

## **24th opinion, of 8 September 2023, of the Ibero-American Commission on Judicial Ethics on the ethical use of artificial intelligence in the work of the courts. Reporting judge: Luis Porfirio Sánchez Rodríguez**

### **I. Ethical concerns about the use of artificial intelligence in justice**

1. In 2020, in its *ninth opinion on the use of new technologies by judges*, the Ibero-American Commission on Judicial Ethics had the opportunity to explore the use of Artificial Intelligence (AI) in the exercise of the judicial function. Our opinion indicated the importance of safeguarding human rights and set out various ethical principles to follow when utilising AI, echoing referents such as the *Declaration on Ethics and Data Protection in Artificial Intelligence* approved in 2018 by the data protection authorities of the European Union and the European Commission's 2020 *White Paper on Artificial Intelligence*.

2. With specific respect to the administration of justice, the Commission's *Opinion* reconsidered the principles laid out in the *European Ethical Charter on the Use of Artificial Intelligence*, adopted in 2018 by the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ). It also underlined the potential repercussions of the use of algorithms in the criminal and administrative spheres on the private processing of data, their interpretation and the purposes pursued, as well as the possibility of exacerbating any biases already present in the data. Finally, it acknowledged the advantages of using AI in optimising routine and quantitative tasks, allowing judicial decisions to be reserved for judges.

3. In 2021, within the framework of the United Nations, UNESCO adopted the *Recommendation on the Ethics of Artificial Intelligence*, which proposes a set of values and principles intended, among other aims, to guide states in the formulation of laws, policies or other instruments to regulate AI and actions to ensure the incorporation of ethical principles at all stages of the life cycle of AI systems<sup>1</sup>.

4. This *Recommendation* sets out the following values: (1) Respect, protection and promotion of human rights and fundamental freedoms and human dignity; (2) Environment and ecosystem flourishing; (3) Ensuring diversity and inclusiveness; and (4) Living in peaceful, just and interconnected societies.

5. It also establishes ten core principles: (1) Proportionality and do no harm; (2) Safety and protection; (3) Fairness and non-discrimination; (4) Sustainability; (5) Right to privacy and data protection; (6) Human oversight and determination; (7)

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<sup>1</sup> UNESCO (2021), [Recommendation on the Ethics of Artificial Intelligence](#), 23 November 2021, Paris.

Transparency and explainability; (8) Responsibility and accountability; (9) Awareness and literacy; and (10) Multi-stakeholder and adaptive governance and collaboration.

6. With respect to the judiciary, the UNESCO *Recommendation* notes the need to provide for mechanisms to monitor the social and economic impact of AI systems and the duty of States to strengthen the capacity of the judiciary to make decisions related to these systems, particularly with regard to the protection of human rights, the rule of law, judicial independence and the principle of human oversight, as well as to ensure that their usage is trustworthy, public interest-oriented and human-centric.

7. In 2022, the Organisation for Economic Co-operation and Development (OECD) conducted a study entitled *The Strategic and Responsible Use of Artificial Intelligence in the Public Sector of Latin America and the Caribbean*, which recommends the application of the OECD AI Principles and the establishment of ethical frameworks at national level<sup>2</sup>. The principles proposed by the OECD are: (1) Inclusive growth, sustainable development and well-being; (2) Human-centred values and fairness; (3) Transparency and explainability; (4) Robustness, security and safety; and (5) Accountability<sup>3</sup>.

8. In 2023, the European Union has now reached an advanced stage in the process of adopting an *Artificial Intelligence Act*, according to which: ‘Certain AI systems intended for the administration of justice and democratic processes should be classified as high-risk, considering their potentially significant impact on democracy, rule of law, individual freedoms as well as the right to an effective remedy and to a fair trial. In particular, to address the risks of potential biases, errors and opacity, it is appropriate to qualify as high-risk AI systems intended to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts. Such qualification should not extend, however, to AI systems intended for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases, such as anonymisation or pseudonymisation of judicial decisions, documents or data, communication between personnel, administrative tasks or allocation of resources’<sup>4</sup>. In one of the amendments to the text, the European Parliament has delimited the use of AI in the administration of justice as follows: ‘The use of artificial intelligence tools can support, but should not replace the decision-making

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<sup>2</sup> OECD/CAF (2022), *The Strategic and Responsible Use of Artificial Intelligence in the Public Sector of Latin America and the Caribbean*, OECD Public Governance Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/1f334543-en>.

