

Military Court's Jurisdiction over Military Members Who Commit General Crimes under Indonesian Military Judiciary System in Comparison with Other Countries

Dini Dewi Heniarti

Abstract—The importance of this study is to understand how Indonesian military court asserts its jurisdiction over military members who commit general crimes within the Indonesian military judiciary system in comparison to other countries. This research employs a normative-juridical approach in combination with historical and comparative-juridical approaches. The research specification is analytical-descriptive in nature, i.e. describing or outlining the principles, basic concepts, and norms related to military judiciary system, which are further analyzed within the context of implementation and as the inputs for military justice regulation under the Indonesian legal system. Main data used in this research are secondary data, including primary, secondary and tertiary legal sources. The research focuses on secondary data, while primary data are supplementary in nature. The validity of data is checked using multi-methods commonly known as triangulation, i.e. to reflect the efforts to gain an in-depth understanding of phenomena being studied. Here, the military element is kept intact in the judiciary process with due observance of the Military Criminal Justice System and the Military Command Development Principle. The Indonesian military judiciary jurisdiction over military members committing general crimes is based on national legal system and global development while taking into account the structure, composition and position of military forces within the state structure. Jurisdiction is formulated by setting forth the substantive norm of crimes that are military in nature. At the level of adjudication jurisdiction, the military court has a jurisdiction to adjudicate military personnel who commit general offences. At the level of execution jurisdiction, the military court has a jurisdiction to execute the sentence against military members who have been convicted with a final and binding judgement. Military court's jurisdiction needs to be expanded when the country is in the state of war.

Keywords—Military courts, Jurisdiction, Military members, Military justice system.

I. INTRODUCTION

IN Indonesia, the intention to change the military court's jurisdiction, i.e. to adjudicate only Indonesian Military Personnel who commit military crimes, has raised academic debates, opinions and predictions among various parties. The reform era that requires transparency, freedom and democracy as well as equality brings an impact on the implementation of judiciary system. Therefore, there is a demand for reform in Defence and Security, e.g. the restriction of military court's jurisdiction and authority [1].

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offenders, according to the current Indonesian military criminal law, places great emphasis on its subject, namely the military members. In the Indonesian military judiciary system, the settlement process and procedure of general crimes committed by Indonesian military personnel are conducted under the military court's jurisdiction, by enforcing some special principles from the military criminal law and by involving special military judicial officers as determined by the law. In case of interconnection of jurisdictions, however, there are often cases where trial of military members is separated from that of civilians, i.e. under the military and general judiciary systems respectively [2].

The ultimate objective of the military in time of peace is to prepare for war. To meet this objective, the military organization requires the highest standard of discipline, which can be defined as an attitude of respect for authority that is developed by leadership, precept, and training. It is a state of mind that leads to a willingness to obey an order no matter how unpleasant the task to be performed. This is not the characteristic of the civilian community. It is the ultimate characteristic of the military organization. It is the responsibility of those who command and instill discipline in those who they command. In doing so, there must be a correction and the punishment of individuals [3]. Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to the state of mind or attitude of the tribunal in respect of the issues and the parties in a particular matter. The word 'impartial' connotes the absence of bias, actual or perceived. The word 'independent' reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees [4].

In analyzing the amplitude of military jurisdiction over civilians, a distinction should be drawn at the outset between martial law, the law of war, and "military judiciary." Military jurisdiction grounded on the martial law has long been sustained, so long as it was limited by the necessity that provided the justification for martial law [5]. Thus, a civilian can be tried by a court-martial or military commission when, by reason of invasion, insurrection, or the like, martial law has been invoked and the civil courts cannot carry on their functions.

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Indonesia has fared better than a large number of countries that have not even begun with their first generation of civil-military reforms, like several states in post-Soviet Central Asia or conflict-prone countries in sub-Saharan Africa. Indonesia has also achieved more stable results than states that addressed both first and second-generation reforms but saw their reform processes collapse due to the weakness of the state and renewed conflicts. The states most similar to Indonesia as far as their current state of civil-military relations is concerned are Ghana, Nigeria, Turkey, and Russia. In those states, problems with the first generation of reforms persist, and the armed forces remain a highly politicized and privileged institution despite formal changes to their organizational framework. Indonesia lags behind states, however, that have seen successful first and second generation reforms while continuing to experience sporadic problems in the process, like South Africa, Taiwan, or South Korea. Although this comparative perspective helps to judge Indonesia's progress in military reform against international standards, the debate on institutional change within Indonesian Armed Forces has to maintain its primary focus on the particular circumstances of the world's largest archipelagic state.

