

## The Regulation of Defendant's Religious Identity in Court Decisions

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### ABSTRACT

This study focuses on using religious attributes in the trial process of corruption cases in Indonesia, the judge's consideration of the decency of a defendant, and the regulation of a defendant's religious identity in the court decision. By identifying the judge's perspective on a defendant's religious attributes and aspects of decency as an interpretative scheme and constructing their significance on it, this study also presents an analysis of the application of the principle of impartiality of judges and courts based on the Bangalore Principles. Impartiality itself is positioned as the bedrock of judicial integrity. With a field-based research method, this study reveals that religious identity has influenced judges and court decisions, especially considering mitigating factors in criminal sentencing. These findings indicate that the Bangalore Principles fall short of clear guidelines to counter such bias and a clear framework in Indonesia's judiciary to restore its integrity.

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## 1. Introduction

The Bangalore Principles of judicial conduct (the Bangalore Principles), particularly the principle of impartiality of judges, form the backdrop for this study of corruption cases in Indonesia. The Bangalore Principles are intended to establish standards for ethical conduct of judges.<sup>1</sup> Under this framework, six core principles are recognized, independence, impartiality, integrity, propriety, equality, competence, and diligence. The Bangalore Principles have been accepted as universal principles that provide guidance on the independence, impartiality, and integrity of judges, although the Bangalore Principles is an international instrument in the form of soft law. This study focuses primarily on the principle of impartiality.<sup>2</sup>

<sup>1</sup>Martian Iovan, 'Values and Ethical Principles for Practicing as Magistrate/ Legal Advisor out of the Perspective of the Codes and National and International Statements of Principles', *Juridical Tribune*, 6.Special (2016), 128–38. <https://doi.org/10.1016/j.exis.2018.12.005>

<sup>2</sup>Andi Agus Salim, Rizaldy Anggriawan, and Mohammad Hazyar Arumbinang, 'Dilemma of Dual Citizenship Issues in Indonesia: A Legal and Political Perspective', *Journal of Indonesian Legal Studies*, 7.1 (2022), 101–54 <https://doi.org/10.15294/jils.v7i1.53503>

This emphasis on judicial impartiality is especially apparent when it is related to the use of religious identities by a defendants accused of corruption. In Indonesia, religion is considered as a basis of an identity, strongly influencing society.<sup>3</sup> This affects various aspects of life as an Indonesian national<sup>4</sup> yet is often exploited by politicians in shaping national politics.<sup>5</sup> Moreover, religious identity has also been used as a tool in corruption cases by defendants in court.<sup>6</sup> In corruption cases, this has been manifested by using religiously nuanced attributes by the defendants, including white *koko* shirt, white *kopiah*, or black *peci* for male defendants, and in robes, hijab, or headscarves for female defendants.<sup>7</sup>

Exploiting religious attributes is indeed possible in Indonesian courts, given that there is no specific regulation concerning recommendations for or prohibitions on a defendant's use of religious attributes. The existing regulations, Article 230 paragraph (2) and Article 231 paragraph (1) of Law No.8 of 1981 on the Criminal Procedure Code (KUHP) and Government Regulation No.27 of 1983 on the Implementation of the Criminal Procedure Code, only contain provisions for the dress code for judges, public prosecutors, advocates, and clerks.<sup>8</sup> However, the Court Rules in each court may be considered merely guidance on how to dress the defendant. In these terms, the Court Rules implies to everyone, including defendants, is required to display good manners and be polite in court such as dressing and etiquette. Thus, if the Court Rules are considered to be an interpretive framework to see the appearance of a defendant in a trial of corruption cases, then the dress code and the use of religious nuances are classified as parameters of politeness in court.<sup>9</sup>

Exploitation of religious attributes and features in court is widespread. A defendant's decency is also considered by judges as a factor that mitigates sentencing in corruption cases. This consideration is relatively common. For example, it has been found in 77 corruption cases from 101 cases decisions investigated. Despite that, not a single of these 77 decisions explained the influence on the judges of the element of decency itself. Additionally, a specific example was found in the corruption case of the former Governor of Banten Province, Ratu Atut Chosiah. In the sentencing phase of the proceedings, the decency factor of the defendant was mentioned but ignored, providing clear evidence-based arguments or considerations on the subject (Court Ruling Number 040/Pid.Sus/TPK/2017/PN.JKT.PST). Moreover, there was finding in a similar case, that of Constitutional Court Judge Patrialis Akbar of corruption matter (Court Ruling Number 81/PID.SUS/TPK/2017/PN.KKT.PST). Subsequently, the use of religious identity in court

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<sup>3</sup>Chris Chaplin, 'Salafi Islamic Piety as Civic Activism: Wahdah Islamiyah and Differentiated Citizenship in Indonesia', *Citizenship Studies*, 22.2 (2018), 208–23 <https://doi.org/10.1080/13621025.2018.1445488>

<sup>4</sup>Tonny Dian Effendi, 'Topics on Chinese Indonesian Issues in Book Publication in the Post-Reform Indonesia', *Journal of Asian Research*, 2.1 (2018), 1 <https://doi.org/10.22158/jar.v2n1p1>

<sup>5</sup>Rossa Ilma Silfiah and others, 'Philosophical And Constitutional Protection Towards Religion In Indonesia', *Brawijaya Law Journal: Journal of Legal Studies*, 3.2 (2016), 151–75 <https://doi.org/https://doi.org/10.21776/ub.blj.2016.003.02.04>

<sup>6</sup>Nathanael Gratias Sumaktoyo and Burhanuddin Muhtadi, 'Can Religion Save Corrupt Politicians? Evidence from Indonesia', *International Journal of Public Opinion Research*, 34.1 (2022), edab029 <https://doi.org/10.1093/ijpor/edab029>

<sup>7</sup>Christopher A Woodrich, 'Perkembangan Islam Dan Praktek Islam Dalam Selebaran Film Indonesia Di Era Soeharto (1966-1998)', *Wardah*, 18.1 (2017), 13 <<https://doi.org/10.19109/wardah.v18i1.1430>>.

