repeal, is a power to adapt the law in such a way as not to be repugnant to, or inconsistent with, any of the provisions of the Constitution; and not simply to amend it to the extent that it is strictly necessary to conform with the Constitution, thus leaving gaps in the laws saved under the Constitution.

I am, therefore, of opinion that it is our duty to adapt section 205 of the Criminal Code in such a way as to provide for a punishment for unpremeditated murder other than the death penalty. The heaviest punishment, apart from the death penalty, provided in our Criminal Code is that for manslaughter under section 206, which is imprisonment for life; and manslaughter is the gravest crime after murder in our Code. I would, therefore, adapt section 205 to provide that any person convicted of murder without premeditation shall be liable to imprisonment for life.

It would seem that my adaptation of section 205 coincides in substace with that adopted by the Supreme Constitutional Court in the *Loftis'* case and it, therefore, follows that no question of any conflict arises in so far as the proposed modification of that section is concerned.

The question reserved for the decision of the Supreme Constitutional Court under Article 144 of the Constitution was whether, having regard to Article 7 2 of the Constitution, sections 204, 205 and/or 207 of the Criminal Code, Cap 154, were wholly or partially unconstitutional The Supreme Constitutional Court gave its decision on the question reserved to the effect that section 205 "to the extent to which it provides for the death penalty for murder other than premeditated murder is inconsistent with paragraph 2 of Article 7 of the Constitution", and it then went on to lay down how it should be applied modified. The question, which was reserved under Article 144, and not under Article 149, of the Constitution, was *inter alia*, the unconstitutionality of section 205 of the Criminal Code, and it may well be that the suggested modification was made *obiter* by that Court, in which case it does not form part of the *ratio decidendi*. But, having regard to the conclusion I have reached in this case, it becomes unnecessary for me to consider that matter

The other point raised by counsel for the Republic, is that the question whether it was within the competence of the Supreme Constitutional Court to lay down a punishment for unpremeditated murder in *Loftis'* case should be referred to them for their decision, under the provisions of Article 139, paragraph 2, of the Constitution. In the first place it does not appear that Article 139, paragraph 2, is at all applicable That paragraph refers to any question arising as to the "competence" of the Supreme Constitutional Court, and not to any "conflict" or "contest" between any courts or judicial authorities, which is expressly provided for in paragraph 1 of the same Article But even if Article 139, paragraph 2, were applicable to this case, it seems to me that no question as to the "competence" of the Supreme Constitutional Court arises ; nor is there any conflict or contest between this Court and that Court. Finally, even if there was a conflict or contest, I doubt whether section 139, paragraph 2, would be applicable to the present case in which the Supreme Constitutional Court has already decided the question reserved to it under Article 144. Because, if that were so, it would

mean that the Supreme Constitutional Court would be asked to confirm or review its own decisions. But as already stated it is not necessary for the purposes of this appeal to decide this question either.

In the result I am of opinion that section 205 of the Criminal Code, Cap. 154, shall be applied by the courts of the Republic, in the exercise of their criminal jurisdiction, modified as follows:-

> "205. Any person convicted of premeditated murder shall be sentenced to death. Any person convicted of murder without premeditation shall be liable to imprisonment for life".

Consequently, I hold that the Assize Court rightly sentenced the appellant to a term of imprisonment for the murder without premeditation of her husband to which she pleaded guilty.

That the law of the Republic especially on such a grave matter as homicide should remain uncertain until modified or adapted by the Courts, creates a very unsatisfactory state of affairs which should have been remedied by the legislature. Indeed this matter was alluded to in this Court in the course of the hearing (between February and April, 1961) of Criminal Appeal No. 2293, *Loftis v. The Republic*, and in the judgment of this Court in that case dated the 18th May, 1961; and it is regrettable that no legislation has so far been enacted. An amending bill was published about a month ago, and it is hoped that the legislature will now proceed to make the necessary enactment without any delay.

O' BRIAIN, P.: In the result the Court by majority holds with the appellant that there is no power to impose a sentence of imprisonment in respect of the crime of which she was convicted, *i.e.* of murder without premeditation; we hereby order her discharge forthwith.

Appeal allowed. Appellant to be discharged forthwith.