This autonomy essentially remained the case until the first stirrings of change in the 1960s when the 'civilianization' of military law, that is, the (consensual) incorporation into military law of perceived beneficial civilian legal norms was accepted by government and approved by the armed forces themselves. It is that particular conceptual approach to the making of military law which, it will be argued, has characterized much of the rapid legal transformations in this field in the past twenty years. To borrow Scott's definition, juridification describes a process by which relations hitherto governed by other values and expectations come to be subjected to legal values and rules. In regard to the military judiciary system, there is a limited colonization by civilian legal norms, especially of crucial territory governing aspects of military discipline and terms of engagement, which had previously been unoccupied by explicit legal criteria [6].

Courts have adopted a hands-off approach, believing that the military is a separate society, totally foreign to the uninitiated and intractable to outsiders; interference from civilian courts would be determined to morale and would thus pose grave danger to national security [7]. Mark J. Osiel stated that: "Military law inevitably rests on certain assumptions about what holds armies together and makes them effective. These concern both the kind and extent of social solidarity that such organizations require and how it is produced [8].

Traditionally, military judiciary has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. They [courts-martial] have always been subject to varying degrees of "command influence." In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Military law is, in many respects, the harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice [9].

As the civil judiciary is free from the control of the executive, so the military [judiciary] must be untrammelled and uncontrolled in the exercise of its functions by the power of military commanders. The decision of questions of law and legal rights is not an attribute of military command [10]. In the time of Roman Empire, troop discipline was maintained by enforcing the principle of who gives the orders sits in judgment, the predominant figure being the Magister Military [11].

II. ANALYSIS

A. Phenomenon of Classifying Military Court

There is a difficulty in classifying military courts. While there are a number of common denominators within national legal systems as far as ordinary jurisdiction is concerned, this is not the case for military jurisdiction. That is what Francisco Fernandez Segado has found as far as European systems of military judiciary are concerned. There have been various attempts to classify types of military jurisdiction. For example, in 1979 John Gilissen suggested a means classification based on the three main existing systems of law; the common law system, the Roman law system, and the socialist system. John Stuart Smits, Francis Clair, and Klaus suggested a classification based on the jurisdictional powers of the military court. They distinguished four different systems as follow: one in which military courts have general jurisdiction, one in which they have general on temporary basis, one in which jurisdiction is limited to military offenses and one in which they have jurisdiction solely in time of war [12].

The next question to be considered concerns the extent of criminal jurisdiction possessed by military authorities. Do they have the power to punish servicemen for as wide a variety of offenses as civilian authorities have with respect to civilians? [13].

In several countries, military systems of criminal justice and discipline coexist. Other systems of military law simply make no distinction in law between a criminal offense and breach of discipline. They are based on the concept of the "service offense", which encompasses both military offenses and breaches of discipline, as opposed to the civil offense, which equates to criminal offenses and misdemeanors. For example, in the United States of America, military courts try any infraction, be it criminal offense or breach of discipline, committed by those under their jurisdiction. In some countries, disciplinary procedures constitute a phase that precedes trial before a military court. In other countries which have abolished military courts in peacetime, such as Austria, Germany and Japan, wrongdoing is punished through the use of disciplinary or administrative courts, with action sometimes also being taken simultaneously in the ordinary criminal court.

