

J. Y. Interpretation No.178 (December 31, 1982) *

ISSUE: Does the fact that the judge who did take part in the previous trial of a case rendering a decision thereto constitute such a ground for him to recuse himself from rehearing the same case regardless of whether it is an appeal or retrial?

RELEVANT LAWS:

Article 17, Subparagraph 8 of the Code of Criminal Procedure
(刑事訴訟法第十七條第八款) .

KEYWORDS:

recusal by a judge (法官迴避) .**

HOLDING: The exact interpretation of the phrase “the judge participated in the decision at a previous trial”, provided in Article 17, Subparagraph 8, of the Code of Criminal Procedure, is that the same judge participated in the same case at a lower trial level.

解釋文：刑事訴訟法第十七條第八款所稱推事曾參與前審之裁判，係指同一推事，就同一案件，曾參與下級審之裁判而言。

REASONING: The Code of Criminal Procedure is the procedural law on criminal sanctions of the State.

解釋理由書：按刑事訴訟法為確定國家具體刑罰權之程序法，以發現實體真實，俾刑罰權得以正確行使為目

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** Contents within frame, not part of the original text, are added for reference purpose only.

Discovering the substantive truth is the condition for the correct application of criminal sanctions. In order to guarantee the fairness of the trial, the withdrawal clauses were provided for the case where the judge had been suspected of being unfair due to some special circumstance. Article 17, Subparagraph 8, of the Code provides “the judge, who has participated in the decision at a previous trial, shall not handle the case by voluntary recusal.” Since the same judge participated in the same case at a lower trial level, the criticism of bias and the loss of a second opportunity to appeal are thus justified. It thus includes all the previous trials. Judges who participated in the case which was later declared a retrial by the final court and was sent back to the lower court, and are now sitting on the same case again in the final court, had not been considered for withdrawal in the past. However, in order to fully implement the system of withdrawal of judges, this case shall be decided by another judge if fact permits.

的，為求裁判之允當，因有特殊原因足致推事執行職務有難期公平之虞時，特設迴避之規定。其第十七條第八款所定：推事曾參與前審之裁判者，應自行迴避，不得執行職務，乃因推事已在下級審法院參與裁判，在上級審法院再行參與同一案件之裁判，當事人難免疑其具有成見，而影響審級之利益。從而該款所稱推事曾參與前審之裁判，係指同一推事，就同一案件，曾參與下級審之裁判而言。惟此不僅以參與當事人所聲明不服之下級審裁判為限，並應包括「前前審」之第一審裁判在內。至曾參與經第三審撤銷發回更審前裁判之推事，在第三審復就同一案件參與裁判，以往雖不認為具有該款迴避原因，但為貫徹推事迴避制度之目的，如無事實上困難，該案件仍應改分其他推事辦理。

Justice Shih-Ron Chen filed dissenting opinion.

Justice Wei-Kuang Yiau filed dissenting opinion.

本號解釋陳大法官世榮、姚大法官瑞光分別提出不同意見書。