<sup>3</sup> OECD (2019), *Recommendation of the Council on Artificial Intelligence*, 22 May 2019, [OECD/LEGAL/0449](https://www.oecd.org/legal/0449).

<sup>4</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain Union legislative acts*, [COM/2021/206 final](https://eur-lex.europa.eu/eli/reg/2021/206/final), Brussels, 21 April 2021.

power of judges or judicial independence, as the final decision-making must remain a human-driven activity and decision<sup>5</sup>.

9. Against this background and considering the advances in and incorporation of new technologies in the judiciary, it was agreed at the 18th meeting of the Ibero-American Commission on Judicial Ethics, held in Santo Domingo in the Dominican Republic on 20 and 21 February 2023, that a new opinion should be issued on specific ethical considerations with respect to AI and its use in the work of the courts.

## **II. Artificial intelligence and its use in the exercise of the judicial function**

10. Artificial Intelligence (AI) is the result of the development of computer systems that simulate or are able to perform tasks that normally require human intelligence, such as perception, reasoning and learning.

11. In the judicial sphere, AI can be used, for example, for the automation and improvement of processes such as those for identifying and comparing evidence, verifying and compiling data, and scheduling hearings. All these tasks can lessen judges' workloads and reduce processing times for cases. At the same time, AI can also be used in more substantial tasks such as decision-making, predicting outcomes and even in determining the probability of a person reoffending, and this raises ethical questions about the appropriateness of its use and how best to use it.

12. Excessive litigation and workloads mean that the use of AI can be justified as an instrument to reduce judicial backlogs and the duration of proceedings, contributing to the goal of ensuring efficient and timely justice.

13. The capacity of AI has grown exponentially over recent years. Among its many functions, it can now understand and interpret human communication in various languages, analyse and compare huge amounts of data, identify patterns and trends, and - of specific interest here in terms of the judicial sphere - compare and interpret certain regulations for their application in specific cases.

14. In some countries, such as Estonia<sup>6</sup> and China<sup>7</sup>, the use of AI has already been introduced to help adjudicate small claims disputes with the aim of reducing judicial

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<sup>5</sup> European Parliament, Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)) [P9\\_TA\(2023\)0236\\_A9-0188/2023](#).

<sup>6</sup> The Technolawgist (2019). [Estonia se prepara para tener “jueces robot” basados en inteligencia artificial.](#)

<sup>7</sup> Zhabina, A. (2023). [How China's AI is automating the legal system.](#)

backlogs. This usage is, however, limited to simple tasks such as comparing evidence or verifying information; while these systems are already capable of ‘suggesting’ a decision, the issuance of a ruling is reserved for human judges.

15. AI is also used in judicial contexts to predict criminal behaviour, for example, the probability that a person will reoffend, and may therefore directly or indirectly influence the determination of sentences handed down by judges<sup>8</sup>.

16. AI systems are also used in Latin America, for example, in Argentina where the *Prometea* system is used for both document writing and the automation of tasks in various organisations. The project was implemented by the Deputy Public Prosecutor in the administrative and tax dispute division of the Public Prosecutor’s Office in the City of Buenos Aires but has since been extended to other organisations<sup>9</sup>.

17. In Costa Rica, three projects have been developed, of which two are already operational. The first is a document categoriser which allows the automatic classification of filings and documents in collection proceedings, while the second is a chatbot which is able to answer questions on judicial issues and the data available for public consultation from collection proceedings. The last project, a voice-to-text transcriber, is still at the testing phase.

18. At the same time, some judges, on their own initiative and with no regulations in place in this respect, are using publicly available AI systems for drafting their own decisions or reviewing jurisprudence.