In United States if a crime is committed by a serviceman inside of the United States, he normally is subject to punishment by civilian as well as military authorities. This, however, does not appreciably cut down the volume of criminal business handled by the military authorities because the civilian authorities, although possessing the power to try

servicemen, are reluctant to use it. They generally prefer to return military culprits to military control. Usually, local working arrangements are developed between military and civilian authorities along this line. During World War II, the standard practice, so far as the Army was concerned at least, was for military courts to handle all cases involving servicemen, murder and rape included. As to crimes committed by servicemen outside the United States, the military authorities have exclusive jurisdiction. By the rules of international law, American servicemen in hostile territory are not subject to trial by the local civilian courts, but only to trial by American military courts. Similarly, the jurisdictional powers of military courts-whether *rationae materiae*, *rationae loci*, *rationae personae* (passive or active) or *rationae temporis*-are regulated in different ways in different national legal systems. In a large number of countries, military courts simultaneously exercise judicial functions and disciplinary authority and are competent to try criminal offenses as well as breaches of discipline committed by armed forces personnel. The dividing line between breaches of discipline and criminal offenses is not clear [14].

With very few exceptions, almost all States have a constitution or a series of constitutional laws. The constitution has a key role to play in protecting human rights as well as in regulating the administration of justice [15].

Many civilians seem to regard the military community as akin to exotic folk living in a distant and isolated land. This sense of distance is created in part by geography. Most of the military community in many countries is centered on self-contained bases that are sometimes remote and often secure. Many military members not only work but also reside on the base, especially when deployed [16]. Traditions serve an important and ethically salient sociological purpose; they help to provide a self-concept for the members, both individually and collectively. Military members understand themselves as situated in a particular societal niche, and this in turn helps in framing the ethical dimensions of any given situation [17].

Culture represents a first category of potential causes of military effectiveness that warrant investigation. Specifically, by the culture we are interested in how shared worldviews or beliefs within a state or society shape how a military organization prepares for and executes war [18]. Culture shapes behavior by defining the possible alternative course of action and helping them to solve problems, not by defining people's goals or the values they place on different ends [19]. Civil-military conflict can also interfere with the officer corps military proficiency *per se*. In states where the military poses a threat of political violence against the regime, for example, civilian leaders often adopt self-defensive measures that interfere with the effective conduct of war. Some say that the military is a microcosm of society at large, and this is likely true if universal military conscription is in place [20]. But in an all-volunteer military, the assertion can come into serious doubt. Reference [21] at least in the case of the United States, in some ways the military does not reflect the population it protects. Both demographically and culturally, there is a palpable distance. And far from considering this a problem, as

some might in a democracy, many military members seem to exude a sense of moral superiority over the citizenry.

As the civil judiciary is free from the control of the executive, so the military judiciary must be untrammelled and uncontrolled in the exercise of its functions by the power of military commanders. The decision of questions of law and legal rights is not an attribute of military command [22]. Military judiciary civilian authorities, although possessing the power to try servicemen, are reluctant to use it. They generally prefer to return military culprits to military control. Usually, local working arrangements are developed between military and civilian authorities along this line [23].

John C. Ries and Owen S. Nibley said that military judiciary: Traditionally, military judiciary has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. They [courts-martial] have always been subject to varying degrees of "command influence." In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Military law is, in many respects, a harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice [24].

As Rubin points out even the military community's need to be different from civilian society in order to maintain its perceived collective good may no longer prevail in the face of certain human rights claims [25].

In United States, the military judiciary is unique. Civilian judges in the United States are either elected or appointed. Once named to the bench, they are not subject to the direction of any other person and, absent removal proceedings; they remain on the bench until death, resignation, or completion of the judicial term. Judicial independence is one of the defining elements of the civilian judiciary. The military judge, on the other hand, is appointed by the Judge Advocate General (TJAG) of the appropriate armed service, serves without a fixed term at the pleasure of the Judge Advocate General, and is evaluated at least annually by senior officers [26]. It was amended in 1974, 1977 and 1979. As in most socialist countries, German military courts were incorporated into the "ordinary judicial apparatus", so that, in terms of subject matter and procedures, military and civilian judges shared the same legislation and were subject to the authority of the same supreme court [27].

