Summary

During the coming years the administration of justice will change drastically as a result of the possibilities of information and communication technology (ICT). These possibilities will have to be used as much as possible, with a view to the conservation and improvement of the legal quality of court procedures. The question that has been answered in the present research is the following: when does the quality of the procedure come into danger? But also: how can quality be improved by using ICT? So far, little research has been carried out into the legal implications which the use of ICT has for court procedures. Both for researchers, legislatures, policy makers and (potential) litigating parties as well as for the members of the Judiciary itself, it is important to obtain a greater insight into this meaning. The principles of a fair electronic trial, formulated in this research, offer a framework for discussion concerning the opportunities for and the threats posed by ICT for court procedures.

The main question in this research was the following: what principles indicate what a fair electronic trial exactly entails? Two preliminary questions are answered: 'what are the main principles of a fair trial?' and: 'what can be considered an electronic trial?' To find principles of a fair trial the framework of article 6 of the European Convention on Human Rights has been used. In the case law of the European Court of Human Rights these principles are more accurately developed. The principles are: accessibility, publicity, a judgement within a reasonable time, independence and impartiality, as well as fair treatment.

In the third chapter the electronic trial is described. Relevant IT systems are: websites, electronic data interchange, digital files, courtroom technology and knowledge-based systems.

Websites
Rechtspraak.nl is the most important Dutch website belonging to the Judiciary. The site contains a great deal of information on court procedures, a list of commonly used legal definitions, frequently asked questions, all the court organizations, complaining procedures and national directives and guidelines. An important part of the website is the integrated database with a selection of interesting case law.

Electronic Data Interchange (EDI)
EDI refers to lodging requests and announcements, as well as the lodging and submitting of documents relevant to a case. It is possible to do so by e-mail, but also by using a so-called e-room, a disclosed website to which process documents can be sent and downloaded.

Digital files
A digital file is a file containing all documents that are available electronically and which can be consulted and edited by all the members of the Judiciary independent of their physical location. At several courts experiments are taking place using digital files.

Courtroom technology
Courtroom technology refers to the use of ICT in courtrooms. For instance, recording a witness hearing in an electronic format or hearing witnesses and suspects using video conferencing.

In the fourth to the eighth chapter a link has been made between the principles of a fair trial and an electronic trial. For every principle of a fair trial it has been examined which principles of a fair *electronic* trial can be formulated. The following questions have been answered: which principles of a fair electronic trial indicate how an electronic trial should proceed, regarding the requirements of accessibility, publicity, a judgement within a reasonable time, independence and impartiality and fair treatment?

The following sixteen principles of a fair electronic trial have been formulated: continuity, co-ordination for non-professionals, traceability, durability, reliability, press freedom and privacy protection, public accessibility, online publication, anonimization, the correct nature of the proceedings, chain control, responsibility, transparency, the automated judgement, well-reasoned decisions and equivalence. These principles are commented upon in greater detail below.

1. Continuity: information relations which have been established by employees of the Judiciary must be kept in line, unless it has been first indicated that the relation is of a temporary or experimental nature.

2. Co-ordination for non-professionals: for non-professional litigating parties the non-electronic method must be preserved. Professional litigating parties can be obliged to use ICT in their communication with the Judiciary.

3. Traceability: electronic data that facilitate access to Justice should be accessible, traceable, understandable and current.

4. Endurability: the applications of ICT used by the Judiciary must, as far as possible, be technology which is commonly used.

5. Reliability: litigating parties must be able to rely on the fact that the data they receive or send has not been manipulated, does not originate from an unmentioned person and is not accessible to persons for whom it is not intended.

6. Press freedom and privacy protection: journalists must be free to carry out their work at the courts. The privacy of litigating parties must be protected.

7. Public accessibility: the press, the public and the litigating parties must be able to follow the hearing, also when the components of the hearing are digitised or if the hearing takes place entirely digitally.

8. Online publication: all legal judgements must be published on the Internet within a reasonable period of time.

9. Anonimization: the anonimization of judgements is only necessary in certain circumstances.

10. The correct nature of the proceedings: matters must be dealt with expeditiously, taking into account the possibilities which IT has to offer.

11. Chain control: data interchange between the Judiciary and the chain partners should – wherever possible – be possible electronically.