19. Litigants, meanwhile, can utilise AI to identify trends in a judge’s assessments or decisions, such as to which evidence or class of witness the judge usually gives more credit (whether they are likely to rely on experts in a specific area), which, in view of these parameters, would help the litigant define their procedural strategy.

20. In 2020, Brazil’s National Council of Justice adopted a Resolution on ethics, transparency and governance in the production and use of artificial intelligence in the judiciary<sup>10</sup>. To this end, the Brazilian judiciary has created the *Sinapses* platform, which it defines as a ‘computerised solution, maintained by the National Council of Justice, whose aim is to store, test, train, distribute and audit Artificial Intelligence models’. The resolution includes very detailed rules to guarantee respect for fundamental rights, specifically prohibiting discrimination, facilitating publicity and transparency, promoting governance and quality, strengthening security, enabling user control and

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<sup>8</sup> Maybin, S. (2016). [How maths can get you locked up](#), BBC News.

<sup>9</sup> Ministerio Público Fiscal (2022). [Innovación e Inteligencia Artificial](#), Buenos Aires, Argentina.

<sup>10</sup> Brasil. Conselho Nacional de Justiça, [Resolução Nº 332 de 21/08/2020 sobre a ética, a transparência e a governança na produção e no uso de Inteligência Artificial no Poder Judiciário](#), Brasília.

guaranteeing responsibility and accountability in relation to all IT solutions that use AI models.

### **III. Opportunities and challenges in the use of Artificial Intelligence in the exercise of the judicial function**

21. There are multiple opportunities for AI usage in the judicial sphere that could facilitate tasks, minimise errors and reduce the duration of proceedings; however, its application in other areas poses challenges that call for the utmost caution.

22. In terms of the opportunities it offers, AI makes it possible to automate routine and repetitive tasks such as scheduling hearings, reviewing and archiving case files or determining case law, which can save time and reduce the number of human resources needed for these tasks.

23. The use of AI can also improve the assessment and interpretation of evidence, such as in the review of telephone records, emails or text messages, by identifying their patterns, frequencies and relationships.

24. Likewise, AI is able to pinpoint details in audio files, photographs and videos that might go unnoticed by a human observer. In the same vein, it can be used in DNA analysis, fingerprint identification and the interpretation of medical imaging.

25. AI's information processing capability would facilitate the analysis of large datasets of decisions in order to identify patterns or prejudices related to sex, gender, nationality or other biases, which could help minimise their effect on future decisions.

26. Likewise, it can be used to provide immediate, free-of-charge responses to legal queries, for example, to explain the scope of a rule or the requirements for initiating some type of procedure, which would help bring equality in access to justice for people who lack the funds to pay for legal assistance.

27. Nevertheless, there are some AI applications where the greatest caution must be exercised: firstly, it has the potential to analyse people's verbal and body language to interpret whether they are telling the truth or lying; secondly, it could predict the likelihood of a person committing a crime (or reoffending) in the future for use by judges when handing down a judgment; and, thirdly, AI is able to analyse all the available evidence and suggest (or even issue) a ruling without the need for a human judge.

28. In light of AI's potentialities, some of its risks and limitations become apparent. Indeed, the European Union regulation that is in the process of being adopted in 2023

aims to classify AI systems for law enforcement and the administration of justice as high risk<sup>11</sup>.

29. Firstly, as is true for any computer system, it is vulnerable to hackers, viruses such as Trojan horse malware, or similar attacks, which could violate any evidential guarantees, or compromise personal data or court files being processed by the AI system.

30. At least during the initial implementation of technologies using AI, some people may be unwilling to accept or may doubt the trustworthiness or appropriateness of its use.

31. In many cases, the most advanced technologies are developed by private entities outside the judiciary, which may pursue other interests, possibly more economic than social, in the use of the data. In general, public institutions do not employ internal professional and technical staff who understand how these systems operate, making them heavily dependent on external providers.