B. Military Court's Jurisdiction in Indonesia

Discussion of military judiciary is much related to the constitutional law because there are various aspects concerning the state of emergency or danger, which is the subject matter of constitutional law that is closely related to the power of military command and military legal institution. However, both military law and military judicature are also related to warfare and interpretations of the emergency law that contain aspects related to the international law. Under the constitutional law, the emergency aspect is also related to the role of the military institution both in peace and during the

war. The legal system in a constitutional state (state of the law) shall, at any rate, the cover also regulations on the situation beyond the normal system [28].

Hood Phillips does not mention the presence of a military criminal element in the military law because the definition of military discipline has also covered to the limited extent the legal aspect called the military criminal law. From a military point of view, this British scholar asserts that a civilian when admitted to becoming a soldier is subject to two laws all at once, namely military law and ordinary law. On the other hand, however, an ordinary citizen may also be subject to the military court. As a separate law, it can be said that military law contains the norms of law that apply to those classified as military organizations or at least particular civilians who under the law are subject to the military law. Regulations that are specifically application to the military forces are called the military law. Some of them are associated with tough and heavy criminal law based on norms that are different from those applicable in the general criminal law. Moreover, its criminal punishment system often deviates from that typically applicable in the general community; for example, in relation to the criminal aggravation. Therefore, the criminal law has a branch called the military law. In addition, there is also another law called military discipline, which despite its similar characteristics to the criminal law, it has different establishment reasons and objectives [29].

Due to such difference in objectives, both laws are codified in different books. The military criminal law is contained in the Military Criminal Code and the military discipline in the Military Disciplinary Code. The principal difference between the two lies in their objectives. The military discipline aims at regulating and upholding the internal order of the military organization; while the military criminal law, in addition to maintaining the internal order, is also intended to regulate and uphold the public order. Therefore, it can be ascertained that the offense against military discipline is only associated with the interest of the internal life of the military organization. Violation of military (criminal) law may entail the interest of public in general.

The norm contained in the military criminal law can be said to have covered the military discipline. An offender of military criminal law must also violate the military discipline. On the other hand, someone was proven to have broken the military discipline must not necessarily have also infringed the military criminal law. For example, a soldier committing a minor insult to his superior is deemed to have committed a military crime under Article 97 paragraph (1) of the Military Criminal Code. However, since insulting the superior is also a violation of the military discipline or because its sanction is light in nature, in practice it is often deemed more appropriate to settle the case through the military discipline mechanism. Likewise, in a case where a military member commits an unpleasant act against a civilian, in general it is considered more appropriate to settle it by means of disciplinary mechanism in spite of the fact that an offense involving a civil citizen is subject to the general criminal law. Generally speaking, civil communities in Indonesia are traumatic with

the standing of the military within the public life of the nation. Therefore, there is a demand that the settlement of a case involving a military member should no longer be attached with the qualification of the offender, but with the object of the offense. Under an abnormal situation, especially during war, where the general tribunal is unable to perform its constitutional duty properly, regardless of the subject, whether it is a military member or a civilian, if breaking the law during wartime, the subject must be tried according to the procedure of martial law by the military court so functioned. This is different from cases happening during normal time, where an offense committed by a soldier often involves controversy due to the issue of the interconnection of jurisdictions. Another field that is also included in the military judicature jurisdiction is military administrative court. This court has the authority to examine, decide and settle military administrative disputes. The decision of the military administrative court is a written document issued by the administrative body or official of the Indonesian Armed Forces. It contains legal actions pursuant to applicable laws and regulations. It is also related to the development and utilization of soldiers and management of state defense in terms of personnel, material, facility, and service of concrete, individual, and final nature, bringing upon legal implications for persons or civil legal entities.

Therefore, the military law includes:

1. military criminal law;
2. military disciplinary law; and
3. military administrative law.

That is why every soldier is at the same time bound to: (a) state law, in general, including the general criminal law; (b) military criminal law; (c) military administrative law; and (d) military disciplinary law. Meanwhile, the subject of law also varies with the country. In UK, for example, the subject of military law is actually limited to the military member. Similarly, Indonesia also allows its civil citizens to be tried by the military court. Due to its long history, to date there are two groups of people who are subjects to military law in Indonesia, namely:

1. Military members; and
2. Civilians who are subject to the certain military law.

This is relevant with the Law Number 31 of 1997 regarding the Military Judicature. Article 9 (1) of this Law provides that the court within the military jurisdiction has the authority to adjudicate the crime committed by:

- a. A soldier;
- b. A person considered by law as equal to a soldier;
- c. A member of a group or institution or body considered by law as equal to a soldier;
- d. A person who is precluded from letter a, letter b, and letter c but based on the decision of the commander of the armed forces upon approval from the minister of justice (now the minister of law and human rights) must be tried by the military court.