<sup>8</sup>Arsyad Aldyan and Abhishek Negi, 'The Model of Law Enforcement Based on Pancasila Justice', *Journal of Human Rights, Culture and Legal System*, 2.3 (2022), 178–90 <https://doi.org/https://doi.org/10.53955/jhcls.v2i3.51>

<sup>9</sup>Moh Iqra, Syabani Korompot, and Al-fatih David, 'The Principle of Equality Before the Law in Indonesian Corruption Case : Is It Relevant ?', *Journal of Human Rights, Culture and Legal System*, 1.3 (2021), 135–46. <https://doi.org/10.53955/jhcls.v1i3.13>

proceedings has continuously occurred in different cases, regardless of whether defendants use the in regular occasion nor daily life and randomly these religious attributes to show their identity except when they appear before courts.<sup>10</sup>

The above situation triggered academic suspicion of the impartiality of judges, particularly in evaluating the element of decency of a defendant in the sentencing phase of court proceedings. This suspicion underlies this study's hypothesis that religious identity directly influences judges' considerations, particularly regarding the decency factor. In Indonesia, the impartiality of judges remains unquestioned. The Criminal Justice indicators in the Rule of Law Index initiated by the World Justice Project from 2017 to 2020 shows that nearly all nations' impartiality component in the criminal justice system consistently gets the lowest score, 0.23% in 2017-2018, 0.24% in 2019, and 0.28% in 2020.<sup>11</sup>

Furthermore, this suspicion extends, as past studies outline the significant influence of personal values, including religion, on decision-making, including in court proceedings. Until now, there have been no studies on the impartiality of judges who identify the use of religious identity in court proceedings. Stuart Chinn (2019) re-examines the concept of impartiality of judges as we know today. One of his findings is that the practice of impartiality of judges today is strongly influenced by politics. As a result, in the judiciary, there is a difference in the significance of impartiality itself. In conducting this study, he also discussed several court decisions regarding race and equal protection.<sup>12</sup> Yoshikuni Ono and Michael A. Zilis (2021) examined the impartiality of judges based on ascriptive characteristics of judges. In this case, both of them focus on issues of race and gender.<sup>13</sup> Andrew Higgins and Inbar Levy (2021) examined the impartiality of judges in order to assess the degree of convergence and divergence between public opinion and the fictional Fair-Minded Observer (FMO) to ascertain whether judges should be disqualified on the basis of possible bias.<sup>14</sup>

Unlike an ostensibly impartial judiciary, defendants have the fundamental right to express their religious beliefs through the use of religion-based attributes. In a courtroom, this expression, intended to influence judge, is legitimate. However, the international community has agreed on the impartiality of judges, including their independence and integrity, as a universal principle that must be adhered to by every judge. The legal basis for this commitment is stated in The Bangalore Principles. In addition, on a macro scale, the performance of courts is considered a part of the services subject to the principle of good governance. Referring to Law Number 30 of 2014 on Government Administration, the principle of good governance also encompasses judicial authority, namely the Supreme Court and the inferior courts. Thus, in the context of the judicial impartiality in adjudicating the cases, the relevant principles are legal certainty and impartiality. Judges may only be

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<sup>10</sup>Wangga, M. S. E., Tawang, D. A. D., Sabirin, A., & Esquivel, A. H. (2022). Criminal Liability of Political Parties from the Perspective of Anti-Money Laundering Act. *JILS (Journal of Indonesian Legal Studies)*, 7(1), 229-264. <https://doi.org/10.15294/jils.v7i1.54534>

<sup>11</sup>The World Justice Project, *Rule of Law Index 2020*, The World Justice Project, 2021; The World Justice Project, *Rule of Law Index 2019*, 2020; The World Justice Project, *Rule of Law Index 2017-2018*, The World Justice Project, 2019.

<sup>12</sup>Stuart Chinn, 'The Meaning of Judicial Impartiality: An Examination of Supreme Court Confirmation Debates and Supreme Court Rulings on Racial Equality', *Utah Law Review*, 5, 2019. <https://dc.law.utah.edu/ulr/vol2019/iss5/1>

<sup>13</sup>Yoshikuni Ono and Michael A. Zilis, 'Ascriptive Characteristics and Perceptions of Impropriety in the Rule of Law: Race, Gender, and Public Assessments of Whether Judges Can Be Impartial', *American Journal of Political Science*, 66.1 (2022), 43-58 <https://doi.org/10.1111/ajps.12599>

<sup>14</sup>Andrew Higgins and Inbar Levy, 'What the Fair Minded Observer Really Thinks About Judicial Impartiality', *Modern Law Review*, 84.4 (2021), 811-41 <https://doi.org/10.1111/1468-2230.12631>

partial with law and justice, not to be influenced by any irrelevant factors, including the religious identity of a defendants.<sup>15</sup>

This situation begs the question of whether religious identity can properly influence decision-making in Indonesian corruption cases. To address this question, it's critical to understand the influence of religious identity on judges' consideration of defendants' decency as a factor that mitigates criminal sentencing. Indeed, the judicial institutions in Indonesia have been influenced by religious identity in the past. In addition, this study was conducted to address the following questions, first, what significance do judges place on defendants' decency as a factor that mitigates sentencing in corruption cases and in practice, second, what is the influence of religious identity on judges' consideration of defendants' decency in the sentencing phase of criminal procedure and third, how does the influence of religious identity on judges' considerations affect compliance with the principle of impartiality of judges under the Bangalore Principles.

## 2. Research Method

This research relied on two different sources, primary and secondary data. Direct interviews were conducted with 11 judges assigned to corruption crimes at the Corruption Courts in Central Jakarta, Surabaya, and Yogyakarta to gather the primary data.<sup>16</sup> The interviews were conducted for two purposes. First, these interviews were conducted to apprehend the significance of the judges on a defendant's decency as a mitigating sentencing factor in corruption cases, and second to investigate the influence of religious identity on judges' consideration of a defendant decency in the sentencing phase of criminal proceedings. The secondary data was obtained from 77 court rulings in corruption cases.<sup>17</sup> The 77 rulings were selected from 101 court rulings for corruption cases. A pilot study was conducted to identify the influence of the decency factor as a mitigating factor in sentencing in corruption cases. According to the pilot study, 77 of the 101 rulings were based at least on part on this decency factor. Additionally, the secondary data collected from legal documents and literature including laws, regulations, books, journals, and mass media were used.

## 3. Results and Discussion

### 3.1. The Significance of Judges on the Decency of a Defendant in Court Proceedings

Individuals, including judges, are entitled to freedom of expression. This is recognized, in among other instruments, Paragraph 4.6 of the Bangalore Principles of Judicial Conduct and Paragraph 8 of the UN Basic Principles on the Independence of the Judiciary. Unfortunately, freedom of expression of judges has been dismissed and often to ignored when scrutinizing court rulings. This component, whereas is essential, and complex at a certain level. For example, the rational justification for a conviction or release of a defendant cannot be identified if judges do not express their opinion through court rulings.

