

連身條款與法官迴避

張 明 偉 *

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關鍵詞：迴避、連身條款、前審、下級審

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摘 要

公正審判乃法制國家之重要內涵，雖我國憲法並未明文公正審判，惟釋字第 178 號、第 256 號、第 530 號及第 761 號等解釋，均已明確指出公正審判在我國具憲法位階。法官迴避可見於我國訴訟法制之中，不論民事、刑事、行政

* 輔仁大學法律學院教授兼副院長暨學士後法律系系主任，美國舊金山金門大學法學博士。

訴訟皆然。由於法官迴避制度係為實現公正審判而制定，故在適用上，即必須以能否維護公正審判作為判斷標準。因依釋字第 178 號與第 256 號等解釋，刑事訴訟法第 17 條第 8 款之前審，係指下級審而言，原法官於同級審僅須迴避一次即可，故實務乃有更二審以後由同一法官承辦同一案件、具爭議性之連身條款規定。然而，憲法法庭 112 年憲判字第 14 號判決卻肯認該規定合憲，以至於有必要進一步對該判決之妥當性予以檢討，以釐清公正審判權之界線。

The Same-Judge in Retrial Clause and the Recusal of Judge

Chang, Ming-Woei

Abstract

The idea of fair trial is an important element in rule of law. Although the ROC Constitution does not provide rule of law, the Grand Justice Council Interpretation of Nos. 178, 256, 530, and 761 already clearly pointed out that fair trial is guaranteed by the Constitution. Recusal of a biased judge is provided in all civil, criminal and administrative procedural laws. As the recusal system is provided to realize fair trial, whether it maintains fair trial is a crucial standard. According to the Grand Justice Council Interpretation of Nos. 178 and 256, the previous trial in Article 17, Subparagraph 8, of the Criminal Procedure Code refers to the trial at lower instance court, and the judge is supposed to recuse himself once only at the same instance of trial, the authority then promulgated the so-called Same-Judge in Retrial Clause which arose controversies in practice. While the Constitution Court held the Clause constitutional in 112 Hsien-Pan-14(2023), it is necessary to review the appropriateness of the ruling so that a clear contour of the right of fair trial would be verified.