

論法官的自請迴避

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關鍵詞：法官自請迴避、法官迴避、自行迴避、聲請迴避、法定法官原則

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摘 要

為了保障公正的法官參與刑事審判並作成判決，我國刑事訴訟法第 17 條以下規定偏頗之虞法官的迴避。

按照同法第 18 條，當事人有權發動法官迴避的程序，而且，同法第 24 條也規定應迴避法官的所屬法院可依職權要求其迴避。1935 年修法之後，應迴避的法官並沒有自請迴避的聲請權。實務操作上儘管承認應迴避法官可對此簽請建議，不過，其所屬法院未必會受其拘束並因此開啟法官的迴避程序。

本文想從法官迴避的理論基礎出發，參考有類似規定的德國立法與實際操作的經驗以及學理的研究成果，探討法官迴避機制背後所要保護的利益，以及為達目的所發展出來的指導原則，據此完整描繪法官迴避機制的理想模型。然後，比較現制所採用的模型，希望透過通報漏洞及其嚴重性的呈現，認真思考恢復法官自請迴避聲請權的可能性。

Self-Application of Judge for not Participate in Trail

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Abstract

In order to protect the impartial judge in the criminal trial and the judgment describe § 17 and the following requirements of the Taiwanese Criminal Procedure Code not participate in trail of judges.

According to § 18 of the Taiwanese Criminal Procedure Code has defendant, prosecutor or private prosecutor the right to open the procedure for judges about not participate in trail. And § 24 of the same code provides also for their courts also the rights to open this procedure and then make the Decision. After the Criminal Procedure Code in 1935 have judges no authority to open the procedure, although they are actually still able to give same Suggestions to their courts. But their courts will not be binding to open this by them hoped procedure.

This article would like to refer to the experience of Germany, to find the protected interests for the procedure for not participate in trail of judges, and then provide the method, to protect effectively this interest. Finally during showing of defect in the regulation and their difficulty can the Self-Application of Judge for not Participate in Trail once more again be considered.