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<sup>15</sup>Wan Norhasniah Wan Husin and Haslina Ibrahim, 'Religious Freedom, The Malaysian Constitution and Islam: A Critical Analysis', *Procedia - Social and Behavioral Sciences*, 217 (2016), 1216–24 <https://doi.org/10.1016/j.sbspro.2016.02.152>

<sup>16</sup>Zainal Arifin Mochtar and Kardiansyah Afkar, 'President's Power, Transition, and Good Governance', *Bestuur*, 10.1 (2022), 68–83 <https://doi.org/https://dx.doi.org/10.20961/bestuur.v10i1.59098>

<sup>17</sup>U.W. Prakasa, Satria, 'Reduce Corruption in Public Procurement: The Effort Towards Good Governance', *Bestuur*, 10.1 (2022), 33–42 <https://doi.org/https://doi.org/10.20961/bestuur.v10i1.51339>

In contrast, the context, paradigms, and/or abstract perspectives that influence judge's consideration based on these expressions are conveyed through court rulings.<sup>18</sup>

Every judge is entitled to the freedom of expression so that a judge commits to two important elements of freedom of expression itself, namely freedom and rationality. Freedom, the first element, allows for discretion of a judge to evaluate and decide a case. This encompasses writing, speaking, and expressing a judge's opinion on politics, religion, and other subjects. Freedom also lays a foundation for a judge to be independent individually and institutionally, and impartial in implementing the judicial function. However, a judge's freedom and discretion are simultaneously constrained by the latter element of rationality. Rationality requires every judge to construct objective rulings based on a judicial manner. This also requires judges to evaluate every case based on legal merits, not the judge's value system or other personal characteristics. This element is inseparable from the freedom of expression because freedom, without rationality, will only produce considerations that are rife with the personal-subjective dimensions of a judge.<sup>19</sup>

A rational court ruling in the context of judicial philosophy should contain logical and relevant arguments. Such rulings address vital questions from justice seekers such as the reasoning behind a defendant's conviction, the length of incarceration, and any mitigating factors. As a result, everyone who faces trial recognizes the details of their conviction and the legal case that is facing. Also, defendants acknowledge that the legal case has been fairly evaluated under the law. As a consequence, defendants understand the reasons supporting the sentences.<sup>20</sup>

Judges, however, experienced challenges in balancing their freedom and rationality. This is because judges' considerations are influenced by various internal and external factors. At the individual level, no one can ignore or suppress their personal value system of his/her life. While such a ruling can hardly be achieved perfectly, it can be said that it is the ideal requirement. In the context of producing justice, the commitment to freedom and rationality requires judges to isolate their personal values or ideology to avoid bias.<sup>21</sup> Contrary to the above discussion, in corruption cases, the above commitment has not been realized in the rulings influenced by decency as a factor that mitigates sentencing. In the case of Anas Urbaningrum, for instance, the judge explained that Urbaningrum's polite attitude in court was a factor that mitigated his crime and reduced his sentence. Similarly, in the case of Ratu Atut Chosiyah, the judge explained that Chosiyah had behaved politely in the trial, and this was considered to be a mitigating factor in sentencing. In yet another similar to case, that of Imam Nahrawi, the judge considered that his polite attitude at trial was one of the factors

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<sup>18</sup> Krisda Chaemsaitong, 'Person Reference, Identity, and Linguistic Violence in Capital Trials', *Journal of Pragmatics*, 142 (2019), 90–104 <https://doi.org/10.1016/j.pragma.2019.01.010>

<sup>19</sup> Katrijn Maryns, 'The Interdiscursive Construction of Irresponsibility as a Defence Strategy in the Belgian Assize Court', *Language and Communication*, 36.1 (2014), 25–36 <https://doi.org/10.1016/j.langcom.2013.12.009>

<sup>20</sup> Solomon Rukundo, 'Wikipedia in the Courts: An Examination of the Citation of Wikipedia in Judicial Opinions in Uganda', *Computer Law and Security Review*, 35.5 (2019), 105316 <https://doi.org/10.1016/j.clsr.2019.03.010>

<sup>21</sup> Tim Forsyth, 'Public Concerns about Transboundary Haze: A Comparison of Indonesia, Singapore, and Malaysia', *Global Environmental Change*, 25.1 (2014), 76–86 <https://doi.org/10.1016/j.gloenvcha.2014.01.013>

that mitigated sentencing. Likewise, a pattern has emerged in court ruling in the case of Anas Ma'ruf.<sup>22</sup>

The court ruled that Anas Ma'ruf was legally and convincingly proven to be sentenced to four years in prison and fined a mere two hundred million Rupiah (USD13.938). In imposing the sentence, the judge went on record as having considered Rendra Kresna's polite attitude as a factor that reduced his sentence. Likewise, judges concluded Kersna's case with a lighter sentence than the public prosecutor demanded, stating that the defendant's decency mitigated the sentence. And once again, in the case of Supriyono, the defendant's polite demeanor succeeded in garnering the sympathy of the judge.<sup>23</sup> Consequently, the defendant's politeness and good behavior at the court were considered to be a factor in mitigating the sentence. Numerous cases have followed this precedent. The judge's consideration regarding the element of decency of a defendant as a factor that mitigates sentencing is also discovered in several corruption cases including the case of Sawija, the case of Agung Nugroho Endro Prasetyo, the case of Bambang Saparyono, and the case of Wahyono Haryadi.<sup>24</sup>

These findings came in an attempt to discern the significance of the decency factor in judges' decisions. Unfortunately, however, none of these court rulings in the above cases provided logical arguments and material facts that would have led decency to be a measurable consideration as a mitigating factor in sentencing.<sup>25</sup> There is also no discussion of the intersection between the defendant's decency and the corruption they committed. In fact, the other 67 ruling also do not address these subjects. Simply put, a judge's consideration of the decency factor appears without any deliberate interpretative scheme. There is no doubt given the rulings in the context of the freedom of judges. However, the absence of a rational justification disclaims the judge's commitment to a rational decision. The significance of decency in judges' decisions has not been identified explicitly in the judge's considerations in court rulings.<sup>26</sup>

Nonetheless, referring to the 77 rulings examined for this study, the decency factor is textually mentioned using different phraseology. Forty rulings used the phrase "polite attitude" 23 rulings utilized the phrase "behaved politely" 10 rulings strictly used the term "polite" three rulings used "be polite" and one ruling used "behaved politely and polite attitude" This pattern demonstrates that the judge's significance on the decency factor refers to the four interpretative schemes. They are decency is based on attitude in court, decency is

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<sup>22</sup> Nurul Hasfi, Micah R. Fisher, and Muhammad A.K. Sahide, 'Overlooking the Victims: Civic Engagement on Twitter during Indonesia's 2019 Fire and Haze Disaster', *International Journal of Disaster Risk Reduction*, 60.April (2021), 102271 <https://doi.org/10.1016/j.ijdr.2021.102271>