12. Responsibility: the judge is responsible for the final decision, also when the decision has been made using knowledge-based systems. The legislature will decide what decision program judges should use.

13. Transparency: decision programs used by the judge have to be made public by publication on the Internet.

14. The automated judgement: computer decisions must be possible in simple cases.

15. Reasoned decisions: if decisions can be more effectively reasoned by using IT, then those decisions must consequently also be more soundly justified. Judges should explicitly mention any deviations from the recommendations made by the system.

16. Equivalence: both parties must have access to and be able to use IT applications in the courtroom in an equal manner.

Suggestions for further research in the field of Information Technology and the Law
In which direction is scientific research into relations between ICT and electronic trials likely to move in the forthcoming years? Three lines of research can be distinguished:
– Testing the principles of a fair electronic trial;
– Conducting research into the consequences and recognition which the principles have on non-electronic procedures;
– Conducting research into the consequences of electronic procedures on the rule of law.

Testing the principles of a fair electronic trial
An initial line of research would be that the principles of a fair electronic trial, as formulated in this research, are more closely reviewed. This could be done, for example, by the application of these principles to the existing processes of digitalisation within the Judiciary and a comparison with other organisations in which ICT is applied. The principles of a fair electronic trial can also be compared to principles which apply to the use of ICT within public government, by public prosecutors or among the judiciary abroad. After this test, it is possible that new principles will be developed or that the principles formulated in the present research still appear to have a basis which is too weak within the legal occupational groups. With that, it can be determined to what extent the principles of a fair electronic trail at this moment in time are already part of the positive right.

Conducting research into the consequences of the recognition of the principles for non-electronic procedures could be a second line of research. Formulating the requirements for an electronic trial leads automatically to a closer reflection on the demands which are made for the non-electronic procedure. One example has already been mentioned: how reliable is the written signature? When the demands for an electronic signature are compared to the requirements for a non-electronic signature, it appears that for non-electronic, written signatures hardly any requirements are applicable. The question is whether that is correct, however. This line of research calls for a large quantity of research questions of a similar scope.

The consequences of electronic procedures for the trias politica is a third line of research. It is related to the question of which shifts the electronic administration of justice can bring about in the rule of law. The way in which court procedures progress nowadays is mainly laid down in statutory regulations. Several components of the procedure have not been more closely developed in the law. The reason for this is that these court procedures are often related to practical matters, such as: the way in which money must be paid, agreements between the Public Prosecution Service and the Judiciary concerning electronic file transportation, the area in which lawyers must remain before the hearing, and security relating to court buildings.

Because it concerns questions surrounding the management and the organisation of the procedure, the Judiciary have a great deal of freedom in stipulating the course of the procedure. During the court hearing it seems logical that the judge remains in control. But concerning electronic procedures as a whole, the question is whether the Judiciary and the judge him/herself should be able to decide what is lawful and what is not. Numerous subjects are currently determined by the Judiciary: whether or not television cameras are allowed in court hearings, arrangements concerning the public, whether or not all judgements should be published on the Internet, the anonimization of case law, whether or not video conferencing should be used, the way in which judges are supported by knowledge-management systems and the way in which judgements should be reasoned. The question is whether answering these questions is always the responsibility of the judiciary in our rule of law.

The principles of a fair electronic trial indicate that the legal quality of the electronic procedure should be very high; often higher than the quality that is required in non-electronic procedures. The only reason for this is the transparency of and the control which we have over ICT applications. More can be asked from ICT simply because we can ask for more. The question, of course, is whether this is always justified. If that is not the case, there are there two options: setting lower requirements for the electronic procedure or setting higher requirements for the non-electronic procedure. If this is not done, unacceptable differences will exist between electronic and non-electronic hearings. I assume that the latter will occur and that the requirements we pose for the legal organisation and for judges, as a result of the process of digitalisation, will become higher. Perhaps within a number of years, along this line of thinking, human judges can no longer satisfy our needs. The question 'can computers administer justice?', as posed by Van den Herik in 1991, might be altered in thirty years' time. Instead of wondering whether computers can meet the requirements which we demand of human judges, the question might be whether human judges can still meet the high requirements which are demanded of computer systems and computers. Van den Herik's question can then be reformulated as follows: can judges actually administer justice?