In Indonesia, the military criminal law is codified in Military Criminal Code. This military criminal law actually originates from "*wetboek van Militaire Strafrecht voor Nederlandsch-Indie*". It was then amended and supplemented

with Law Number 39 of 1947 dated 27 December 1947 but applied retroactively following the enforcement of Law Number 7 of 1946 regarding the Military Court. Another law was also enacted in the same year, namely Law Number 20 of 1946 regarding the Confinement. By virtue of Law, Number 39 of 1947, the name *Wetboek van Militaire Strafrecht voor Nederlandsch Indie* is shortened into *Wetboek van Strafrecht*, which is also called the Criminal Code. There is also another law that has the characteristics of criminal law but cannot be categorized as criminal law. This field of law is commonly known as the military disciplinary law, codified in Military Disciplinary Code. The procedural law can be found in Law Number 31 of 1997 regarding the Military Judicature, detailing the procedure of such military criminal law. Under this Law, the military criminal procedure is set forth in Chapter IV, starting from Article 69 to Article 264, providing in details 13 matters, namely:

1. Investigation, associated with investigator and assistant investigator, arrest and detention, search and seizure, examination of documents, and implementation of investigation;
2. Transfer of case;
3. Pretrial, including court hearing preparation, detention and summon;
4. Ordinary trial, including examination and proof, accusation and defending, inclusion of claim for compensation of loss, deliberation, and judgment;
5. Trial of interconnection of jurisdictions;
6. Special trial;
7. Summary trial;
8. Legal assistance;
9. Ordinary legal remedy, in connection with trials at appellate and cassation levels;
10. Extraordinary legal remedy, in connection with a trial at cassation level for the interest of law and reconsideration of judgment;
11. Enforcement of court orders;
12. Surveillance and enforcement of court orders; and
13. Official report.

A sovereign country must have a military organization as a state defense tool required to support the existence of the state sovereignty. Each military organization should have a disciplinary rule that is put into effect internally against its members. In UK, such a rule is set forth in service discipline act, including the Army Act 1955, Air Force Act 1955, and Naval Discipline Act 1957, as well as the Queen's Regulation and Procedural Regulations. At present, all of these disciplinary regulations have for the most part been revised, mainly since 1996. Furthermore, in practice, the need to act in emergency situation has expanded, covering not only the state of war but also situations resulting from social and political turmoil among the citizens or natural disasters beyond human control.

According to Law Number 23 of 1959, the state of danger includes three situations, namely the state of war, military emergency, and civil emergency.

In Indonesia, the military judicature has also been

established since the early period of independence. However, this term of military judicature implies a broad meaning. Compared to the terms used in the law of UK or USA, such military court, military tribunal and court martial as described above, all of them are included in the meaning of military judicature and military court in Indonesia. In its historical development, there are also terms used to denote this military judicature, namely army judicature, the higher military court of law or higher army court of law.

The preamble of Law Number 7 of 1946 affirms the importance of establishing such military judicature separately from the general judicature. The reason is because there are particularities in the life of the military members or soldiers, namely [30]:

1. The presence of heavy main duty to protect, defend, and fight for the integrity and sovereignty of the nation and country which, where necessary, are carried out using the power of weapons and by war.
2. The requirement for a special organization including special maintenance and education in relation to such an important and heavy main duty.
3. Permission for soldiers to use weaponry and ammunition in the implementation of the tasks assigned to them; and
4. Requirement for harsh, heavy and typical rules and norms of law, to be applied to soldiers, along with heavy criminal punishment as a tool of surveillance and control for the soldiers to behave and act in accordance with the requirements of their main tasks.