<sup>23</sup> Ryan Randy Suryono, Indra Budi, and Betty Purwandari, 'Detection of Fintech P2P Lending Issues in Indonesia', *Heliyon*, 7.4 (2021), e06782 <https://doi.org/10.1016/j.heliyon.2021.e06782>

<sup>24</sup> Raza Ali and others, 'Hate Speech Detection on Twitter Using Transfer Learning', *Computer Speech and Language*, 74.November 2021 (2022), 101365 <https://doi.org/10.1016/j.csl.2022.101365>

<sup>25</sup> Pradeep Kumar Roy, Snehaan Bhawal, and Chinnaudayar Navaneethakrishnan Subalalitha, 'Hate Speech and Offensive Language Detection in Dravidian Languages Using Deep Ensemble Framework', *Computer Speech and Language*, 75.November 2021 (2022), 101386 <https://doi.org/10.1016/j.csl.2022.101386>

<sup>26</sup> Zewdie Mossie and Jenq Haur Wang, 'Vulnerable Community Identification Using Hate Speech Detection on Social Media', *Information Processing and Management*, 57.3 (2020), 102087 <https://doi.org/10.1016/j.ipm.2019.102087>

based on behavior in court, decency is based on the character in court, and decency refers to a broader meaning of politeness, which encompasses attitudes, behavior, and character.<sup>27</sup>

The above findings were confirmed through interviews with 11 judges who preside over corruption crimes. One judge referred to the decency factor of the defendants' attitudes in court. Another judge argued that decency referred to the behavior of the defendant at trial. Six judges also explained that the decency factor referred to the behavior and manner of dress of a defendant in court. Two judges considered the decency factor as the attitude and manner of dress of a defendant in court. One judge did not mention anything related to the decency factor. Accordingly, this study concludes that the judge significance on the decency factor is not only based on the four above findings that were identified from court rulings. In addition to the four aforementioned findings, judges' reliance on the decency factor also extends to the way a defendant dressed, which was acknowledged by eight of the 11 judges interviewed. Given the above evidence and discussion, the textual pattern of court rulings and the results of interviews with judges described that judge's significance of the decency factor as a reason to mitigate sentence can be formulated as "the politeness of a defendant represented by the way he/she dresses, attitude, behavior, nature, and his/her verbal communication (words used at court)." These factors have been considered by the judges in mitigating sentencing for corruption convictions.<sup>28</sup>

### ***3.2. The Role of Religious Identity in Judges' Consideration on the Decency Factor in Court Rulings***

This discussion focuses on the influence of religious identity on judges' consideration of a defendant's decency at trial. This study focuses on the scope of how religious identity is shown through piety and religion-based attributes, particularly related to the way a defendant dresses at trial. The use of religion-based attributes during in trials of corruption cases is the main concern often mentioned by the judges during our interviews. For example, three judges explained that a defendant uses religion-based attributes to express that he/she has reflected a religious manner to influence the judge's ruling. Also, another judge disclosed this act as an attempt to seek the court's sympathy.<sup>29</sup>

To address the foundational question, does showing off religious identity in the trial process affect a judge's consideration, in particular when evaluating the decency of a defendant as a factor that reduced a sentence. Two key questions were asked to all judges who participated in our interview to deepen our understanding concerning this matter. First, what is the basis for judges' considerations in assessing factors that mitigate sentences of a defendant in a corruption case? Second, because many court rulings contain the decency factor as a mitigating factor at sentencing, it is notable to understand whether there is a difference of consideration between both defendants who wore religious-based clothes and

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<sup>27</sup> Cahya Wulandari and others, 'Penal Mediation: Criminal Case Settlement Process Based on the Local Customary Wisdom of Dayak Ngaju', *Lex Scientia Law Review*, 6.1 (2022), 69–92 <https://doi.org/10.15294/lesrev.v6i1.54896>

<sup>28</sup> Kevin D. Li and others, 'A Legal Database Review of Circumcision Related Litigation in the United States', *Urology*, 160 (2022), 94–101 <https://doi.org/10.1016/j.urology.2021.09.036>

<sup>29</sup> Hava Dayan, 'A Socio-Legal Deconstruction of Homicide Victims and Perpetrators: Israeli Femicide Case Law', *Aggression and Violent Behavior*, 52.May 2019 (2020), 101391 <https://doi.org/10.1016/j.avb.2020.101391>

those who used ordinary clothes. Thus, the judges' answers to these above questions are mapped as follows.<sup>30</sup>

First, religious identity does not affect judges in assessing the decency of a defendant at trial. Eight out of 11 judges answered that their foundational basis for considering mitigating factors in imposing criminal sanction is based on material facts revealed at trial. Such fact is restricted to the actions of a defendant, which aims to objectify the court's considerations and ruling. Besides, the judges also mentioned that their considerations were tied to the evidence presented and the structure of the material facts of a case revealed in the proving process. This basis also encompasses their consideration regarding the factors that can mitigate sentencing. The judges emphasized a few examples of the factors they considered including the willingness of a defendant to be a justice collaborator, the returned of state financial losses due to a corruption act, the degree of the involvement of a defendant in a corruption case, given that corruption is not a single-actor crime, and whether a defendant benefit or use the result of the corruption act or not. In this respect, indeed the decency of a defendant is considered as a mitigating factor in criminal sentencing. One judge specifically explained his judicial philosophy for this. According to him, a judge must see a defendant as an individual who is entitled to the opportunity to plead mitigating factors, regardless of the severity of the guilt he has committed, but the mitigating factor cannot cover all the guilt. This is because a defendant is still an individual with dignity. The decency factor, for him, is a modality that can be considered, although he realizes that making decency a mitigating factor is the subjective side of a judge. That is the reason for him to restrict the decency with the question "how cooperative does a defendant in a trial process".<sup>31</sup>

A defendant's religious identity that manifested in the attire at trial may be an aspect that is considered to be a defendant decency. However, it is restricted to a general view in public about what kind of attire that considered to be polite. In principle, the law and the judge guarantee a defendant freedom to choose his own attire in the trial process. If there are defendants who choose to wear religious-based attributes, such as Muslim clothes, the judges respect this as an expression. However, they realized that there was a strong possibility that a defendant wore religious-based attribute solely to make them look good, show their remorse, and obtain the sympathy of the judge. The judges also emphasized that the religiosity of a defendant is considered to be a private matter for everyone, including in terms of attire in court. Therefore, judges cannot interfere or touch this private dimension in examining and adjudicating a case. Thus, there is no difference in the value of decency between the defendants who wear religious-based attribute or not.<sup>32</sup>