32. The use of AI affects the safeguarding of certain fundamental rights of great importance to a democratic society: private life, privacy and the protection of personal data. The introduction of AI into the justice system, therefore, presents a particular challenge, since the processing of information from legal cases could be carried out by computer systems developed, operated and/or belonging to private companies, both local and multinational, over which the State might exercise little or no direct control. This, therefore, entails the need to establish clear guidelines for data processing and

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<sup>11</sup> In the Annex to the future EU *Artificial Intelligence Act*, cited above, the following usages are included under the heading of law enforcement: ‘(a) AI systems intended to be used by law enforcement authorities for making individual risk assessments of natural persons in order to assess the risk of a natural person for offending or reoffending or the risk for potential victims of criminal offences; (b) AI systems intended to be used by law enforcement authorities as polygraphs and similar tools or to detect the emotional state of a natural person; (c) AI systems intended to be used by law enforcement authorities to detect deep fakes as referred to in article 52(3); (d) AI systems intended to be used by law enforcement authorities for evaluation of the reliability of evidence in the course of investigation or prosecution of criminal offences; (e) AI systems intended to be used by law enforcement authorities for predicting the occurrence or reoccurrence of an actual or potential criminal offence based on profiling of natural persons as referred to in Article 3(4) of Directive (EU) 2016/680 or assessing personality traits and characteristics or past criminal behaviour of natural persons or groups; (f) AI systems intended to be used by law enforcement authorities for profiling of natural persons as referred to in Article 3(4) of Directive (EU) 2016/680 in the course of detection, investigation or prosecution of criminal offences; (g) AI systems intended to be used for crime analytics regarding natural persons, allowing law enforcement authorities to search complex related and unrelated large data sets available in different data sources or in different data formats in order to identify unknown patterns or discover hidden relationships in the data’. Meanwhile, the heading of administration of justice and democratic processes includes these high-risk activities: ‘(a) AI systems intended to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts’.

oversight mechanisms. Within each State, too, there may be a division of competences in technological matters between the respective judicial authorities, which must not prevent full judicial control over these matters.

33. Due to the conditions inherent to computing in its current state, there are particular problems in guaranteeing the transparency and explainability of judicial decisions taken by means of or with assistance from AI systems. Programming code is usually a sensitive part of any computer program, primarily because of the implications of intellectual property (whether the system is developed by private companies, purchased from one of them, or developed internally within the justice system). Irrespective of the above, if the system is freely accessible (open source, in general, or with exclusive access for the parties) or is network-based, this makes it more vulnerable to cyber-attacks which could be used to influence a specific case or the general functioning of the system, or even to destabilise institutions or States.

34. Whatever the case, programs using AI are not infallible. They can produce inaccurate information which might be assumed to be correct and might go unquestioned by end users who have learned to blindly trust the results issued by these systems or simply may not allow the possibility of comparison with other sources in order to verify the information.

35. The raw data used by AI programs is the statistical information they collect from sources which have, until now, been managed by human beings; consequently, if there is any kind of bias present in the dataset, the AI will be able to reproduce and even compound it. As an example, if in one country there are frequent arrests of people who belong to a minority population, as may happen with migrant populations, these programs might interpret that migrants in general have a greater tendency to commit crimes, when this may not be the case in reality.

36. Through AI, it would also be possible to manipulate evidence. For example, it is already being used to create photographs and videos in which people appear who were not present in reality. It is also possible to simulate voices or replicate writing styles and characteristics, making it difficult to distinguish between real and fabricated evidence.

37. The determination of responsibility is another factor to consider. If an AI system made an incorrect analysis or a wrong decision that to some degree guided a judicial decision, it would be difficult to determine where the responsibility lies with respect to the error. Is it the people who designed the system, the people who entered the information, or the people who relied on its results in making the decision? Or could it just be due to system error?

38. While the use of technologies has extended the reach of justice to more people, the fact cannot be ignored that there are other people with little or no access to justice because they lack access to these technologies, whether due to geographical, economic or generational factors, and this holds true for AI.

39. The development of AI has accelerated over recent years, while regulations governing its use are barely starting to be developed in most countries. Moreover, regulatory adaptation is not able to keep pace with current technological growth, and this creates lacunas with respect to the actions that can be implemented, both in terms of preventive strategies and strategies to control and sanction improper usage.

