

J. Y. Interpretation No.256 (April 4, 1990) *

ISSUE: Should a judge voluntarily recuse himself from rehearing a case in which he took part in the previous trial or judgment? Is there a limitation on recusal times?

RELEVANT LAWS:

Article 16 of the Constitution (憲法第十六條) ; Article 32, Subparagraph 7, of the Code of Civil Procedure (民事訴訟法第三十二條第七款) ; Article 6, Subparagraph 4 of the Administrative Proceedings Act (行政訴訟法第六條第四款) ; Supreme Court's Precedent S. T. 362 (Supreme Court 1937) (最高法院二十六年判字第三六二號判例) .

KEYWORDS:

voluntarily recuse himself (自行迴避) , previous trial (前審) .**

HOLDING: The purpose of the provision of Article 32, Subparagraph 7, of the Code of Civil Procedure, requiring the voluntary recusal of a judge is to disqualify him from performing his duty in a proceeding to rehear the case in which he took part in the previous trial or judgment

解釋文：民事訴訟法第三十二條第七款關於法官應自行迴避之規定，乃在使法官不得於其曾參與之裁判之救濟程序執行職務，以維審級之利益及裁判之公平。因此，法官曾參與訴訟事件之前審裁判或更審前之裁判者，固應自行迴避。對於確定終局判決提起再審之

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so as to maintain the interest of all levels of courts and to ensure fair trial and judgment. While a judge who took part in the adjudication of a case in its previous proceeding or the new trial before the case was remanded should voluntarily recuse himself from rehearing the case, a judge who participated in the irrevocable final judgment of a case should likewise voluntarily recuse himself during the new trial where a motion for a new trial has been filed from such irrevocable final judgment. However, taking into consideration the limited number of judges sitting on each court and the purpose of Article 6, Subparagraph 4, of the Administrative Proceedings Act, we hold that the recusal shall be limited to one time only, and that the part of the Supreme Court's Precedent S. T. 362 of 1937 inconsistent with the views herein expressed must be overruled to protect the people's right to fair trial.

REASONING: The essence of Article 16 of the Constitution is to protect the right of the people to institute a lawsuit in accordance with legal procedure and to receive a fair trial. The purpose of

訴者，其參與該確定終局判決之法官，依同一理由，於再審程序，亦應自行迴避。惟各法院法官員額有限，參考行政訴訟法第六條第四款規定意旨，其迴避以一次為限。最高法院二十六年上字第三六二號判例，與上述意旨不符部分，應不再援用，以確保人民受公平審判之訴訟權益。

解釋理由書：憲法第十六條規定人民有訴訟之權，旨在確保人民有依法定程序提起訴訟及受公平審判之權益。現行民事訴訟法第三十二條第七款關於法官應自行迴避之規定，即在當事

the provision of Article 32, Subparagraph 7, of the Code of Civil Procedure, requiring the voluntary recusal of a judge is to disqualify him from performing his duty in a proceeding to rehear the case in which he took part in the previous trial or judgment to which the party has lodged a motion of objection, so as to maintain the neutral and objective position of judges and the interest of all levels of courts and to ensure a fair trial and judgment. While a judge who took part in the adjudication of a case in its previous proceeding or the new trial before the case was remanded should voluntarily recuse himself from rehearing the case, a judge who participated in the irrevocable final judgment of a case should, for the same reason, voluntarily recuse himself during the new trial where a motion for a new trial has been filed from such irrevocable final judgment. However, taking into consideration the limited number of judges sitting on each court and that there is no limit on the number of times for which motions for retrial may be brought, and with reference to the purpose of Article 6, Subparagraph 4, of the Administrative Proceedings Act,

人就法官曾參與之裁判聲明不服時，使該法官於其救濟程序，不得再執行職務，以保持法官客觀超然之立場，而維審級之利益及裁判之公平。因此，法官曾參與該訴訟事件之前審裁判或更審前之裁判者，固應自行迴避；對於確定終局判決提起再審之訴者，其參與該確定終局裁判之法官，依同一理由，於再審程序，亦應自行迴避。但在各法院法官員額有限，而提起再審之訴，又無次數限制之情況下，參照行政訴訟法第六條第四款規定意旨，其迴避以一次為限。例如對於再審確定終局判決及原確定終局判決又合併提起再審之訴者，僅參與再審確定終局判決之法官須迴避，而參與原確定終局判決之法官，則不須再自行迴避。最高法院二十六年上字第三六二號判例謂：「以再審之訴聲明不服之確定終局判決，並非再審程序之前審裁判，推事曾參與此項終局判決者，於再審程序執行職務，不得謂有民事訴訟法第三十二條第七款所定之迴避原因（按該款規定原為：「推事曾參與該訴訟事件之前審裁判或公斷者」，中華民國五十七年二月一日修正為：「推事曾參與該訴訟事件之前審裁判、更審前之裁判或仲裁者」），其與上述意旨不符部分，應不再援用，以維人民受公平審判

we hold that the recusal shall be limited to one time only. By way of example, in a proceeding of a second new trial brought by joining a motion from the irrevocable final judgment entered upon a new trial with a motion from the original irrevocable final judgment, only the judge who took part in making the irrevocable final judgment upon the retrial needs to recuse himself, and the judge who took part in rendering the original irrevocable final judgment is not required to do so. Thus, the Supreme Court's Precedent S. T. 362 of 1937 is inconsistent with our views expressed above in its statement that "an irrevocable final judgment to which objection is raised by filing a motion for retrial is not a decision of the trial preceding the new trial, and a judge who participated in rendering such final and binding judgment shall not be required to recuse himself from hearing the new trial pursuant to the provision of Article 32, Subparagraph 7, of the Code of Civil Procedure." (The text of said Subparagraph was originally: "If the judge participated in the decision of the former trial, or arbitration, of the same action" but has now been amended

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to read: “If the judge participated in the decision of the former trial or in the decision before remand for retrial, or arbitration, of the same action.”) The part of the Supreme Court judgment quoted above must be overruled to protect the people’s right to a fair trial.