Second, religious identity does affect judges significantly in assessing the decency of a defendant at trial. Another result is that three out of 11 judges provided the same answers as eight previous judges when we asked about the basis in considering mitigating factors in criminal sentencing. They evaluate the evidence presented and the material facts revealed before the trial process. However, this study identified a differing answer regarding a

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<sup>30</sup> A.B. Barrul Fuad, 'Political Identity and Election in Indonesian Democracy: A Case Study in Karang Pandan Village – Malang, Indonesia', *Procedia Environmental Sciences*, 20 (2014), 477–85 <https://doi.org/10.1016/j.proenv.2014.03.060>

<sup>31</sup> Endang Wahyu Pamungkas, Valerio Basile, and Viviana Patti, 'A Joint Learning Approach with Knowledge Injection for Zero-Shot Cross-Lingual Hate Speech Detection', *Information Processing and Management*, 58.4 (2021), 102544 <https://doi.org/10.1016/j.ipm.2021.102544>

<sup>32</sup> Lorraine Wolhuter, 'German and Swedish Procedures as Models for the Empowerment of Racial Minority Women in Rape Trials', *International Journal of Law, Crime and Justice*, 38.1 (2010), 1–16 <https://doi.org/10.1016/j.ijlcj.2009.11.001>

defendant's decency in the context of religious identity. The judges in this group identified the decency of a defendant as a mitigating factor at the sentencing phase of trial. In the context of the religion-based attributes used by a defendant at trial, the judges considered this as a form of remorse of a defendant for his/her actions. In such situations, the judges considered this as the expression of defendants' desire to be closer to his/her God.<sup>33</sup>

The sudden changes in attire of a defendant to be more pious, for instance, indicated that the court has attributed a certain value to a defendant, a judge said. For a judge, the use of religious identity is indeed an indicator that someone is polite. For another judge, wearing religious attire had proven that a person had become religious and converted so this can be considered as a mitigating factor in sentencing. The judge even stated firmly that religious identity is a form of decency in court. As for another judge, the value of decency of a defendant who wears religious-based attributes is clearly different from the one who does not. At a certain level, the more perfect the religion-based attributes used by a defendant, he said, the higher the value of decency. This consideration is structured because for judges, religion is an ideal guide for every human being.<sup>34</sup>

Based on the results of interviews with 11 judges, religious identity significantly influences a judge's consideration of a defendant decency factor at trial. These findings were highlighted by three judges. Indeed, this is relatively small number compared to the other 8 judges. However, this portrait offers a significant contribution and understanding of the role of religious identity in court. Thus, although the influence of religious identity, particularly through the use of religion-based attributes, on judges' considerations is not detected in their ruling (objective dimension), but identified through the judges' interpretative framework (subjective dimension).<sup>35</sup>

### ***3.3. When Judges Are Not Impartial About the Defendant's Religious Identity: An Analysis Using Bangalore Principles***

The influence of religious identity, particularly in the context of a defendant religion-based attributes at trial, a judge's considerations should be viewed through the lens of the judge's impartiality. Impartiality is a fundamental doctrine that is considered as a critical indicator in a fair judicial process. The basic principle is that neither one can be the judge of his own case nor allowed to adjudicate cases in which he/she has a personal bias. The impartiality of a judge is a basic prerequisite to the rule of law and due process of law, "A lack of impartiality in a judge is a violation of the due process of a litigant".<sup>36</sup> This explained that every individual is entitled to the right to an impartial judge, a judge whose views regarding her/his personal matter as an individual should not influence his/ her decisions on the cases that he/she is adjudicating. As a result, an impartial judiciary also depends on an impartial judge.<sup>37</sup>

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<sup>33</sup>Maila Stevens, 'Religion, Nation and Mother-Love: The Malay Peninsula Past and Present', *Women's Studies International Forum*, 33.4 (2010), 390–401 <https://doi.org/10.1016/j.wsif.2010.02.013>

<sup>34</sup>Laurence Miller, 'Psychological Evaluations in the Criminal Justice System: Basic Principles and Best Practices', *Aggression and Violent Behavior*, 18.1 (2013), 83–91 <https://doi.org/10.1016/j.avb.2012.10.005>

<sup>35</sup>Bambang Ali Kusuma, 'Establishment of Indonesian Maritime Power: Regulation of Transnational Organized Crime on Illegal, Unreported, and Unregulated (IUU) Fishing', *International Journal of Criminal Justice Sciences*, 16.2 (2021), 251–66 <https://doi.org/10.1016/j.avb.2012.10.005>

<sup>36</sup>Douglas E. Edlin, *Common Law Judging: Subjectivity, Impartiality, and the Making of Law*, Common Law Judging: Subjectivity, Impartiality, and the Making of Law, 4th edn (Ann Arbor: University of Michigan Press, 2016).

<sup>37</sup>Xinxin Wang and Kevin Lo, 'Civil Society, Environmental Litigation, and Confucian Energy Justice: A Case Study of an Environmental NGO in China', *Energy Research and Social Science*, 93.March (2022), 102831 <https://doi.org/10.1016/j.erss.2022.102831>

Impartial means favoring no one side or party more than another; without prejudice or bias; fair, just, and absence of bias or prejudice in considering issues that may come before a judge. Impartiality refers to the absence of personal sentiment or bias from a judge to prevent a defendant from being treated unfairly in court. The American Bar Association also proposed a similar definition, where impartiality is specified as the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. Hence, the impartiality of judges in the context of religious identity is viewed in the idea that a judge is required to produced law and evidence-based considerations and decisions. Also, the facts revealed at trial regardless of a defendant's religious identity which is exhibited through his dress should be considered.<sup>38</sup>

Impartiality requires a neutral attitude from judges.<sup>39</sup> This includes the freedom of judges from adjudicating a case based on personal prejudice or bias based on religious identity. An impartial judge will produce decisions based on objective arguments. Moreover, "judges are unmoved by prejudice or ideological bias that might incline them to decide a dispute one way or the other"<sup>40</sup>. For a judge, the International Commission of Jurist stated that being impartial means setting him/herself apart from the parties that a judge is adjudicating, either because of the prejudice about the issue brought before the party or due to the hostility or subjective sympathy towards one of the parties. In this case, a judge should evade any partiality based on considerations of political ideology, personal character, gender, race, and religion of the parties which he/ she adjudicates.<sup>41</sup>