40. Finally, in today's world, AI lacks the capacity for moral judgment. It cannot understand the emotional or psychological context of a particular situation and it cannot with any certainty interpret the spirit of rules, which is essential in judicial work, for example, in gauging the margin of discretion inherent in judicial decision-making.

#### **IV. Ethical aspects of the use of Artificial Intelligence in light of the Ibero-American Code of Judicial Ethics**

41. While the Ibero-American Code of Judicial Ethics does not make direct reference to AI systems, its principles and virtues are applicable to the use of this type of technology in the work of the courts.

42. The most recent proposal to update the Ibero-American Code of Judicial Ethics, pending approval by the Ibero-American Judicial Summit, includes a new Article 82 *quinquies*, which makes specific reference to new technologies and aims to underscore the significance of its use in the exercise of the judicial function and recognise the limits imposed by fundamental human rights.

43. Articles 1 to 8 of the Code address the importance of judges' independence, in relation to both external factors and their peers. If AI were to fully replace human decision-making in the legal and evidentiary analysis of specific cases, it would distort the democratic spirit of the judicial system, which is based on society's trust in its judges and their requirement to settle disputes independently. Human judgment is essential in the face of newly emerging legal discussions awash with grey areas, against which a diversity of opinions (depending on different contexts, backgrounds, legal ideologies and methods of reasoning) enables us to maintain the judicial function as a living instrument which evolves and adapts to the needs of society.

44. Article 9 of the Code underlines the importance of impartiality based on the right of defendants and litigants to be treated equally, which means that judicial decision-making must be free from the influence of prejudices or stereotypes. This is relevant to



the use of AI, to the extent that algorithms can apply biases that have been assimilated into the input data used by new technologies in their decision-making.

45. The ethical obligation to provide grounds and, more particularly, the obligations imposed on judges by Article 23 of the Code require – in view of the advanced capabilities of AI to manipulate, falsify and generate textual and audiovisual material which can appear highly credible – that special care is taken in the admission and assessment of evidence where traditional technological tools or AI-based technology are used.

46. In light of Articles 28 to 34 of the Code, the rapid development of technologies requires the acquisition of technical knowledge by both judges and court personnel and continuous training in this area.

47. In relation to the principles of justice and fairness, set out in Articles 35 to 40 of the Code, the judicial system faces the challenge of ensuring that access to or the possible use of AI does not confer an undue advantage on parties in judicial proceedings, to the extent that not all people have equal access to technology.

48. Given the extreme complexity of the technologies underpinning AI systems, there is a risk of widening the gaps between the justice system and the general population. Legal language is complex in and of itself, to the point that the guidance of legal professionals is required in many judicial processes. If we add to this the need to understand the computer language on which the AI is based, this creates a further degree of separation, since this technical knowledge is beyond the reach of many people. Even the vast majority of current legal practitioners have only a basic notion of how AI functions, and require professional preparation to acquire the necessary skills to understand how it works, how to evaluate its mechanisms and how to contest issues in a specific case.

49. In view of their institutional responsibility, as enshrined in Article 42 of the Code, judges are responsible for verifying the proper functioning of the entire judicial system. They are therefore obliged to verify that the AI systems implemented in the judiciary are put to proper use. This responsibility, in line with Article 41 of the Code, must be considered in relation to judges as individuals and from an institutional standpoint, which extends to the decisions made on which AI mechanisms should be implemented.

50. The principle of transparency, in accordance with Article 57 of the Code, means that it is the responsibility of the judge and, therefore, of the entire judicial system, to provide useful, relevant, comprehensible and reliable information. This responsibility extends to any handling of evidence or documentary reviews that may be carried out by

an AI system, since defendants and litigants need to understand the way in which this information is processed in order to be able to trust the veracity of the resulting data.

## **V. Recommendations for the ethical usage of Artificial Intelligence in the judicial sphere**

51. The implementation of AI systems can improve efficiency and may be helpful in court procedures. Nevertheless, there must always be human oversight or review in order to prevent any improper or aberrant functioning that might affect the proper provision of judicial services.