In view of the above, it is necessary to have a judicial body that not only measures up to other judicial bodies in general, but also has the ability to judge anything related to the objective of armed forces establishment. Such judicial body is required to meet the need for armed forces in order to uphold the law and justice, both in peacetime and wartime.

The military court operating during the wartime can also be called as court martial. Meanwhile, during peacetime, the military court must be available to fulfill the requirement of a military organization with the main tasks that are certainly different from those in wartime. As described above, the judicial process conducted by the military tribunal is based on accusation made by the military commander, prosecuted by the military prosecutor, adjudicated by the military judge, and sentenced by the military officer against members of the enemy forces. Prosecution that may be brought forward to the military tribunal covers several types of crime including murder, rape, and other types of crime up to war specific crimes such as assault against civilians, using human shields, terrorism, and war crimes in general. The Panel of Military Tribunal consists of three to seven judges, depending on the claim charged against the accused. They act as judges and jurors.

III. CONCLUSION AND RECOMMENDATION

A. Conclusion

Military court jurisdiction over the military personnel who commit general crimes refers to the prevailing military

criminal law in Indonesia, i.e. using the 'jurisdiction over the person' approach with the emphasis on the subject of law, namely the military personnel. Under the perspective of law reform, the military judiciary jurisdiction over the military personnel who commit general crimes departs from the national system of law and the global trend as well as *iuscomparandum*. Jurisdiction related factors such as *ratione personae*, *loci*, *materiae* and *tempore* must take into account the structure, composition and position of the military forces within the state structure. The military judiciary jurisdiction needs to be expanded when the country is under the state of war. This *tempus delicti* becomes important to determine whether or not a crime belongs to the military judiciary jurisdiction, considering the special circumstances of state control during such time. At times of war, all crimes committed by foreign military personnel who are subject to the law of war or unlawful enemy combatants become the absolute jurisdiction of the military judiciary. During the war, civilians committing crimes related to military interests are determined to be within the domain of military justice jurisdiction. According to the current Indonesian military judiciary system, the process and procedure of settlement of general crimes committed by military members are under the jurisdiction of military judiciary with several special principles in the military criminal law and special apparatuses in the military judiciary system as determined by the law. In fact, however, the trial of the jurisdictional interconnection case is often split, namely military members are tried by the military court while civilians by the general court. Upon the enactment of Law, Number 48 of 2009 regarding the Judicial Power, the military court as well as other branches of the judiciary are under the power of the Supreme Court. The Organization, Administration and Finance of judicial institutions including the Military Court are under the Supreme Court. The military element is maintained in relation to the Military Criminal Justice System and the Military Command Development Principle, which employ Pre-Adjudication, Adjudication and Post-Adjudication stages, i.e. from the process of pre-investigation, investigation, prosecution to execution.

B. Recommendation

At the level of jurisdiction formulation, it is necessary to stipulate the substantive norm of any crime included in the category of military offense, or the crime related to the military offense. This is important to avoid overlapping between military crime, general crime, and military disciplinary offense. To stipulate the jurisdiction formulation of military crime, several jurisdictional approaches can be used in accordance with the social structure and legal system in Indonesia. The substantive norm regulating the crimes committed by military personnel is the Military Criminal Law Code. It means the substantive norm must become the first priority for formulation. For the process and settlement of a general crime committed by a military member, it is suggested to use a mixed form of adjudication by taking into account the offender. Military offenders have no interconnection with those subject to the general judiciary. Therefore, regarding the

general crime committed by the military member, there is no principle of participation for the actor who is subject to the general judiciary. Looking at the object of the crime, focus and emphasis must be given to the losses and consequences resulting from the crime in relation to the mixed composition of the judges. Considering the emphasis on the losses and its consequences to the public interest, the majority of the judges must be military officers. By admitting the existence of Military Judiciary constitutionally and the legality of its implementation under the Supreme Court, such mixed composition of judges must be chaired by the Military Judge. The presence of Military Judge is relevant with the concept of "Treatment and Rehabilitation of Offender" that is universal in nature for all systems and forms of judiciary, because the military organizational structure, which is based on the universal hierarchy, uses the principle of Command Development.

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