The principle of impartiality of judges is closely related to the principle of independence. However, these two principles have different meanings. Independence is associated with the court as an institution of judicial power so that it must be independent from other external influences. Impartiality is more linked to the state of mind (internal) of a judge towards a case and the parties involved in it. According to The International Commission of Jurist, independence in general refers to the autonomy of judges or courts in deciding cases. Judge or courts apply the law by focusing on the facts presented at the trial in this term. It is related to the judiciary as an institution, independence from other branches of power, or also referred to as institutional independence. At the individual level, this means independence from other members of the judiciary or also referred to as individual independence. Independence requires that neither the courts nor the judges that compose them are subject to other public powers. In contrast, impartiality refers to the state of mind of a judge or court towards a case and the parties to it.<sup>42</sup>

Numerous studies, as also stated in Paragraph 56 of the UNODC Commentary on the Bangalore Principles of Judicial Conduct, agreed that the application of the impartiality principle in the context of the influence of religious identity tapped every aspect of the

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<sup>38</sup>Hannah F. Rasmussen and others, 'How Discrimination and Perspective-Taking Influence Adolescents' Attitudes about Justice', *Journal of Adolescence*, 62.November 2017 (2018), 70–81 <https://doi.org/10.1016/j.adolescence.2017.11.005>

<sup>39</sup>Flavio Croce Caetano, 'Disrespect to the Practice of Law and Breach of the Principle of Judicial Impartiality', in *Comments on a Notorious Verdict: The Trial of Lula* (CLACSO, 2018), pp. 46–52. <https://doi.org/10.2307/j.ctvn96gjp.2>

<sup>40</sup>Alex Schwartz and Melanie Janelle Murchison, 'Judicial Impartiality and Independence in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia-Herzegovina', *Law and Society Review*, 50.4 (2016), 821–55 <https://doi.org/10.1111/lasr.12237>

<sup>41</sup>Jeffrey J Rachlinski and Andrew J Wistrich, 'Judging the Judiciary by the Numbers: Empirical Research on Judges', *Annual Review of Law and Social Science*, 13.1 (2017), 203–29 <https://doi.org/10.1146/annurev-lawsocsci-110615-085032>

<sup>42</sup> Maryns.

personal and deep dimension of a judge. Thus, the question arises as to whether a judge can be impartial of the religious-based personal commitments and experiences that shape the judge's life. If this question was addressed directly at the affective aspect of a judge, then the answer would be no. Judge's commitments and associated experiences, just like us, provides prior knowledges and various pre-judgments and evaluations in their own lives. The commitment and personal experience that shape the lives of a judge can also be referred to as a modality that can determine the judge's significance on a reality, including in court. Besides, religion itself is part of that personal commitment and experience.<sup>43</sup> In the context of religion, this study, therefore, found that religious identity significantly influences judges in seeing a defendant and adjudicating a case.<sup>44</sup>

Prejudice based on religious identity will not be seen clearly in certain cases. As regards, testing the impartiality of judges from religious-based biases and prejudices remains a challenging task<sup>45</sup>. Also, in the work related to dimensions of judicial impartiality, divining judicial bias requires an assessment of the judge's subjective mind. As scholars noted, satisfying ourselves that judges are always impartial is unlikely to prove a straightforward task.<sup>46</sup>

Concerning "bias or prejudice," the United Nations Office on Drugs and Crime (UNODC) presented an explanation of the scope in the context of judicial impartiality. According to UNODC, the state of bias or prejudice refers to "a leaning, inclination, bent or predisposition towards one side or another of a particular argument." In particular, UNODC states that "bias is a condition or state of mind, an attitude of view, which sways or colors judgment and renders a judge unable to exercise his or her functions impartially." Furthermore, UNODC explained that "bias or prejudice may also manifest themselves in body language, appearance, or behavior in court." However, UNODC, in its comments on a matter that expect a state of bias or prejudice, claimed that "a judges' values, philosophy or beliefs about the law may not constitute bias." The above argument demonstrates that law does not negate the existence of judges' values, philosophies, or beliefs. However, the phrase "about the law" limits the use of these personal values, philosophies, and beliefs, namely, only to interpret the law objectively. This can be derived from the evidence and legal facts revealed in the trial process. As a result, a defendant's religious identity should be not covered.<sup>47</sup>

The challenges in testing the impartiality of a judge in a case do not necessarily make this subject to be impossible to test<sup>48</sup>. The European Court of Human Rights has a long history and adequate jurisprudence in constructing an indicator to test the impartiality of

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<sup>43</sup>Pazit Ben-Nun Bloom, Gizem Arikan, and Allon Vishkin, 'Religion and Democratic Commitment: A Unifying Motivational Framework', *Political Psychology*, 42.S1 (2021), 75–108 <https://doi.org/https://doi.org/10.1111/pops.12730>

<sup>44</sup>Rachlinski and Wistrich.

<sup>45</sup>Cesare Oliverio and Michael Manley-Casimir, 'The Courts and the School: The Judicial Construction of the School', in *The Courts, The Charter, and The Schools. The Impact of the Charter of Rights and Freedoms on Educational Policy and Practice, 1982–2007*, ed. by Michael Manley-Casimir and Kirsten Manley-Casimir (Toronto: University of Toronto Press, 2019), pp. 242–62.

<sup>46</sup>Anne L. Craig and Sukumar P. Desai, 'Human Medical Experimentation with Extreme Prejudice: Lessons from the Doctors' Trial at Nuremberg', *Journal of Anesthesia History*, 1.3 (2015), 64–69 <https://doi.org/10.1016/j.janh.2015.06.001>

<sup>47</sup>Kunyi Jian and others, 'The Establishment of the Absichtsdelikte Model of Criminal Law for Controlling Terrorist Crimes: The Case of China', *International Journal of Law, Crime and Justice*, 60.October 2018 (2020), 100366 <https://doi.org/10.1016/j.ijlcrj.2019.100366>

<sup>48</sup>Sabina Ibrahimova, 'Challenges to Judicial Impartiality and Their Implications on Human Rights', *SSRN Electronic Journal*, 2021 <https://doi.org/10.2139/ssrn.3758917>

judges. According to the European Court of Human Rights (2018), the test of impartiality of judges can be conducted by two testing mechanisms namely subjective and objective tests. The first assesses to identify the personal beliefs and personal thoughts of a judge regarding a case and defendant. This is conducted to ensure that a judge performs his/her obligation without bias, opinion, or subjective prejudice against an act, evidence, or the parties (UNODC). UNODC illustrates that “no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary.” Furthermore, the International Commission of Jurist asserted that it “consists in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt” as to his or her impartiality. This test includes relevant efforts to determine whether there are facts that can be ascertained to raise doubts about the impartiality of a judge regardless of the judge's behavior. In this case, even physical appearance may have a certain importance in influencing the impartiality of a judge.<sup>49</sup>