52. The use of AI to predict recidivism should be ruled out. Whatever the case, it is not prudent for judges to allow themselves to be influenced by this type of prediction when issuing their judgments; decisions must be guided by the law and the factual assessment of each specific case, rather than by any predictions that might be made.

53. In the Commission's view, AI can help with multiple tasks within the judicial system, but the work of judging and making judicial decisions must remain the duty of judges – judges who are required to have the ability to understand the spirit of the rules and the implications of each specific case and who, at the same time, must account for their decisions.

54. Given the current state of technology and with respect to the use of AI systems within the judicial sphere, it is recommended not to entrust AI with complex reasoning or the weighing of evidence in judicial decisions but rather with repetitive tasks that generate patterns of similar behaviour, which can facilitate both the functioning and classification of procedures, compliance with requirements, completion of forms and other tasks of a similar nature.

55. The judiciary must ensure that the AI systems that it uses are transparent and comprehensible for both judges and citizens. Procedures carried out and decisions made using AI must be traceable and explainable to ensure public trust in judicial processes.

56. As part of the public administrations' duty of transparency, artificial intelligence applications should be developed based on 'white box' algorithms which are designed to avoid opacity, i.e., they must be oriented toward explainability and traceability, allowing users to have informed interactions with AI systems. For this reason, it is inadvisable for a public justice service in a democratic society to use 'black box' models, i.e., those which include unknown data and interactions in their processing.

57. Training programmes on the use and responsibilities of implementing AI should be approved for judges and other personnel involved in the administration of justice. It

is essential that these training programmes take into account the ethical dimension of the use of AI systems.

58. It is recommended to promote knowledge, training and awareness among court personnel about the concepts, operation and support of AI environments and systems in daily work, focusing on the use of these tools for more simple, repetitive tasks, with the aim of allocating personnel to more complex tasks. To this end, and in line with the OECD (2019) and UNESCO (2021) *Recommendations*, it is vital to underline the need to place human beings at the centre and the end of artificial intelligence systems, averting the myths and fears of replacements and redundancies due to the use of these new tools. These myths and fears can hinder its implementation when, in reality, it is court personnel who must be responsible for training and feeding these AI systems and environments with data.

59. When regulating the use of AI, the judiciary in Latin America should take into account the developments made by international bodies such as UNESCO and the OECD and in other supranational areas such as the European Union. The corresponding policies should include principles of applied ethics with the main aim of maintaining a human-centric approach to these tools, avoiding discrimination, bias or noisy data in their programming, applying the principles of proportionality and do no harm to ensure that they are used only for the purpose for which they are developed, and ensuring restrictive regulation of high-risk applications and safeguarding of sensitive personal data, for example, with respect to biometric identification. These policies must be matched with a national artificial intelligence strategy in order to avoid contradictions in public services and digital government.

60. In order to ensure innovation and development, but at the same time to protect sensitive and restricted user data, the AI policies that are formulated should incorporate rules on data protection and deletion that do not limit the functioning of these systems. To this end, it is recommended to design appropriate data governance strategies that balance data deletion with the feeding and training of systems, since a volume of data is required to generate new technological developments.

61. It is important to monitor AI systems to verify that they are not replicating or amplifying biases present in the original datasets. Likewise, computer control and surveillance systems must be set up to prevent any type of external breach and to facilitate the detection of hacking and other illegal intrusions into the databases which might distort their results.

62. It is highly recommended to create external review or audit teams separate from the development teams, comprising developers, data scientists, legal professionals who specialise in computer law and AI, and specialists in applied ethics. These teams should

evaluate, free of conflicts of interest, the results of AI developments in areas such as data protection, ethical and algorithmic biases, adherence to the principle of legality and the fundamental right of access to justice, and their recommendations should be binding on development processes.

63. The principles of impartiality, justice and fairness, institutional responsibility and transparency, as laid down in the Ibero-American Code of Judicial Ethics, must be taken into account when safeguarding the guarantee and respect of due process in the use of AI in the exercise of the judicial function.

64. Whoever bears the responsibility within each State to provide the technologies and information systems used in the administration of justice, they must be subject to the control and guarantee of the judiciary, leaving final control not in the hands of the developers but rather the judges.

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