The International Commission of Jurists noted that the impartiality of judges concerning the influence of religious identity may thus be tested based on subjective and objective aspects of the court. From the subjective aspect, this study identified that the consideration of three out of 11 judges regarding a defendant decency in court was subjectively constructed due to the influence of religious identity. This occurred because the judges had a personal belief regarding how a defendant expresses his/her repentance and piety through the way they dressed. This personal belief is often used by judges in adjudicating acts of corruption, where in fact the way of a person dresses is not included in the elements of the act of corruption.<sup>50</sup>

As a legal consequence, this factor is considered by the judge to mitigate the criminal sentence of a defendant. From the objective aspect, the 77 court rulings which contain the judge's considerations regarding the defendant's decency did not present reasonable arguments as a rational justification for the element of decency as a factor that mitigating criminal sentencing. The public suspicions about partiality of a judges' considerations were justified in the context of the widespread use of religion-based attributes in the trial of corruption cases and the findings of the influence of religious identity on judges' consideration. Thereby, the principle of impartiality of judges may have been potentially violated when a judge considering the element of decency of a defendant as a factor that mitigates criminal sentencing. The thickness of the judge's subjectivity in considering the aspect of decency also makes this factor irrelevant in criminal sentencing. The Beijing Statement of Principles on the Independence of the Judiciary stated that the commitment to the rule of law must be realized by judges through impartial decisions. If a judge is unable to decide impartially, the judge will be considered incapable to adjudicate a case based on the legal facts in the case, then the justice system become arbitrary.<sup>51</sup>

The judge's violation of the principle of impartiality due to the influence of religious identity resulted in three derivative problems. First, violation of the principle of impartiality is a violation of human rights. In this regard, the United Nations General Assembly in 1985 adopted the Basic Principles on the Independence of the Judiciary (Basic Principles). The Basic Principles itself is adopted for two reasons. First, the United Nations has committed to promoting judicial conditions that promote respect for human rights and fundamental

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<sup>49</sup>Dewi Nurul Savitri, ‘Legal Policy on the Protection of the Right to Health during the Covid-19 Pandemic in France’, *Bestuur*, 10.1 (2022), 1–11 <https://doi.org/https://doi.org/10.20961/bestuur.v10i1.54449>

<sup>50</sup>Awaludin Marwan and Fiammetta Bonfigli, ‘Detection of Digital Law Issues and Implication for Good Governance Policy in Indonesia’, *Bestuur*, 10.1 (2022), 22–32 <https://doi.org/https://doi.org/10.20961/bestuur.v10i1.59143>

<sup>51</sup> Mochtar and Afkar.

freedoms among the international community. Second, the Universal Declaration of Human Rights (UDHR) endorses the principles of equality before the law, the presumption of innocence, and the right to a fair public hearing by a competent, independent and impartial court.<sup>52</sup>

The relationship between human rights and the impartiality of judges is established in at least four human rights instruments. First, Article 10 of the UDHR states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.” Article 14 paragraph (1) of the International Covenant on Civil and Political Rights asserted that everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. At the regional level, Article 8 of the American Convention on Human Rights recognizes “every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal” Article 6 paragraph (1) European Convention on Human Rights also states that “...everyone is entitled to a fair and public hearing with a reasonable time by an independent and impartial tribunal established by law...” Article 7 Section (1) paragraph 4 African Charter on Human and Peoples' Rights has an identical recognition, namely “every individual shall have the right to have his cause heard. This comprises the right to be tried with a reasonable time by an impartial court or tribunal.” The existence of the right to an impartial trial obliged judges to respect and fulfill these rights.<sup>53</sup>

The obligation to respect mandates judges not to interfere with the enjoyment of a fair trial on the basis of the principle of impartiality. Adjudicating a case partially to one of the parties on the basis of religious considerations is a violation of the obligation to respect this right. While the first-mentioned obligation mandates the state not to harm the enjoyment of the right to an impartial trial, the obligation to fulfill mandates judges to take active steps by ensuring that the judicial power is carried out by promoting the right to an impartial trial. This obligation can be realized by establishing adequate laws so that the influence of religious identity in the judicial process can be prevented. Unfortunately, in Indonesia, the current legislation allows the use of this factor, referring to the Article 197 paragraph (1) of the Criminal Procedure Code requires court rulings to contain consideration regarding mitigating factors in imposing criminal sentences. If the consideration of this factor is absent in a court ruling, then the legal consequence according to Article 197 paragraph (2) of the Criminal Procedure Code is that the ruling is “null and void by law”. Specifically, according to the technical regulation, Article 13 paragraph (1) of the Supreme Court Regulation Number 1 of 2020 on the Guidelines for the Criminalization of Article 2 and 3 of the Corruption Eradication Law also demands the inclusion of mitigating factors. This regulation still opens the opportunity to consider the decency factor.

A violation of the principle of impartiality undermines commitment to the rule of law. Most importantly, interpreting the concept of the rule of law is not an easy matter. This is because the rule of law is a concept that “has always been contested”. This suggested that the essential meaning of the rule of law always depends on agreement on normative issues that circulate in time, context, and even between various scholars. There are two well-known schools that contribute an interpretive scheme to the concept of the rule of law; the instrumental which is referred to as the procedural, formal, or minimalist, and the

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<sup>52</sup>Victoria Ellen Collins, ‘Guilty until Proven Guilty?: An Examination of the Anti-Piracy Response at the Interactional Level’, *International Journal of Law, Crime and Justice*, 43.1 (2015), 88–108 <https://doi.org/10.1016/j.ijlcj.2014.07.004>

<sup>53</sup>Steven Wheatley, ‘189C7The Idea of International Human Rights Law’, ed. by Steven Wheatley, *The Idea of International Human Rights Law* (Oxford University Press, 2019), p. 0 <https://doi.org/10.1093/oso/9780198749844.003.0008>

substantive which also refers to the material or maximalist school.<sup>54</sup> However, besides the existence of these two schools, scholars agree that there are two main functions of the rule of law although there is disagreement regarding the significance of the rule of law. First, the rule of law limits the authority and prevent abuse of power from state. In this context, the rule of law is an umbrella concept for several legal instruments and state institutions to protect citizens from state abusive power. Second, the rule of law is vital for property protection and citizens' safety. Therefore, it can be concluded that the rule of law is valuable for protecting every citizen of the state and protecting one from another at the citizenship level.

The second function of the rule of law, protecting every citizen, is interesting to be discussed further in the context of the lack of the principle of impartiality in the judiciary. However, the question is, should the second function of the rule of law be considered as important as the first? This question produces a lot of debate. Some authors argue that there is currently a tendency to neglect the first function. On the other hand, there are those who argue that the second function should not be elevated, place it outside the context of the rule of law. However, there are strong reasons to keep the second function. One of the reasons is related to the central position of human rights as an integral part of the rule of law.

Human rights have increasingly been cited as the main standard in the rule of law.<sup>55</sup> Although human rights are not identical with the rule of law, it is now considered as an instrument to determine the quality of a country's adherence to the principles of the rule of law. The protection of human rights in the context of the rule of law distinguishes freedom country from countries with arbitrary government. In the current context, the relationship between the rule of law and human rights can be identified, for instance, from the Rule of Law Index initiated by the World Justice Project which uses the human rights as an indexing indicator. Thus, the violation of the right to a fair trial by not implementing the principle of impartiality of judges is the same as a violation of the commitment of the rule of law. Correspondingly, The Rule of Law Index initiated by the World Justice Project not only revealed the indirect relationship between the rule of law and the principle of impartiality of judges through violations of the right to a fair trial. But The Rule of Law Index also demonstrated the direct relationship between the rule of law and the principle of impartiality of judges.

The direct relationship between the rule of law and the principle of impartiality of judges can be viewed from the seventh factor of civil justice and the eighth factor of criminal justice from the Rule of Law Index. Further, the impartiality of judges is one of the instruments used to assess the quality of these two factors. Specifically, the paragraph 8.4 of eighth factor in criminal justice section stated that "the criminal justice system is impartial" as the indicator. Also, it was explained that paragraph 8.4 is used to "measures whether the police and criminal judges are impartial and whether they discriminate in practice based on socioeconomic status, gender, ethnicity, religion, national origin, sexual orientation, or gender identity"<sup>56</sup>. As a result, the lack fulfillment of the principle of impartiality of judges in the judiciary because a judge's consideration are influenced by religious identity can be considered as a poor practice in implementing the rule of law.

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<sup>54</sup>Alfredo Narváez Medécigo, *Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico, Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico* (Switzerland: Springer International Publishing, 2016) <https://doi.org/10.1007/978-3-319-24562-1>

<sup>55</sup>Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law', *Human Rights Law Review*, 18.3 (2018), 473–94 <https://doi.org/10.1093/hrlr/ngy015>

<sup>56</sup>Project, *Rule of Law Index 2020*.

A violation of the principle of impartiality also undermines the legitimacy of judicial power. Today, the legitimacy of judicial power cannot be separated from the long history of the idea of separation of power. The function of the judiciary, originally attached to a single power and to one person, has historically shifted to accumulate simultaneously on the executive power. Then, the judicial function shifted again to be separated from the executive power so that the judicial function stood firmly on a separate judicial power. One of the reasons for the separation of the judicial function from the executive power was because the impartiality of the judiciary will be difficult to achieve if the executive power at the same time plays its role as a judge. Likewise, historically the emergence of the principle of impartiality of judges in the judiciary is linked to the spirit of separation of powers. It can be concluded that judicial impartiality is the foundational legitimacy of the existence of a judicial power that is separated from other powers. It is not surprising that the principle of impartiality of judges is viewed as one of the most important principles in the world of justice today. Additionally, the principle of impartiality of judges as necessary for court rulings to enjoy authority and legitimacy<sup>57</sup>

The spirit of the principle of impartiality of judges in the judiciary is emphasized on the attitude of judges not to be partial based on subjective considerations. This consideration includes the influence of religious identity. Moreover, the principle of impartiality presents judges who adjudicates a case based on law, evidence, arguments of the parties, and material facts that are revealed at trial. By implementing the principle of impartiality of judges, judicial power becomes a neutral and unbiased authority so that it can effectively resolve existing problems and present objective and constructive solutions. Accordingly, an impartial and neutral judge should consistently apply legal principles and the facts of the case, not personal opinions and biases. This condition will promote and ensure the achievement of the objectives of substantive justice and fair punishment. Besides, it follows the axiom "justice should not only be done but should manifestly and not be seen to be done".<sup>58</sup>

The above arguments are a basis for the encouragement of the principle of impartiality of judges in the judiciary in various regulations. As an example, the Second Paragraph of the Basic Principles emphasized that "the Universal Declaration of Human Rights enshrined, in particular, the principles of equality before the law, of the presumption of innocence and the right to a fair and public hearing by a competent, independent and impartial tribunal." In addition, Article 1 of The Universal Charter of the Judges (UCJ) noted that "judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal." In sum, both historical and juridical, it is shown that the impartiality of judges in the judiciary is a foundational legitimacy for judicial power. Without an impartial decision, the judicial power is the same as eliminating the spirit of its formation. Thus, the lack of and failure to implement the principle of impartiality of judges due to the religious identity influence on the judge's decision is an act of betrayal of the legitimacy of the judicial power which is formed impartially and independently.<sup>59</sup>

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<sup>57</sup>Prakasa, Satria.

<sup>58</sup>Iqra Mushtaque, 'Cases of Blasphemy and Mental Illness on the Rise in Pakistan', *Asian Journal of Psychiatry*, 73, February (2022), 103120 <https://doi.org/10.1016/j.ajp.2022.103120>

<sup>59</sup>Dayan.

#### 4. Conclusion

This study identifies that judge considered the decency of a defendant in court as a mitigating factor in the sentencing phase of corruption prosecutions in Indonesia. The decency of a defendant itself is represented by the way the defendant dresses, attitude, behavior, character, and words in court. With this significance, in cases where the defendant uses religious-based attributes, religious identity which is expressed through it has a direct effect on the consideration of some judges regarding the defendant's decency at the trial process. Judges tend to see such religious identity as a manifestation of the defendant's repentance and regret, as well as the defendant desire to be closer to God in order to improve himself to be better. Unfortunately, the judge's point of view is not related to material facts related to the criminal acts of corruption that have been committed by a defendant, nor is it related to the evidence and arguments presented before the trial. Therefore, the judge's consideration is biased and subjective so that the ruling does not contain reasonable arguments. This condition is a concrete form of judges' defiance against the commitment regarding the judge's code of ethics, especially regarding the principle of impartiality. Therefore, this study encourages the establishment of a legal-based framework that treats as a guidance for judges in considering factors that can mitigating criminal sentence in corruption cases. This framework is not intended to limit the freedom of judges in considering and deciding a case, but rather focuses on its function as an instrument that minimizes the influence of the personal values and subjectivity of judges in deciding corruption cases. As such, this framework will encourage the application of the Bangalore Principles in a national context.

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